

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

# Usage guidelines

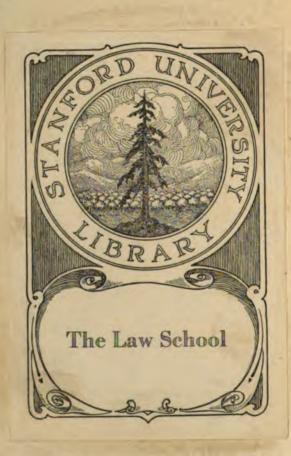
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + Refrain from automated querying Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

## **About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/









# REPORTS OF CASES

## ARGUED AND DETERMINED

IN THE

# English Courts of Common Naw,

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

HERETOFORE CONDENSED BY

THOMAS SERGEANT AND JNO. C. LOWBER, ESQRS.,

How Reprinted in Jull.

# VOL. XXIV.

CONTAINING THE CASES DECIDED IN THE COURT OF KING'S BENCH, FROM MICHAELMAS TERM, 3 WILLIAM IV., 1832, TO EASTER TERM, 1833, INCLUSIVE; AND AT NISI PRIUS, FROM TRINITY TERM, 1831, TO HILARY TERM, 1833, INCLUSIVE.

Billaspi

## PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,
PUBLISHERS AND IMPORTERS,
NO 197 CHESTNUT STREET.

1853.

# 359630

EITE & WALTON, PRINTERS,
3 RANSTEAD PLACE.

# REPORTS OF CASES

## ARGUED AND DETERMINED

236

# The Court of King's Bench.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL,

AND

JOHN LEYCESTER ADOLPHUS,

OF THE INNER TEMPLE,

ESQES., BARBISTERS AT LAW.

# VOL. IV.

CONTAINING THE CASES OF MICHAELMAS, HILARY AND EASTER TERMS, IN THE THIRD YEAR OF WILLIAM IV., 1832-3.

## PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,
PUBLISHERS AND IMPORTERS,
NO. 197 CHESTNUT STREET.
1853.

			•	•	
		,			
	•				
•					

# JUDGES

OF THE

# COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

Sir THOMAS DENMAN, Knt., C. J. Sir JOSEPH LITTLEDALE, Knt.

Sir JAMES PARKE, Knt.

Sir WILLIAM ELIAS TAUNTON, Knt.

Sir JOHN PATTESON, Knt.

ATTORNEY GENERAL. Sir WILLIAM HORNE, Knt.

Sir JOHN CAMPBELL, Knt.

•			
	•		

# TABLE

OF THE

# NAMES OF CASES

# REPORTED IN THIS VOLUME.

A	PAGE
PAGE	Broxtowe, Hundred of, Duke of New-
Adames, Rex v 61	castle v 273
Allely, Hine v 624	Bruister, Wright v 116
Allen, Apothecaries' Company v. 625	Bulwer v. Horne 132
Apothecaries' Company v. Allen . 625	Bunney v. Poyntz 568
Apothecaries' Company v. Collins . 604	Burn, Carvalho v 382
Arden v. Tucker 815	Burt, Kemp v 424
Attwood, Rex v 481	Burton v. Haworth 462
В	Bussey v. Storey 98
<del>"</del>	Butcher v. Harrison 129
Barker and Mitchell, Wilson v 614	C
Barkworth, Marshall v 508	Carew v. Edwards 351
Baron v. Husband 611	Carmarthenshire, Justices of, Rex v. 563
Bartolozzi, Howard, Gent. One, &c. v. 555	Carvalho v. Burn
Bateman and Another, Rex v 552	Carwardine, Williams v 621
Batley, Shaw v 801	Castledine v. Mundy 99
Battine, Ex parte 690	Chauvel v. Chimelli 590
Baxter v. Taylor	Chimelli, Chauvel v 590
Belshaw v. Marshall and others . 336	Clarke, Sturch v
Bingley, Inhabitants of, Rex v 567	
Bird v. Boulter 443	v. Imperial Gas Light and Coke
— v. Relph 826	
Bishop, Lamey v 479	Company
Blake, Rex v	Clixby, Inhabitants of, Rex v 153
Blackburn and Others, Rex v 575	Colebrook, Bart. v. Layton 578
Blofield v. Payne 410	Collins, Apothecaries' Company v. 604
Boddington v. Schlencker 752	Commissioners for improving Market
Bolton v. Dugdale 619	Street, Manchester, Rex v 333
Bonner, Gent. One, &c. In the Matter of 811	Coningsby, Inhabitants of, Rex v. 156
Boulter, Bird v 443	Cording, Ex parte 198
Bowles, Storr v	Crosfield v. Stanley 87
Brindley, Doe d. Rankin v 84	
Brittain and Others, Sims v 375	D
Brittlebank, Tomlinson, Gent. One,	Davey, Roberts v 664
&c. ▼ 630	Davies, Doe d. Jones v 43

PA			AGE
	46	Haughley, Inhabitants of, Rex v	650
Dickenson v. Naul 6	38	Haworth, Burton v	462
Digby v. Thompson 8	21	Heath v. Sansom	172
Doe d. Rankin v. Brindley	84	Hendon, Inhabitants of, Rex v	628
	43	Hensworth v. Fowkes	449
Cooper v. Finch 29	83	Hertfordshire, Justices of, Rex v.	561
Dalton v. Jones 19	26	Hickman, Doe d. Hickman v	56
	35	Hine v. Allely	624
	56	Hirst, Wilson v	760
Thompson v. Lediard . 1:	37	Horn v. Ion	78
— Dearden v. Maden 8	80	Horne, Bulwer v	132
Cawthorn v. Mee 6	17	Howard, Gent. One, &c. v. Bartolozsi	555
	08	Hull Dock Company v. Priestly .	178
Templeman v. Martin and	- 1	Hungerford Market Company, Ex parte	
	71	Elizabeth Davies, Rex v	327
	98	Hungerford Market Company, Ex	
Dormer, Lord, Roots v	77	parte Still, Rex v	592
	44	Ех	
Douglas, Doyle v	45	parte Gosling, Rex v	596
	44	Husband, Baron v	611
	67	Hutchinson v. Lowndes	118
	19		
Duke of Newcastle v. Hundred of	- 1	Ĭ	
	73	Imperial Gas Light and Coke Company,	
		Clarke v	315
E		Ion, Horn v	78
East India Company, Directors of,		J	
Rex v	30	James, Dean v	546
Easton, Price v 4	33	Johnson, Lowe and, In the Matter of	412
Edwards, Carew v 3	51	Jollie, Rex v	867
Egremont, Earl of, Wray, Assignee v. 1	22	Jones, Doe d. Dalton v	126
	55	— and Others, Rex v	345
	81	·	010
		K	
F		Kelly v. Partington	700
Fell, Clarke v 4	04	Kemp v. Burt	424
	83	Kirk v. Strickwood	421
	65	L	
	49	Lamb, Lyall v	468
	87	Lamey v. Bishop	479
Friedlander v. London Assurance		Layton, Colebrook, Bart. v	578
	93	Lediard, Doe d. Thompson v	137
• •		Leeds, Inhabitants of, Rex v	248
G	- 1	Lloyd and Others, Rex v	135
Gardner and Others, Walker v 3	71	London Assurance Company, Fried-	
	55	lander v	198
	35	London Dock Company, Lucas v.	378
	41	Long v. Douglas	545
4004000	13	v. Wordsworth	367
4004	69	Longnor, Inhabitants of, Rex v.	647
Green V. Mitton	-	Lowe and Johnson, In the Matter of	412
H	- 1	Lowndes, Hutchinson v	118
Hanna Don d Bormelow w A	35	Lucas v. The London Cock Company	378
	29	Lyali v, Lamb	468
	- 1	Lydlinch, Inhabitants of, Rex v.	150
Hartley and Others, Rex v 80	69	That in the street of the st.	100

30

397

573

224

267

846

178

- v. Penryn, Inhabitants of

habitants of

tices of

- v. Saint Helens Auckland, In-

- v. St. Katherine Dock Company

v. St. Peter's Liberty, York, Jus-

- v. Rolfe

- v. Rustell

224

840

576

71A

360

342

Pease, Rex v.

gesses of, v.

Powell, Doyle v.

-, Clarke v.

Pedley, Mayor, Aldermen, and Bur-

Penprase and Others, Rex v.

Penryn, Inhabitants of, Rex v.

Priestly, Hull Dock Company v.

PAGE	PAG
Rex v. Somersetshire, Justices of . 549	Strickwood, Kirk v 42
— v. Smithson 861	Sturch v. Clarke
— v. Snowdon 713	Swann, Woodbridge and Others v. 63
v. Tadcaster, Inhabitants of . 703	Sweeney, Saville v 51
v. Threlkeld, Inhabitants of . 229	T.
v. Tremayne 162	
v. Yorkshire, Justices of the	Tabram v. Freeman 88'
West Riding of 685	Tadcaster, Inhabitants of, Rex v 703
v. Woodbridge, Inhabitants of 711	Taylor, Baxter v
v. Wroxton, Inhabitants of . 640	Terrell, Moore v 870
Richardson v. Watson 787	Thompson, Digby v 821
Roberts v. Davey 664	Threlkeld, Inhabitants of, Rex v 229
Rolfe, Rex v 840	Tomlinson, Gent. One, &c. v. Brittle-
Roots v. Lord Dormer	bank, Gent. One, &c 630
Rowe v. Shilson and Another 726	Tremayne, Rex v 162
Rubery v. Stevens and Another . 241	Tucker v. Tucker 749
Russell, Rex v 576	, Arden v 815
<b>a</b>	₹.
S.	Vaux v. Vollans, Clerk 525
Saint Helens Auckland, Inhabitants	Vollans, Clerk, Vaux v 525
of, Rex v	
Saint Katherine Dock Company,	<b>w</b> .
Rex v	Wagstaffe v. Wilson 339
Saint Peters Liberty, York, Justices	Walker v. Gardner and Others . 371
of, Rex v 342	Wardle v. Nicholson 468
of, Rex v	Watson, Richardson v 787
Sandys, Ex parte 863	Wedge v. Newlyn 831
Sansom, Heath v 172	West Riding of Yorkshire, Justices
Saville and Wife v. Sweeny 514	of, Rex v 685
Schlencker, Boddington v 752	Williams v. Carwardine 621
Shaw v. Batley 801	Wills, Gent., One, &c., Nurse v 739
Shilson and Another, Rowe v 726	Wilson v. Barker 614
Sims v. Brittain and Others 375	v. Hirst 760
Smith v. Goodwin and Richards . 413	Wilson, Wagstaff v 339
, Meager v 673	Witham Navigation Company v. Pad-
Smithson, Rex v 861	_ley 69
Snowball v. Goodricke 541	Woodbridge and Others v. Swann 633
Snowdon, Rex v 713	, Inhabitants of, Rex v. 711
Soden, Empson, Gent., One, &c. v. 655	Wordsworth, Long v 367
Somersetshire, Justices of, Rex v 549	Wray v. The Earl of Egremont . 122
Stanley, Crosfield v 87	Wright v. Bruister 116
Stearn v. Mills 657	Wroxton, Inhabitants of, Rex v 640
Stevens and Another, Rubery v 241	Υ.
Storey, Bussey v 98	Yorkshire, Justices of the West Rid-
, Ogle, Gent., One, &c. v 735	ing of, Rex v 685
Storr v. Bowles 112	Youells, Everett v
,	



ARGUED AND DETERMINED

COURT OF KING'S BENCH,

Michaelmas Cerm,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV

## MEMORANDA.

On the first day of this term John Beames, Robert Mounsey Rolfe, and Clement Tudway Swanston of Lincoln's Inn, Esquires, and Henry Hall Joy, of the Inner Temple, Esquire, having been, during the preceding vacation, appointed His Majesty's counsel, were called within the bar and took their seats accordingly.

Mr. Serjt. Spankie was appointed one of His Majesty's serjeants, and took

his seat within the bar accordingly.

On Sunday the 4th day of November, Lord TENTERDEN, C. J., died at his house in Russell Square. He was succeeded by Sir Thomas Denman, knight, His Majesty's Attorney-General, who was called to the degree of the coif, and gave rings with the motto "Lex omnibus una," and took his seat as Chief Justice of this Court on Thursday the 8th day of November.

# GENERAL RULES

## AGREED UPON BY THE JUDGES IN PURSUANCE OF THE STATUTE 2 W. 4. c. 39.

IT IS ORDERED, That every writ of summons, capias, and detainer shall contain the names of all the defendants [if more than one] in the action, and shall not contain the name or names of any defendant or defendants in more actions than one.

IT IS FURTHER ORDERED, That the following fees shall be taken:

	æ	8.	a.
For signing all writs for compelling an appearance, whether of summons,			
distringas, capias, or detainer, and whether the same shall be the first writ,			
or an alias or pluries writ: and whether the same shall issue into the same			
county as the preceding writ, or into a different county	. 0	2	6
		•	7
For entering an appearance for every defendant	0	1	0
Unless an appearance shall be entered for more than one defendant by	•		
same attorney, and in that case for every additional defendant	0	0	4

IT IS FURTHER ORDERED, That the person serving a writ of summons shall, within three days at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute; and every affidavit, upon which such an appearance shall be entered, shall mention the day on which such indorsement was made.

IT IS FURTHER ORDERED, That the sheriff or other officer or person to whom any writ of capias shall be directed, or who shall have the execution and return thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof; and, in default thereof, shall be liable in a summary way to make such compensation for, any damage which may result from his neglect, as the Court or a Judge shall direct.

IT IS FURTHER ORDERED, That the second rule of Hilary term 1852, 3 B. & Ad. 390, shall be applicable to all write of summons, distringar, capias, and detainer issued under the

authority of the said act, and to the copy of every such writ.

IT IS FURTHER ORDERED, That any alias or pluries writ of summons may, if the plaintiff shall think it desirable, be issued into another county, and any alias or pluries writ of capias may be directed to the sheriff of any other county, the plaintiff in such case upon the alias or pluries writ of summons describing the defendant as late of the place of which he was described in the first writ of summons, and upon the alias or pluries writ of capies referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed.

IT IS FURTHER ORDERED, That the alias or pluries writ of summons into another county

shall be in the following form :-

William the Fourth, &c.

To C. D. of in the county of late of

[original county]. We command you as before, in the county of [or, often] we have commanded you, &c. [as in the writ of summons, No. I. in the schedule of the said act.]

And that the alias and pluries writ of capias shall be in the following form:-

William the Fourth, &c.

To the sheriff of

We command you, as heretofore we have commanded the sheriff of that you omit not, &c. [as in the writ of capias No. 4, in the schedule of the said act].

IT IS FURTHER ORDERED, That in every writ of distringas, issued under the authority of the said act, a non omittas clause may be introduced by the plaintiff, without the payment of any additional fee on that account.

It is further ordered, That when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of

such attorney in the country shall also be indorsed upon the said writ.

It is further ordered, That if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the

Court out of which the same shall issue, or to any Judge.

It is further ordered, That upon all writs of capias, where the defendant shall not be in actual custody, the plaintiff at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare de bene esse, in case special bail \*shall not have been perfected; and if there be several defendants, and one or more of them shall have been served only and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in chief, and de bene esse against the defendant or defendants who shall have been arrested and shall not have perfected special bail.

It is further ordered, That in case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose, after the 24th day of October, as if the declaration or preceding pleading had been delivered or filed on the 24th day of October; but in such cases it shall not be

necessary to have a second rule to plead, reply, &c.

It is further ordered, That in case a Judge shall have made an order in vacation for the return of any writ issued by authority of the said act, or any writ of capias ad satisfaciendum, fieri facias, or elegit on any day in vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the mean time.

It is further ordered, That if any attorney shall, as required by the said act, declare that any writ of summons or writ of capias upon which his name is indorsed was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed until further order.

IT IS FURTHER ORDERED, That every declaration shall in future be entitled in the proper Court, and of the day of the month and year on which it is filed or delivered, and shall

commence as follows:-

#### DECLARATION after summons.

Venue. A. B., by E. F. his attorney, [or in his own proper person,] complains of C. D. who has been summoned to answer the said A. B., &c.

DECLARATION after arrest, where the party is not in custody.

Venue. A. B., by E. F. his attorney, [or in his own proper person,] complains of C. D who has been arrested at the suit of the said A. B., &c.

## DECLARATION where the party is in custody.

Venue. A. B., by E. F. his attorney, [or in his own proper person,] complains of C. D. being detained at the suit of the said A. B. in the custody of the sheriff [or of the Marshal of the Marshalsea of the Court of King's Bench, or of the Warden of the Fleet.]

DECLARATION after the arrest of one or more defendant or defendants, and where one or more other defendant or defendants shall have been served only and not arrested.

Venue. A. B., by E. F. his attorney, [or in his own proper person,] complains of C. D. who has been arrested at the suit of the said A. B. [or being detained at the suit of the said A. B. as before] and of G. H., who has been served with a writ of capias to answer the said A. B. &c.

And that the entry of pledges to prosecute at the conclusion of the declaration shall in

future be discontinued.

TENTERDEN.
N. C. TINDAL.
LYNDHURST.
J. BAYLEY.
J. A. PARK.
J. LITTLEDALE.
S. GASBLEE.
J. VAUGHAN.

J. PARKE.
W. B. GABRUST.
W. E. TAUNTON.
E. H. ALDERSON.
J. PATTESON.
J. GURNEY.

It is ordered, That the writ of capies and distrings which shall hereafter be issued out of the superior Courts of law at Westminster into the counties palatine of Lancaster or Durham, shall be directed to the Chancellor of the county palatine of Lancaster, or his deputy there, or to the Bishop of Durham, or his Chancellor there, and shall be in the following form:—

#### WRIT OF DISTRINGAS.

William the Fourth, &c.

To the Chancellor of our county palatine of Lancaster, or his deputy there; or
To the Reverend Father in God by Divine Providence Lord Bishop of Dur-

ham, or to his Chancellor there, greeting. We command you that by our writ under the seal of our said county palatine to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [or, if in Durham, that by our writ under the seal of your Bishoprick, to be duly made and directed to the sheriff of the county of Durham, you cause the said sheriff to be commanded] that he omit not by reason of any liberty in his bailiwick, but that he enter the same and distrain upon the goods and chattels of C. D. for the sum of forty shillings, in order to compel his appearance in our Court of to answer A. B. in a plea of trespass on the case, [or debt, as the case may be,] and how he shall execute that our writ he make known to us in our said Court on the day of now next ensuing.

Witness

day of

in the

at Westminster, the year of our reign.

Notice to be subscribed to the foregoing writ.

In the Court of

Between A.B. . . . . . . . . . . Plaintiff,

and C.D. . . . . . . . Defendant.

Mr. C. D.

TAKE NOTICE, That I have this day distrained upon your goods and chattels in the sum of forty shillings in consequence of your not having appeared in the said Court to answer to the said A. B. according to the exigency of a writ of summons bearing teste on the day of , and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said A. B. will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [if the defendant be subject to outlawry] will cause proceedings to be taken to outlaw you.

#### WRIT OF CAPIAS.

William the Fourth, &c.

To the Reverend Father in God

ham, or to his Chancellor there, greeting.

To the Chancellor of our county palatine of Lancaster, or his deputy there; or by Divine Providence Lord Bishop of Dur-We command you, that by our writ under

the seal of our said county palatine to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [or, if in Durham, that by our writ under the seal of your Bishoprick to be duly made and directed to the sheriff of the county of Durham, you cause the said sheriff to be commanded] that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take C. D. of if he shall be found in his bailiwick, and him safely keep until he shall have given him bail or make deposit with him according to law in an action on promises [or of debt, &c.] at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from his custody, and that he further command him, that on execution thereof he do deliver a copy thereof to the said C. D., and that the said writ do require the said C. D. to take notice, that within eight days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of to the said action; and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunder written or indorsed thereon. And that he further command the said sheriff, that immediately after the execution thereof, he do return that writ to our said Court, together with the manner in which he shall have executed the same, and the day of the execution thereof; or that if the same shall remain unexecuted, then that he do so return the same at the expiration

of four calendar months from the date thereof, or sooner if he shall be thereto required, by order of the said Court or by any Judge thereof.

at Westminster, the

### MEMORANDUM to be subscribed to the writ.

N. B. This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

### A WARNING TO THE DEFENDANT.

1. If a defendant being in custody shall be detained on this writ, or if a defendant being arrested thereon shall go to prison for want of bail, the plaintiff may declare against such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.

2. If a defendant being arrested on this writ shall have made a deposit of money according to the statute 7 & 8 G. 4, c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the

defendant, and proceed thereon to judgment and execution.

3. If a defendant having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail bond.

4. If a defendant, having been served only with this writ and not arrested thereon, shall

not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

### Indonsements to be made on the writ of Capias.

Bail for £

Witness

by affidavit,

Bail for £ day of by order of [naming the Judge making the order], dated

This writ was issued by E. F. of

, attorney for the plaintiff [or

plaintiffs] within named,

This writ was issued in person by the plaintiff within named, [mention the city, town, or

parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.]

N. C. TINDAL.
LYNDHUBST.
J. BAYLEY.
J. A. PARK.
J. LITTLEDALE.
S. GASELEB.
J. VAUGHAN.
J. GURNEY.
J. GURNEY.

The following rule was agreed upon by the Judges of the Court of King's Bench, in pursuance of the statute 2 W. 4, c. 39, s. 18, and took effect on the first day of Michaelmas term, 1832.

It is ordered, That all writs of summons, distringas, capias, and detainer issued in the county of Middlesex, shall be issued, signed and sealed, by the signer of the bills of Middlesex; and that all such writs issued in any other county, shall be issued and signed by the signer of the writs in the King's Bench office, and sealed by the sealer of the writs until further order.

# \*9] \*The KING v. JOHN PATTESON.(a)

By the statute 12 Geo. 2, c. 29, s. 6, it is enacted that the respective high constables shall pay the sums of money received by them in respect of the county rate, to such person whom the justices shall at their quarter sessions appoint to be the treasurer, (which treasurer they are thereby authorized to appoint,) he first giving sufficient security in such sums as shall be approved by the justices at sessions, to be accountable for the money which shall be paid to him in pursuance of that act, and for which by s. 7, he is made accountable to the justices: Held, that this section of the statute does not make the giving of the security a condition precedent to a person's becoming treasurer, or being responsible or accountable to the justices, but that the appointment is complete without such security being given.

In quo warranto for usurping the office of alderman and justice of the peace of the city of Norwich, the pleas set out a charter of Car. 2., granting among other things, that all the aldermen of the city who had borne the office of mayor, so long as they should continue in their public offices, should be justices of the peace of the same city; that the defendant was duly elected an alderman, and still was alderman; and that he became mayor, and thereby afterwards became justice. Replication, that the defendant being such alderman and justice, was duly appointed to be treasurer of the county of the city of N., and gave such security to the mayor and recorder, being justice of peace for the said city as in that behalf required, and accepted and took on himself the office of treasurer, and entered on the discharge of the duty of his office, which offices of alderman and justice, and of treasurer, were incompatible with each other, whereby the defendant vacated the offices of justice and alderman, &c. Rejoinder that the defendant did not give such security; Held, on demurrer, that the rejoinder was bad, as tendering an immaterial issue:

Held, secondly, that the replication was bad, because the acceptance by a person holding a corporate office, of another incompatible office not corporate, did not operate as an absolute avoidance of the corporate office, though it might be ground of a motion; and that acceptance of an incompatible office does not operate as an absolute avoidance of a former office in any case where the party could not divest himself of that office by his own act and without the concurrence of another authority to his resignation or amotion unless such authority be privy and consenting to the second appointment.

Held also, that the defendant, as long as he was an alderman and justice of peace of the city of N., was not a person capable of being appointed county treasurer.

QUO WARRANTO. The first count of the information charged the defendant with usurping the office of alderman of the city of Norwich; the second, the office of justice of peace within the city; and the third count, the offices of alderman and justice of peace. The plea to the first count set out a charter of

(a) Littledale, J. sat in the bail court this term.

King Charles the Second, whereby he granted, among other things, "that all the aldermen of the city who had borne the office of mayoralty, so long as they should continue in their public offices, should be justices of the peace of the same city," and ordained the mode of electing aldermen; \*and the plea [\*10] averred that the defendant was, in December 1781, duly elected alderman of the said city, and became and still is alderman thereof. To the second count the defendant pleaded the like charter, his election as alderman, and that in June 1788 he was duly elected and was mayor for one year next following and thereby became and was made a justice of the peace, &c. There was a similar plea to the third count. Replication to the first plea, that King Charles the Second granted, &c., and the defendant was elected alderman as in that plea alleged, but that afterwards in 1788 he was elected and became mayor for one year next following, and thereby was constituted a justice of peace for the said city; and afterwards, in August 1827, the defendant being such alderman and justice as aforesaid, was duly appointed to be treasurer of the county of the city of Norwich, giving security to account, &c., and that he gave such security to the then mayor, recorder, &c., being justices of the peace for the said city, as in that behalf required, and then and there took upon himself the office of treasurer, which offices of alderman and treasurer were wholly incompatible with each other, whereby the defendant vacated the office of, and ceased to be an alderman of the said city. To the second plea, that the defendant was elected alderman and mayor, and became justice of peace as in that plea alleged, but that in August 1827 he was appointed treasurer and gave security, and took on himself the office of treasurer, &c. (as before): and that the offices of justice of the peace and treasurer were incompatible. To the third plea, the same facts were replied, with an allegation, that the offices of alderman, justice of the peace and treasurer were incompatible. Rejoinder to each \*part of the replication, that the defendant did not give such security to the mayor, &c., being [\*11 justices of the peace of the said city, &c., as in the replication alleged, and of this, &c. Demurrer, stating for cause that the defendant had attempted to put in issue matter altogether immaterial and not properly issuable, and had not denied, confessed, or avoided the substantial matter in the replication. Joinder in demurrer. This case was argued in Michaelmas term 1831.

Campbell in support of the demurrer. The rejoinder tenders an immaterial issue. It admits that the defendant was elected to, and accepted and took upon himself the office of treasurer; and this renders it immaterial whether or not he gave the security; for by the statute 12 G. 2, c. 29, s. 6., "the high constables are required, at or before the next general quarter sessions after they shall have received any sum of money, to pay the same into the hands of such person whom the justices shall, at their respective general or quarter sessions, appoint to be the treasurer, (which treasurer they are thereby authorized to appoint,) such treasurer first giving sufficient security in such sums as shall be approved by the said justices at their respective quarter sessions, &c." The security to be given is an act to be done after the election to and acceptance of the office.

Then, secondly, the replication is good. It shows an appointment of the defendant to, and acceptance by him of incompatible offices. It is clear that the offices of alderman and county treasurer are incompatible, for by the 12 G. 2, c. 29, s. 6, the treasurer is appointed by the justices of the peace, and by s. 7, is accountable to them for the moneys he receives, and by s. 11, he is to continue in office and be removable at their pleasure; and by the 55 G. 3, c. [\*12 51, s. 17, the justices are to fix his salary. Then, the two offices being incompatible, the acceptance of the second operates as an avoidance of the first, Milward v. Thatcher, 2 T. R. 81. Rex v. Tizzard, 9 B. & C. 418, and Rex v. Pateman, 2 T. R. 779.

This rule is not confined to cases where both the offices are corporate. Wherever the offices are of a public nature, and incompatible, and the public are interested in a due performance of the duties, the acceptance of the second

Vol. XXIV.—2

office operates as an avoidance of the first. A coroner, becoming sheriff, vacates the former office. In Com. Dig., tit. Officer, K. 5, it is said that a man shall lose his office if he accept another office incompatible, and the first instance put is of an office not in a corporation: "as, if the one office be under the control of the other, as, if the remembrancer of the exchequer be made a baron of the exchequer." Under the same title, B. 6, it is laid down generally, that the grant of an office to one who has another office incompatible is not good; for the first office will thereby be void; as "if a forester by patent for life be made justice in eyre of the same forest pro hac vice, the office of forester will be void, for it is incompatible; being subject to correction by the justices in eyre;" or "if the steward, warder, or justice or the forest be made justice in eyre," and 4 Inst. 310, is cited; or, "if a justice of C. B. be made a justice of B. R.;" and for this latter position the cases of justices Dyer and Croke are cited. (See also Vin. Abr. Officer and Offices (R.) and the instance there cited.) In the first of these, (Easter, 4 & 5 P. & M.) Dyer himself, \*a justice of the Common Pleas, having been appointed a justice of the King's Bench, it was held that the letters-patent creating him a justice of K. B. vacated his former patent, (Dyer, 158, b.,) upon this, among other grounds, that a writ of error lay from C. B. to B. R., and, therefore, that a man might have to reverse his own judgment; and in Michaelmas 4 Car. 1, Cro. Car. 127, 128, Croke, a justice of the Common Pleas, being made a justice of the King's Bench, it was held by all the justices assembled at the Lord Keeper's house, that the office of justice of the Common Pleas became void on signing the patent of promotion, and that no patent of revocation was necessary. And in Dyer 159, a, it is said that Saunders, then Chief Justice of England, who was a justice of C. B. before, never surrendered his former patent, and that it was only determined by operation of law. Yet, even as to judicial offices, two may be held by the same person, if they are not incompatible. Thus Knivet was Chancellor and Chief Justice at the same time, in the reign of Edward III., 5 Rep. 8. a. So where Lord Hardwicke, Cas. temp. Hardw. 364, and Lord Loughborough, and Noel was Chief Justice of Chester as well as a judge of Westminster Hall, Dyer, 158, b. note 35, ed. 1794. So Sir Edward Littleton was Lord Keeper and Chief Justice of C. B. at the same time, Cro. Car. 600, and Sir Orlando Bridgman being Chief Justice of C. B. was made Lord Keeper, and still continued Chief Justice. 1 Sid. 338. These authorities abundantly shew that, as to offices not corporate, the acceptance of a second incompatible with the first, avoids it; and Sir Charles Howard's case, (Sir W. Jones, 295), is a strong authority to the \*same effect. There "the Attorney-general desired that, for a general reason, his offices of keeper and bailiff of several walks, and of the game there, and of riding forester, might be seized, because all those were subordinate to the office of a verderer (which he held); and, therefore, by that his other offices were determined, and for that he cited Blage's case, (cited in Crocker and York v. Dormer, Poph. 28, and Colt v. Glover, 1 Roll. Rep. 452), who was remembrancer in the exchequer, and after that was made one of the barons there; and it was resolved, that his office of remembrancer was gone. Mr. Attorney said he had seen precedents, that divers offices had been seized because one man had so many, quod eis intendere nequit. It was objected by the counsel on the other side that a verderer was by election, and that may be against a man's will, and, therefore, should not determine other offices by letters-patents. To which Mr. Attorney answered, that he had particularly averred that Sir Charles had used the office of verderer, and so accepted the election, which he might have waived. The Judges agreed that all the other places here claimed by Sir C. Howard were inferior to his place of verderer, and so determined by acceptance thereof. Judgment was given upon the whole claim for all things against Sir Charles Howard." ground of the decision, therefore, was, that the other offices held by Sir Charles Howard were actually determined by his acceptance of that of verderer.

It is undoubtedly true, that in many of the cases in which it has been held that a man loses an office when he accepts one that is incompatible, the two offices were corporate, as, in Milward v. Thatcher, 2 T. R., 81, those of jurat and \*town clerk, and in Rex v. Blissel, Doug. 398, note, that of chamberlain and alderman; but the reasons given for those decisions were not that the two offices were corporate, but that they were incompatible. In Rex v. Tizzard, 9 B. & C. 418, it was alleged in the replication that the offices of town clerk and alderman were incompatible, and that the defendant by accepting the office of town clerk vacated that of alderman; and on demurrer to the replication, the only question argued was, whether the two offices were inconsistent, it being conceded that if they were, the acceptance of the office of town clerk vacated that of alderman. In Verrior v. The Mayor of Sandwich, Sid. 305, there was a mandamus to restore Verrior to the place of town clerk; the return was, that he being town clerk was elected mayor, and that he accepted the office. question was, whether the same person could be mayor and town clerk. Court seemed to think he could not, but delivered no opinion; but the argument was not that the two offices were corporate, but that they were incompatible; (see also Rex v. Jones, 1 B. & Ad. 677); because the mayor was judge of a court of record, which it was the duty of the town clerk to attend ministerially, and he might be fined for his default, and it was not likely that he would impose a fine upon himself. Upon the same ground, it was there said in argument, and affirmed by the Court, that the Chief Justice of C. B. cannot be prothonotary or clerk of the papers in the same court; and it was also said in argument, and affirmed by the Court there, that a bishop could not hold a parsonage by commendam in his own diocese, for he could not visit himself; and these dicta are adopted, Com. Dig. Officer, (B) 6.

\*The authorities, therefore, establish that a party hold ing an office (whether it be corporate or not), by accepting another incompatible with it avoids his first office: and it follows that the defendant in this case, by accepting the office of county treasurer, vacated his offices of alderman and justices.

tice of the peace.

Coleridge contra. The issue tendered by the rejoinder was material, because, by 12 G. 2, c. 29, s. 6, the giving of security by the party nominated county treasurer is a condition precedent to the office becoming vested in him. Until security is given, the high constables are not to pay money into the treasurer's hands, nor does the latter become accountable to the justices, nor can they order him to pay any money. Incompatibility is a legal conclusion, the result of facts one or many; and the liability of one officer to account to another is a fact from which incompatibility of offices may result. The replication alleges a fact (the having given security), from which the accountability of the treasurer arises. That is a material fact. The defendant was not bound to admit it, as he must have done if he had not traversed it. It is an established rule in pleading, if there be two or more material facts, a traverse of one is good, Com. Dig., Pleader, G. 10. The allegation of acceptance, and entering on the duties, of the office makes no difference; because the defendant has entered on no offices or duties incompatible until he has given the security.

Then, as to the replication, it alleged the incompatibility of the offices, and that by reason thereof, the office of alderman became ipso facto void. It is not disputed that the two offices are incompatible, but it is denied that the appointment of a person holding a \*corporate office, to an incompatible office not corporate, and his acceptance thereof, will of itself vacute the first. A corporate office has been held to be avoided by acceptance of an incompatible corporate office, on the principal that from the acceptance of the second the law implies a surrender of the first by the officer, and an acceptance of that surrender by the power which appointed him. Where the same power appoints to both offices, the act of appointment to the second implies an assent to the sur-

render of the first, as the act of acceptance of the second office implies the surrender by the officer of the first. The authorities prove not that the acceptance of the second office of itself vacates the first, but, merely, that two incompatible offices cannot be held together; which is conceded. Thus, the acceptance of the office of sheriff does not ipso facto vacate the office of coroner, though (Com. Dig. Officer, G. 4), it is a ground of discharge by writ. The coroner is elected by the freeholders in pursuance of a writ from the crown, and he may be discharged of his office by the king's writ sent unto him, and thereupon another writ issues to the sheriff to choose a new coroner; and that writ recites the cause for which the king had removed the other coroner from his office, Fitzh. N. B. 163, 164. One of the causes cited in the writ given in Fitzherbert is, "that the coroner has been chosen into the office of the sheriff;" from which it appears, that at the time when those writs were framed on which Fitzherbert comments, the sheriff was elected by the freeholders. He continued to be so till the statute of Lincoln, 9 E. 2, stat. 2. As to the incompatible offices of judges of different courts; in the times of Dyer and Croke judges were appointed \*18] durante bene placito, and the king \*determined his will as to the first office, by appointing the same party to another incompatible office. This is quite consistent with the opinion delivered by the judges, when Croke, who was a justice of C. P., was appointed to the office of Chief Justice of K. B., that a patent of revocation of the first office was unnecessary, because, by making him Chief Justice of K. B., his former patent was in law determined. where Chief Baron Walter was appointed Chief Baron quamdiu se bene gesserit, though he was in the king's displeasure, and commanded to forbear to execute the office, he continued Chief Baron until the day of his death. Cro. Car. 203. The king, if he could have deprived him of his office by appointing him to an incompatible office, undoubtedly would. Then, although it appears from the older authorities, not indeed that the acceptance of the second office vacates the first, but that two incompatible offices cannot be held together, the question may still arise, which office becomes vacant? In Rex v. Blissel, Doug. 398, note 22, the question was, whether one Pike had been duly elected alderman? he, at the time of the election, having been chamberlain of the corporation, and being therefore objected to as ineligible (the aldermen being auditors of the chamberlain's account): but the Court held that he had vacated the office of chamberlain by accepting that of alderman, not on the ground that acceptance of a second incompatible office avoided the first, but that the acceptance of the higher of the two ipso facto vacated the other. The same principle is laid down in Dyer's case, Dyer, 159 a. It was in Rex v. Trelawney, 3 Burr. 1615, where \*19] both the offices were corporate, that the doctrine afterwards \*adopted by this Court in Milward v. Thatcher, 2 T. R. 81, was first stated in argument; viz. that if the two were incompatible, it would be the former office that was vacated by acceptance of the latter. In Sir Charles Howard's case, Sir W. Jones, 293, the question was not whether the offices were void, but whether they should be seised into the king's hands; the reason of the decision there was, that all the other offices claimed by him were inferior to that of verderer; and, therefore, there was good ground for seizure. As to the dictum that a bishop cannot hold a living by commendam in his own diocese, because the same person cannot be visitor and visited; Gibson in his Codex, 913, states that to be a questionable position, because the bishop is under the correction of the metropolitan; and that seems to have been the opinion of Dodderidge, J., in Colt v. Glover, Moore, 899. As to the cases of forester, steward and justice in eyre of the forest, in 4 Inst. 310, Lord Coke speaks only of a forester by patent, and Manwood, p. 163, says, he is made by letters-patent under the great seal, and that some have their offices in fee, some for life, and some only durante bene placito. The steward and justice in eyre are appointed by the king. The dictum as to these offices is, therefore, consistent with the principle that incompatibility, per se, only vacates the first office, where both are granted by the same

In Com. Dig. tit. Officer, K. 5, and B. 6, not a single instance of avoidance is mentioned where the grant of the second office is not from the same authority which granted the first, except the case of the bishop holding a parsonage by commendam in his own diocese. According to Gibson, it may be doubted whether that be \*law; and even if it be, that stands upon its own footing; it is the ecclesiastical law which is positive upon this subject, and where the crown pro hac vice is patron of the living, it seems hardly an exception. The ordinary avoidance of a first benefice by taking a second, is by stat. 21 H. 8, c. 13, which applies only to a living of the yearly value of Below that value, the first living is voidable only at the patron's pleasure, unless the bishop by sentence make it void, Gibson's Codex, 906. Then if no case be found which contradicts the principle, can any analogies be found to sup-The principle is, that the party granting and the grantee must concur to make the avoidance. If the granter confer a second office, which his grantee of the first declines to accept, the first office is not void; so that the grantee's assent is necessary; Boston's case, cited in Awdley's case, Noy's Rep. 78. There Boston was elected to be alderman on purpose to oust him of the office of town-clerk, because they were incompatible offices in one person, and in the King's Bench he had restitution to the first office. If the acceptance of a second office avoided the first simply on account of incompatibility, because thereby the duty of the first could not properly be discharged, one would expect a motion to be necessary, as in all similar cases, such as non-residence, insolvency, &c. In Rex v. Heaven, 2 T. R. 772, the defendant was an alderman of Bedford, but thirteen years before had removed from Bedford, and of late had been appointed to an office which, by act of parliament, required him to reside elsewhere, and it was contended that the office of alderman was thereby vacated, but the Court refused a rule for a quo \*warranto until a sentence of amotion by the corporation. In Rex v. Pateman, 2 T. R. 779, the defendant having accepted an office in the same corporation incompatible with his former one, Lord Kenyon said the appointment was an act of the corporation, and equivalent to an amotion. Here the defendant has lawfully been elected for life, or until amotion for a reasonable cause, and the corporation have neither expressly nor by implication amoved him. By the charter he might have been elected alderman without having been a candidate, and against his will. He was liable to a penalty if he refused to serve when elected, or withdrew himself from the duties of the office without permission or a reasonable cause. Was he then at liberty, without permission of those who elected him, to vacate the office by acceptance of a second conferred by a different authority? And what reason is there for saying, that if two offices be incompatible, the first should become vacant by appointment to the second, rather than the appointment to the first should make the person ineligible to the second?

Cur. adv. vult.

PARKE, J., in the course of this term, delivered the judgment of the Court (having first stated the pleadings) as follows:—Two questions arose on these pleadings, and were argued at the bar. The first, whether the rejoinder was sufficient? The second, whether the appointment to and acceptance of the office of treasurer of the county of the city did or did not vacate the offices of alderman and justice of the peace, or either of them?

The first question depends upon the materiality of \*the averment in that the defendant gave such security as therein is before mentioned, to the mayor, recorder, steward and alderman, being justices of the peace," the same replication containing also an averment, that "he accepted and took upon himself the office of treasurer, and entered upon the discharge of the duties of his office." If the giving security be a condition precedent to becoming treasurer, or being responsible and accountable as such, the averment is material and traversable. If it be not, it is immaterial, and we are

of opinion that by the form of the appointment, stated in the replications, it is not made a condition precedent, if it be not so by the statute 12 G. 2, c. 29, s. 6, in pursuance of which statute the appointment took place; and, by the statute, we think it is not made a condition precedent, either to the enjoyment of the office, or to the liability to account for the moneys received by virtue of the office. The statute appears to us in this respect to be directory only; and if so, the appointment of the defendant was complete, though such security was not given, and the rejoinders are all bad in law, as tendering issue on an immaterial allegation.

The second question is one of more difficulty and importance. It was admitted on the argument, that the offices of treasurer and of justice of the peace are incompatible: it is also admitted on the pleadings that the defendant was appointed to and accepted the office of county treasurer. The question is, what is the effect of that appointment and acceptance? Without acceptance by the person appointed, it is clear that the first office would not be avoided, Noy's Rep. \*23] 78; Dyer's Rep. 332 b. in not. After acceptance, is the first \*office become absolutely void, so that the party may be ousted by a proceeding in quo warranto? If we were to hold that the office of justice of the peace is absolutely void in this case, it would be difficult not to come to the same conclusion in every case in which a justice of the peace accepted an office within his district accountable before justices or at sessions; that, for instance, of overseer of the poor, or churchwarden, or surveyor of highways, and it would be of mischievous consequence to the interests of the public, if it were to be decided that a magistrate could not discharge the important duties of those subordinate situations without losing entirely and forever his superior office.

This very question, how far the office of justice of the peace and the office of overseer were compatible, came before the Court in Rex v. Gayer, 1 Burr. 245; the Court gave no judicial opinion on it; but from the form of the proceeding, which was an application to quash an order of sessions discharging an order of two justices appointing the defendant, who was an acting justice of the peace for the county, to be an overseer of the poor, it seems to have been considered both by the bar and by the bench, that if the two offices were incompatible the consequence would be, that the party should be discharged from that of overseer as having been disqualified or exempted, and not from that of justice of the

peace as being vacated by the appointment to be overseer.

Again, it would be an anomaly in the law, if a public officer who could not directly resign, or be amoved without the concurrence or privity of a superior authority, should be able to accomplish the same object indirectly by an acceptance of an incompatible office. A \*sheriff, for instance, who is indictable for not accepting and exercising his office, might relieve himself without the concurrence of the crown by being elected to the office of coroner;

and other instances of the same kind might be put.

These considerations lead us to doubt whether the general proposition can be supported, that under all circumstances, the acceptance of an incompatible office, by whomsoever the appointment to it is made, absolutely avoids a former office; and upon reference to the authorities, we think that this proposition is not made out; but that it must be limited and qualified; and that such acceptance (though it may be ground of amotion) does not operate as an absolute avoidance in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment.

In the earlier text books and authorities, the ground upon which the acceptance of an incompatible office avoids another is not distinctly explained. In the cases, however, of Gage v. Peacock, Noy. 12, and Verrior v. The Mayor of Sandwich, 2 Keb. 92, it appears to have been argued on the ground of an implied surrender; and in some more modern cases, where the first office is clearly avoided, the reason expressly stated is, that it operates as an implied surrender of

the former office, or an amotion from it. In Rex v. Trelawney, 3 Burr. 1615, Lord Mansfield puts it on the former ground; and that opinion is adopted by Buller, J. in Milward v. Thatcher, 2 T. R. 87. \*Lord Kenyon in Rex v. Pateman, 2 T. R. 777, puts it on the latter. See also the opinion of [\*25 Littledale, J. in Rex v. Hughes, 5 B. & C. 886.

If this view of the subject be correct, it seems to follow that the acceptance of the second office will not absolutely avoid the first, unless it be made by, or with the privity of, that authority which has the power to accept the surrender

of the first or to amove from it.

Upon reference to the authorities it will be found that in most, if not in all cases where the office has been held to be absolutely void, a surrender to and acceptance by the same person who appointed to the second office, or an amotion by

them, would be good.

A forester by patent for life, or warden of a forest, made justice in eyre of the same forest pro hac vice, 4 Inst. 310; a justice of C. P. made justice of K. B., Dyer, 158 b.; a remembrancer of the Exchequer for life made a Baron of the Exchequer, Dyer, 197 b.; a flag officer appointed to another command, Johnstone v. Margetson, 1 H. B. 261,—are all instances in which both appointments are made by the crown. The case of a town-clerk made mayor, Sid. 305, a jurat made town-clerk, Milward v. Thatcher, 2 T. R. 81, a burgess made alderman, Rex v. Hughes, 5 B. & C. 886, all appear to be cases of appointments by the corporation at large. In Rex v. Tizzard, 9 B. & C. 419, it does not appear by the pleadings in the case, whether the mayor, alderman, and bailiffs who appointed to the office of town clerk, had or had not the power of accepting the resignation of that of alderman; and as this objection was not stated, we do not \*consider the case as forming an exception to the position now laid [\*26]

The cases of a forester appointed by the crown and elected verderer by the freeholders, Sir Charles Howard's case, Sir W. Jones, 293, a coroner made a verderer, Com. Dig. Officer, G. 4, only shew that the acceptance of the new appointment is a ground of discharge from the old one by the crown; and that this is so further appears from the argument of Noy in Sir W. Jones, who said, "that he had seen precedents that divers offices had been seized because one had so many, quod eis intendere nequit." In Sid. 305, where it is said that the Chief Justice cannot be prothonotary in his own court, it is not said that by accepting it the office of Chief Justice would be void.

Upon principle, not conflicting with any of the authorities, it seems that an officer cannot avoid his office by accepting another, unless his office be such as he could determine by his own act simply, or unless that authority concurs in the new appointment, which could accept the surrender of, or amove from,

the old one.

This defendant is an alderman, and, by virtue of that office, a justice; the office of alderman he could only surrender to the corporation at large, or, by charter or prescription, or by-law, to a select body.

That the assent of the corporation to the resignation of an office is necessary

appears from the following authorities:-

In 2 Roll. Abr. 456, it is said, that an alderman by the assent of the corporation can resign and relinquish his office to the corporation, for there is no reason why \*he should be bound to execute and continue in his office for all his life, against his will; and the corporation may take such surrender of right without any power given by the charter to take it. In Rex v. Tidderly, Sid. 14, it is laid down that every corporation, as a corporation, has power to take a resignation. In Taylor's case, (Popham, 133, reported, 2 Roll. 11, as Hazard's case), the question was, whether an alderman might surrender or not? Coventry, solicitor, said he could not, and cited Medlicott's case, where the opinion of the Court was, that he could not; but, per Dodderidge, "perhaps they would not accept his surrender." In Com. Dig. tit. Franchises, F. 30, it

is said, every member or officer of a corporation may resign his place or office. Nothing is mentioned of acceptance; but as it is followed by these words, "and a corporation has power to take such resignation," it seems to be implied that the corporation must accept it in order to render it valid. Rex v. The Mayor of Rippon, 1 Ld. Raym. 563, and Rex v. Lane, 2 Ld. Raym. 1304, are authorises to the same effect.

If, then, the assent of the corporation at large or a select body be required to make a resignation valid and complete, the defendant could not in this case have effectually got rid of his offices of justice and alderman merely by his own act, and the adoption of it by the other justices and aldermen in session assembled; and if so, there can be no implied surrender of those offices by acceptance of an incompatible appointment from them, assembled and acting in the same character.

The offices of justice and alderman, therefore, did not become absolutely void by that acceptance.

\*28] \*It must, not, however, be supposed, that in laying this down in the present instance, the Court mean in the slightest degree to trench upon the rule, that where two offices are incompatible they cannot be held together. This is a rule founded on the plainest principles of public policy, and which has ob-

tained from very early times.

It is not perhaps necessary for the Court to decide more, than that the circumstance of the defendant being appointed to, and accepting the office of treasurer, did not vacate that of alderman and justice. But as it may be objected, that if so, the two offices may yet be held together, it may be as well to add, that the acceptance of the treasurership may perhaps be the ground of a motion by the corporate body; and in addition, that it seems to us that the defendant was not a person capable, under 12 G. 2, c. 29, s. 6, as long as he was an alderman and a justice, of being nominated and appointed treasurer. Though there be no direct prohibition in the statute of such an appointment, it is clear that it never contemplated the possibility of the justices appointing one of themselves. By the sixth section they are to appoint a person resident in the county, he first giving sufficient security, and he is to pay the money in his hands according to their orders; and by the seventh section he is to keep books of entries of the sums received and paid by him, and to deliver in accounts, upon oath if required, of such sums, and to lay before the justices at sessions proper vouchers for the He is, moreover, by the eleventh section, to be continued in office or to be removed at their pleasure, and to be allowed such sum for his care and pains in the execution of his trust, not exceeding 201. by the year, as they in their discretions shall \*think fit. All these provisions show that he is intended to be a mere ministerial officer under the justices, and not to be one of their And therefore, if, as we think is the case here, the justices of the county of the city of Norwich and Mr. Patteson could not, for the reasons above given, by their own acts, the justices by appointing to, and Mr. Patteson by accepting, the office of treasurer, vacate his office of alderman and justice, to which under the king's charter he was elected by the citizens duly assembled at a corporate meeting for that purpose, and the offices could not be held together; it follows, as a necessary consequence, that the defendant was not eligible to that office, and, if he still fill it in conjunction with his character of alderman and justice, may by some legal proceeding be amoved, and this conclusion is materially strengthened by the case, before cited, of Rex v. Gayer, 1 Burr. 245.

For these reasons we are of opinion that the judgment of the Court must be

for the defendant.

This judgment must be considered as that of my Brothers, Littledale, Taunton, and myself. My Brother Patteson has taken no part in the consideration of the case, for private reasons. Lord Tenterden, I believe, entirely concurred in this judgment.(a)

Judgment for the defendant.

(a) Lord Tenterden, during the argument, stated that, on his being appointed a Judge of this Court, he surrendered the patent creating him a Judge of the Common Pleas.

# \*The KING v. EDWARD PEASE and Others.

By an act reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest and the general traffic of the country, power was given to a company to make such railway, according to a plan deposited with the clerk of the peace, from which they were not to deviate more than 100 yards. By a subsequent act the company, or persons authorized by them, were empowered to use locomotive engines upon the railway.

The railway was made parallel and adjacent to an ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made, in those instances, to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage road. On

indictment against the company for a nuisance:

Held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) showed at least that there was nothing unreasonable in a clause of an act of parliament giving such unqualified authority.

INDICTMENT stated that before and at the time, &c. there was a certain king's highway, in the parish of Stockton-upon-Tees in the county of Durham, leading from Stockton to Yarm, used by the king's subjects with horses, carriages, &c.; and that during all the time aforesaid there was in the same parish an iron railway and tramroad, leading from the river Tees near the south-west end of the town of Stockton towards and unto Wilton Park colliery, which railway was raised to a great height, to wit five feet, higher than the said highway, and was parallel and adjacent to a part of the same, in the parish, &c., of the length, &c., and breadth, &c., between Stockton and Yarm aforesaid. And that the defendants on, &c., and on divers other days, &c., set up and placed on the said railway so parallel and adjacent, &c., divers, to wit ten locomotive engines to be worked and propelled by steam along the said railway, together with divers, to wit, &c., furnaces and stoves on each of the said days and times employed in working and propelling the said engines by steam; and did on the said days, &c., use the said engines so worked and propelled by steam, and the said furnaces and stoves respectively so employed in working and propelling the same by steam; and did \*on, &c., put, place and burn in the said engines so worked, &c., and in the said furnaces and stoves so employed in working, &c., parallel and adjacent to such part of the said highway, divers large quantities of coke, coal, charcoal, wood, &c., close to the said part of the said highway, and thereby corrupted the air and caused noisome smokes, &c.; and that they did on the said days, &c., attach to each of the said engines a great number, to wit the number of twenty-six, of wagons loaded with coal, and unlawfully caused the said engines so worked by steam, with the said waggons so loaded with coal, attached thereto, to move along the said part of the said railway so raised, &c., and parallel, &c., for a great length of way, to wit one mile, with great noise, force, and violence; and did then and there with the said engines, furnaces and stoves, and the fires burning therein as aforesaid, exhibit terrific and alarming appearances, and make divers loud explosions, shocks and noises, whereby it became dangerous for the subjects of this realm to go, return, pass and repass on, through, over and along the said common highway, near to, parallel and adjacent to the said railway and tramroad; to the great terror, &c., and common nuisance of all the liege subjects then and there going, returning, &c., with their horses, carts and carriages, in, through, and along the said part of the said highway so parallel, &c. There were several other counts, dividing and generalizing the statement. Plea not guilty. The indictment was tried at the Yorkshire Lent assizes 1832, by a jury of that county (on a suggestion that an impartial trial could not be had in the county of Durham), before Parke, J., and a special verdict was found.

The verdict described the respective situations of the \*highway and of \*32] the railway or tramroad as mentioned in the indictment, adding, that the latter was constructed under and by virtue of the acts of parliament after mentioned, or one of them. It also stated that the railway, which was adjacent and parallel to the highway for more than a mile between Stockton and Yarm, was separated from it only by a low hedge, except in some places where there were small plantations; and that in many places the two roads were not more than five yards apart. That the defendants (under the authority of the Stockton and Darlington Railway Company) did put upon the said railway, so being parallel, &c., six locomotive engines worked by steam, for the purpose of drawing coalwagons thereon, which engines (under the direction of the defendants) travelled on the said railway, drawing coal-wagons, by night and day, and, when so travelling, emitted great quantities of smoke and steam, and made a great noise, and by their appearance and noise alarmed the horses of many of the king's subjects when travelling along the said highway, and thereby occasioned many accidents, and impeded and annoyed his majesty's servants in passing and repassing along the highway with their horses and carriages. But the verdict went on to state, "that the locomotive engines were of the best construction known at the time when they were constructed, and that the said defendants used duc care and diligence in the management of them, and from time to time adopted such improvements as had been discovered in the erection and management of locomotive engines worked by steam; and that the said defendants used the said engines as aforesaid for the purpose of facilitating, and did thereby facilitate the \*38] transport and carriage of coals and other \*goods upon the said railway and tramroad, and that the public obtained coals cheaper and much better by the use of the locomotive engines, but that many coal-wagons are drawn on the railroad by horses." It was further stated that by the statute 1 & 2 G. 4, c. xliv. certain persons were united into a company, and created a corporation, under the name of The Stockton and Darlington Railway Company, for the purpose of making and maintaining a railway or tramroad from the river Tees at Stockton to Witton Park colliery, with several branches therefrom, all in the county of Durham. And that by another statute, 4 G. 4, c. xxxiii., (which was stated in the title to be made for the purpose of enabling the said company to vary the line of their railway and of some of its branches and to make an additional branch, and of altering and enlarging the powers of the former act,) it was enacted, in sect. 8.—"That it shall and may be lawful for the said company, or any person or persons authorized or permitted by them, from and after the passing of this act, to make and erect such and so many locomotive or moveable engines as the said company shall from time to time think proper and expedient, and to use and employ the same in or upon the said railways or tramroads, or any of them, by the said recited act and this act directed or authorized to be made, for the purpose of facilitating the transport, conveyance, and carriage of goods, merchandize, and other articles and things upon and along the same roads; and also of passengers."(a) The verdict found that some of the defendants were members. and the rest servants, of the company. This case was argued in last Trinity term, before Lord Tenterden, C. J., LITTLEDALE, PARKE, and TAUNTON,

\*24] \*Cresswell for the crown. The company were not justified in using the locomotive engines, as they have, to the detriment of the public. The statutes under which they act did not oblige them to come within so short a distance of the highway; for by 1 & 2 G. 4, c. xliv., s. 7, it is enacted, that the company in making their railroads shall not deviate more than 100 yards from the course or direction laid down in the map or plan deposited with the clerk of the peace, and referred to in sect. 6: they might, therefore, have deviated to an extent not exceeding 100 yards, and by so doing they could have gone far

<sup>(</sup>a) Locomotive engines were not mentioned in the former act.

enough from the highway to avoid endangering the public. They must contend, on the other hand, that they have a right to do all that the letter of the statutes authorizes, however prejudicial to the public, and although not necessary to their undertaking; for it was not necessary that their railroad should approach, in parts, within five yards of the highway, or be separated from it only by a low hedge. Plowden, in commenting upon Eyston v. Studd, Plowd. 465; (see also Stowel v. Lord Zouch, Plowd. 363,) says, "It is not the words of the law, but the internal sense of it, that makes the law; and our law, like all others, consists of two parts, viz. of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the soul." The restraint, if the act is of a restraining nature (as in Eyston v. Studd, Plowd. 463,) or, if it be an enabling act, the power, is not to be extended against common right and reason; but the operation of the statute, if opposed to these, must be controlled by the common law. Thus it is laid down in Dr. Bonham's case, 8 Rep. 118, b., that if an act of parliament gives the lord of a \*manor conusance of all pleas within his manor, he shall not have conusance where he himself is party. In Emanuel v. Constable, 3 Russ. 436, where the question was upon the statute 25 G. 2, c. 6, s. 1, which enacts that if any person shall attest any will or codicil, to whom any devise, legacy, &c. shall be thereby made, such devise, legacy, &c. shall be void as to him;" the Master of the Rolls, referring to the intention and not the letter of the statute, held that it did not extend to wills of personalty; and the same point was ruled, upon the same principle, in Brett v. Brett, 3 Addams's Rep. 210. These last were cases upon a public act: the statutes in question here are, in their nature, private. Such statutes have, in modern cases, been considered as agreements between the adventurers and the public, or a portion of it. Lord HARDWICKE says, in Hornby v. Houlditch, 1 T. R. 93, note (a), that private acts of parliament, introduced only for the settlement of particular estates, ought to be considered only as common conveyances, and directed by the same rules of law, and therefore cannot be taken to extend as a discharge of any person's right not mentioned. Now the present statutes provide only for the rights of the adventurers, the land-owners over whose property the railroad passes, and the portion of the public who may use it. By 1 & 2 G. 4, c. xliv. s. 1, it is enacted, that the proprietors shall execute the powers thereby granted, doing as little damage as may be, and making full satisfaction, as after mentioned, to the owners of, and all persons interested in, any lands or hereditaments which shall be taken, used, removed, diverted, or injured, for all damages to be by them sustained in or by the execution of the said powers; and sections 16 \*and 23 provide for the making of such compensation. If it had been intended that the general rights of the public should be taken [\*36] away by this act, it may be presumed the legislature would also have provided some compensation for them; but they have none. It cannot be said that the company, having bought the land for the railway, might have used what engines they pleased upon it without an act of parliament. At the time when the first statute passed there were no locomotive engines. Without a special provision by a new act they would have been a nuisance to the public, (who, by the 1 & 2 G. 4, c. xliv., s. 81, were authorized to use the railway with carriages and horses on the conditions there described,) and perhaps also to the proprietors of the adjoining lands and houses. The statute 4 G. 4, c. xxxiii., was therefore necessary to give the company power, as against those land-owners, and that part of the public, to use locomotive engines; it does not follow that the rights of the public in general are concluded by the act. In Rex v. Sir John Morris, 1 B. & Ad. 441, a local act enabled proprietors of any lands, &c., to make railways through such lands, and across and along any road or roads to communicate with the railway of a certain company; and there PARKE, J. observed that, supposing this clause to be taken alone, it must at least be understood with the limitation that, where a railway was laid upon another road, sufficient space must be left, independently of it, for the public to pass. That case shews that

where a privilege is bestowed on private adventurers, which may contravene the right of the public, it must (though given in unqualified terms) be exercised

under such limitations as not to take away the public right.

\*F. Pollock, contra. The construction of a statute is like that of any other instrument: the question is what was meant? and the nature of the statute ought to make no difference, if the meaning be plain. The rule given in Bac. Abr. Statute, I. 6, (from Plowd, 467,) is to suppose the law-maker present, and to be asked what he intended; and then to give such an answer as he, being an upright and reasonable man, might have been expected to give. statutes in question here are not analogous to the acts for settling property, which have been compared to private agreements. The enterprize in this case is private; but it is one in which the public are largely interested. Like Waterloo Bridge or the London Docks, it has a mixed object; profit to the adventurers, and public benefit. The London Docks were established by private funds, but were subsidiary to a material improvement in the collection of the revenue; and a monopoly was therefore given to the company. The principle in such cases is, that some public benefit is to be sacrificed to the greater public benefit derived from the undertaking. What that is in the present case, is shewn by the recital of 1 & 2 G. 4, c. xliv.(a) It has been argued that these acts provide no compensation to the public for the rights alleged to be taken from \*them, and therefore that the intention cannot have been to take away those rights. But the claims of the public were undoubtedly taken into consideration when the act is passed, and it must have been thought that the general convenience to be expected was compensation enough. Direct com- pensation is never given to the public by such acts; for instance, in the common clause in turnpike acts, enabling the trustees to take materials from the waste, no indemnity is provided for what is so taken. [Lord TENTERDEN, C. J. That is not so in all cases, and it ought not to be in any; for the undertakers of roads are enabled in this way to take property from many individuals without paying.] They and the public are benefitted by the road being made at a less expense. There are many acts done on public roads which might be considered nuisances but for the necessity of doing them in the ordinary use of the roads; as stopping to take up and set down goods. Other things which might at a former period have been thought nuisances, become tolerable from the altered habits of society. A new kind of carriage, as an omnibus, may at first alarm horses travelling on the road; but it comes into common use, and they grow accustomed to it. The use of a high road by the different parties interested in it, is a continual balance of conveniences and inconveniences. That a public right may be sacrificed in consideration of a benefit by which the public receive compensation, is a doctrine fully recognized in Rex v. Russell, 6 B. & C. 566, though perhaps that case must not be altogether relied upon, as the Lord Chief Justice differed in opinion \*39] from the other Judges. [Lord TENTERDEN, C. J. It has the \*authority of a decision of this Court.] It may be said here, that the parties receiving benefit from the use of the railroad are not the same with those inconvenienced by the alleged nuisance; but this is too narrow a view of the case: the public at large are to be considered, and they are benefitted by the general facilities and advantages given to the commerce of this district. At least there is no improbability in supposing that the legislature took this view of the sub-

<sup>(</sup>a) The preamble recites, that the proposed railway and branches from it will be of great public utility, by facilitating the conveyance of coal, iron, lime, corn, and other commodities, from the interior of the county of Durham to the town of Darlington, and the town and port of Stockton, and towards and into the North Riding of the county of York; and also the conveyence of merchandize and other commodities from the said town and port of Stockton to the said town of Darlington, and into the interior of the said county of Durham; and will materially assist the agricultural interest, as well as the general traffic of that part of the country, and tend to the improvement of the estates in the vicinity of the said railways.

ject in framing the act. It is suggested that the clause authorizing the employment of these engines was introduced only to prevent the adjoining land-owners, or the persons using the railroad, from treating them as a nuisance; but there are no words in the act to warrant such a limitation. The company have exercised their power so as to cause the least possible inconvenience, by using engines of the best construction. Some inconvenience was to be expected, or the legislative permission would not have been necessary. It is urged that the company are empowered to deviate a hundred yards from the proposed line, and therefore ought to have gone to a greater distance from the highway; but it does not appear that this power was given with a view to the protection of the public, nor does the case show that at the particular points in question the deviation could have been made. Neither does it appear that the railroad could have been screened from the highway more effectually than it is. The privilege of travelling this railway with locomotive engines is not confined to the company: the public are entitled to do the same. [Lord Tenterden, C. J. Only with the company's leave. They have a monopoly as to the use of the engines.]

\*Cresswell in reply. The doctrine of compensation was certainly carried to a great length, in Rex v. Russell, 6 B. & C. 566, by the learned Judge [\*40 who tried the cause; and Holryod, J., in giving judgment, does not ground his opinion upon that doctrine. To apply it to the present case would, at all events be carrying it much too far. In the instance referred to, of turnpike acts giving authority to take materials from the waste, the benefit accrues to the public, the loss only to individuals. Here the company acquire a monopoly in the use of the engines with which the road is now travelled, and they claim to do that which is generally injurious to the public.

Cur. adv. vult.

The judgment of the Court was delivered in this term by PARKE, J., who

after stating the special verdict, proceeded as follows:-

The case turns upon the meaning of the eighth section of the statute 4 G. 4, c. xxxiii. and the question is, whether that section gives an authority to the company to use locomotive engines on the railway absolutely, or only with some implied condition or qualification, that they should employ all practicable means to protect the public against any injury from them? and those means were, on the argument, suggested to be, the altering the course of the railroad, or the erection of fences or screens of sufficient height to exclude the view of the engines from the passengers on the common highway. Now the words of the clause in question clearly give to the company the unqualified authority to use the engines; and we are to construe \*provisions in acts of parliament [\*41] according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be extended or modified; instances of which are to be found in the case of Eyston v. Studd, Plowd. 463, and Bacon's Abr. statute letter I., referred to during the course of the argument.

Let us, then, consider whether there is any thing unreasonable, or contrary to the express or implied intention of the legislature, in construing these words in their ordinary sense, and without any such condition or qualification as before mentioned. It is clear that the makers of this, and the prior act, had in view the construction of a railroad (with its branches) in a certain defined line, which (1 & 2 G. 4, c. xliv. s. 6, and 4 G. 4, c. xxxiii. s. 3,) had been delineated on a map, deposited with the clerk of the peace, and from which line the road was not to deviate more than one hundred yards, and not into the grounds of persons not mentioned in the book of reference. The legislature, therefore, must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and consequently that travellers upon the highway would be in all probability incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public which should

use the highway should sustain some inconvenience for the sake of the greater \*42] \*good to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandize along the new railroad. Can any one say that the public interests are unjustly dealt with, when the injury to one line of communication is compensated by the increased benefit of another? So far is such a proceeding from being unreasonable, that it was held by the majority of the Judges in Rex v. Russell, 6 B. & C. 566, that a nuisance was excusable on that principle at common law; and whether that be the law or not, at least it is clear that an express provision of the legislature, having that effect, cannot be unreasonable.

It is true that the same object, that of giving one part of the public the benefit of the use of these engines, might have been effected without the same injury to the other part using the road, if the act had imposed on the company the obligation of erecting a sufficient fence or screen, at their own cost; or had provided that the line of road should be different at that place; but it is by no means necessary to imply such an obligation in order to make the clause reasonable and consistent, for it has been shewn to be so without it; and it is natural to suppose that if such a condition had been intended it would have been particularly expressed.

For these reasons, we think that the defendants were justified under the above-mentioned section of the 4 G. 4, and therefore that the judgment of the Court should be in their favour. Judgment for the defendants.

\*437

## \*DOE dem. JONES and Others v. DAVIES.

Testator, after premising that, should his daughter die unmarried, he would not have his estate sold or frittered away after her decease, or left to any body who would not reside on it, but that it should be entailed, and residence be made the absolute groundwork of such entail; devised all his real estate to trustees and their heirs; "But to permit, nevertheless, my daughter S. J. not only to receive the rents and profits thereof to her own use, or to sell or mortgage any part, but also to settle on any husband she may take the same or any part thereof for life, should he survive her, but not without his being liable to impeachment for waste or non-residence, or neglecting necessary repairs. But should my daughter have a child, I devise it to the use of such child, from and after my daughter's decease, with a reasonable maintenance for the education, &c. of such child in the mean time. Should none of these cases happen," he then devised the estate after his daughter's decease to trustees to preserve contingent remainders for the use of his nephew, on condition of residence, or of giving security for his residence when of age, if he should be a minor when the remainder vested. There were other remainders over. He added, that he did not will to restrain his daughter as a tenant for life, but that in case of misconduct in any of the remainder-men, she might, by the advice or consent of the trustees, set aside such a one by her will. He further added, "I recommend it to my daughter, for want of issue to herself, not to leave in legacies above 600% and that out of my charge on N., which I have also articled for, and entail

the rest for the further support of this house:"
Held, that the word "child" in this devise was nomen collectivum; that the daughter took an estate tail; that the estate during her life and after her decease were not of different qualities; and, therefore, that a recovery suffered by her after the testator's

death, was valid.

EJECTMENT for messuages and lands in Cardiganshire. The cause came on for trial at Cardigan, at the Lent assizes, 1831; and a special verdict was found,

to the following effect:-

Henry Jones, being seised in fee of the premises in question, made his will in 1793, and thereby devised as follows:—"Having laboured in early life under various difficulties and incumbrances, I felt it my unavoidable duty, by the strictest care and economy, to lighten those burdens as far as was consistent with the necessary expenses of life (which some might have attributed to covetumess), because my wife and child would be less able to extricate themselves

in case of my death. But now, since it was God's will to allow me length of days, and to enable me to clear my debts, should my daughter die unmarried, I would not have the small estate I have been at the pains of improving and enlarging so, to be sold or frittered away after her decease, or left to any body who would be \*above residing upon it; but that it should be entailed, and the residence of the several remainders in turn be made the absolute [\*14] groundwork of such entail, imminent business and common or neighbourly visits excepted. I therefore give, devise, and bequeath, unto William Lewes of Llysnewidd, Thomas Lloyd of Bronwith, and Lewis Gwynne of Monachty, Esquires, and the survivor of them, and the heirs of such survivor, all my real estate; but to permit, nevertheless, my beloved daughter, Susanna Maria Jones, not only to receive the rents and profits thereof to her own use, or to sell or mortgage any part if occasion requires, but also to settle on any husband she may take, the same or any part thereof for life, should he survive her; but not without his being liable to impeachment for waste or non-residence, or neglecting necessary repairs of the house and farm. But should my daughter have a child, I devise it to the use of such child from and after my daughter's decease, with a reasonable maintenance for the education, &c. of such child in the mean time. Should none of these cases happen, I give and devise my said real estate, from and after my said daughter's decease, unto the said W. L., T. L., and L. G., and the survivor of them, and the heirs of such survivor, in trust to preserve contingent remainders for the use of my nephew John Jones of Carmarthen, now at Eton school, if he shall be at full age at my daughter's decease, and complies with such residence and keeping the houses and farm in good repair, or shall give my trustees security for so doing when he arrives at that age, and supporting a family and servants for the house and farm in the mean time, and to the first and every other son of the said J. J." For default of such residence, he gave the estate to the eldest son of \*D. J. Edwards, on condition of residence and taking the name of Jones, and to his first [\*45] and every other son. There were other like remainders on failure of male heirs, upon the like terms; remainder ultimately to the testator's right heirs for ever. The will then proceeded as follows:--"My will and meaning for having the house and farm occupied is for the sake of improving the neighbourhood as far as my poor abilities extend, which would be otherwise proportionably impoverished for protecting the parish and supporting its poor. This I am persuaded is my daughter's wish as well as my own, whom I by no means will to restrain as a tenant for life; but in case that either of the remainder-men should ill treat her, or should be likely to turn out an immoral man or a bad member of society, she may, by the advice or consent of the trustees, set aside such an one by her own will and testament, (a) that my intention of doing good in the neighbourhood might not be defeated. I recommend it to my daughter, for want of issue to herself, not to leave in legacies above five or six hundred pounds, and that out of my charge on Nevern' (a distinct property of the testator,) "which I have also articled for, and entail the rest for the further support of this house." Some charitable and other bequests were added. .The daughter was left executrix and residuary legatee.

The testator died in April, 1794. In the following September, Susanna, the daughter, suffered a recovery of the premises, after which she married, and she and her husband took the surname of Jones. They continued in the possession of the premises during their joint lives. Susanna outlived her husband, and after his decease \*devised the premises in question to the defendant, to certain uses. She held them during the remainder of her life, and died in 1830, without having had any issue. A formal entry to avoid fines and recoveries was immediately made by the above-mentioned John Jones, who was one of the co-

<sup>(</sup>a) It seems uncertain whether the following words were not intended to begin the next sentence.

heirs at law of Henry the testator and of the said Susanna Maria, and on whose demise, among others, this ejectment was brought. None of the trustees named in Henry Jones's will ever joined in making a tenant to the precipe for suffering a recovery of the premises in question. This case was argued in Trinity Term before Lord Tenterden, C. J., LITTLEDALE, PARKE, and TAUNTON, Js.

E. V. Williams for the lessors of the plaintiffs. The principal questions are, whether Susanna Jones took, under her father's will, a life estate or an estate tail? and if the latter, whether or not that estate was barred by a valid recovery? On the first point the lessors of the plaintiff say that the word "child" in the will is a word of purchase and not of limitation. Prima facie and in its proper acceptation it is a word of purchase; it is for the defendant to show that it was meant otherwise. Looking to the whole will, the intention apparently was to put the estate in strict settlement, the daughter taking for life merely. It may be said that an inconvenience arises from construing "child" as signifying only an individual, because, if that child were to die, the estate would then go to its heirs, although the mother might have a child by another husband, which, according to the natural construction of the will, ought to take. It may also be objected, that the first-born child might be a daughter, and would take, according to this \*construction, in preference to a son born afterwards; and it may, therefore, be argued that "child" must have been used as nomen collectivum. But it is enough to say that these events may not have eccurred to the testator's mind; and, on the other hand, the intention is clear that the daughter should have a life estate only, with remainder to her "child" individually, as purchaser, or perhaps to her children successively as purchasers, if one or more died, as in Ginger dem. White v. White, Willes, 348. The testator here expressly declares his wish that the estate should not be frittered away if his daughter should die unmarried, and then it should be held on the condition of residence; both which objects might be defeated if she took an He desires that any husband of his daughter on whom the estate may be settled shall be liable to "impeachment for waste or non-residence;" but if this were an estate tail the husband might become tenant by the curtesy, and then the condition of residence could not be enforced. The reasonable maintenance left for the education of such child applies to an individual child: taking the word as nomen collectivum the bequest would be too indefinite. The care taken to enforce residence in the limitations to remainder-men, and the desire to improve the neighbourhood, are inconsistent with the supposition that he intended the several estates to be defeasible by a common recovery; and on the same supposition it would have been nugatory to give his daughter a specific authority to bar the remainder-men under certain circumstances. He expressly refers to her in this part of the will as "a tenant for life." In the cases where "son" has been construed as nomen collectivum, either there \*were other expressions technically applicable to an estate tail, or that construction was evidently borne out by the general intention of the testator. Robinson v. Robinson, 1 Burr. 38, and Mellish v. Mellish, 2 B. & C. 520, are instances. The rule, that in construing a will the general intent must prevail in spite of inconsistent particular intentions, goes no further than (as is stated by Lord Redesdale in Jesson v. Wright, 2 Bligh, 57, that "technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." But here no technical words are found to con-

only.

It cannot be said that the devise of the estates by Susanna was an execution of any power granted to her by Henry Jones's will; and even assuming that it could have been so considered, still, if she was tenant for life only, by suffering a recovery she forfeited both the estate and the power annexed.

tradict the expressed intent that the daughter should take an estate for life

But, secondly, assuming that she took an estate for life with remainder to herself in tail, the recovery was not valid, because the two estates were not of

the same quality. The life estate was given to trustees to permit Susanna not only to receive the rents and profits to her own use, but also to settle on any husband she might take the same or any part thereof for life. This implies a use given to her apart from her husband, which would require the intervention of trustees; so also would the maintenance which is provided for the education of a child during Susanna's life. The legal interest, therefore, during her life, was in the trustees; \*and she, who had only the equitable estate, could [\*\*40]

not cut off legal remainders by suffering a recovery. Wilson, contra. It is clear the testator did not intend the property to go over to collaterals, except on failure of issue of his daughter. The words "child," "son," "issue," in wills, have been repeatedly construed, in such cases, as indicating a class; Bifield's case, cited in King v. Melling, 1 Ventr. 231, Milliner v. Robinson, Moor. 682, and Wyld v. Lewis, 1 Atk. 433, where Lord Hardwicke gives the reason for which that construction has been adopted. Robinson v. Robinson, 1 Burr. 38, "son" was considered as nomen collectivum. and the father held to take an estate in tail male, though the devise to him was for his natural life "and no longer." So in Mellish v. Mellish, 2 B. & C. 520, "son" was interpreted as meaning any male descendant, and the reasons given by Bayley, J. and Holroyd, J. are applicable here. In Raggett v. Beaty, 5 Bingh. 243, "If G. B. die and leave no child lawfully begotten of his body, was held to imply an indefinite failure of issue. In Broadhurst v. Morris, 2 B. & Ad. 1, a devise "to W. B. and his children lawfully begotten for ever, but in default of such issue at his decease to A. B.," was held to give W. B. an Then, are the other parts of this will inconsistent with a like con-The wife is empowered to settle the estate or any part of it on her husband if he should survive her; and it may be said that if she was to take an estate tail it is not likely such a provision would be made, because if the estate were of that nature he might take without any settlement, as tenant by the curtesy. But that would \*be only in case a child had been born, whereas the will gives power to settle on him, at all events; and it obliges the latter wife to add the condition of residence. It is true, if this was an estate tail, the daughter was enabled to defeat many of the testator's intentions by suffering a recovery; but, as Lord Tenterden observed in Doe dem. Garrod v. Garrod, 2 B. & Ad. 96, "the same consequence would happen in many of the cases in which the first taker has been held to have an estate tail, and in some that consequence had actually happened before the decision." It is said the provision of "a reasonable maintenance for the education of such child," shows that an individual child only was meant; but then it must be contended that the devise of the estate after the daughter's decease could attach only to a single child. tator, however, says, "should my daughter have a child, I devise it to the use of such child;" "should none of these cases happen" (one of which was the daughter's having a child) then I give my said estate to W. L., &c. That means, "should my daughter not have a child," which is the same as if he had said "a child or children."

Then, supposing an estate tail to have been devised, it was well barred by the recovery, for the daughter took a legal estate. A devise to A. in trust to permit B. to receive the rents and profits, gives the legal estate to B., Broughton r. Langley, 2 Ld. Raym. 873, Doe dem. Leicester v. Biggs, 2 Taunt. 109, Doe dem. Phillips v. Smith, 12 East, 455. The Court will not consider the trustees as having taken the legal estate unless the purposes of the will require that they should do so. Unless the trust for the daughter \*amounts to a trust for her separate use, it does not require that the legal estate should be in the trustees. But it has frequently been held in equity that a mere trust to permit a married woman to receive the rents and profits of an estate or the interest of a fund to her own use does not amount to a trust for her separate use.(a) In

<sup>(</sup>a) See on this point Jacobs v. Amyatt, in a note to 1 Madd. 376; Johnes v. Lockhart in a note to Mr. Belt's edit. of Bro. Cha. Ca. vol. iil. p. 383.

this case, however, the devise gives also a power to appoint by the advice or consent of the trustees But there is scarcely any marriage-settlement in which some power is not given, to be exercised with such consent; that does not vest a legal estate in the trustees. It was not necessary for the purposes of this will that they should take such an estate. It cannot be said that the maintenance ordered for education of the child of Susanna required a legal estate in the trustees; if so, it might have been necessary that such legal estate should continue beyond her lifetime, and the trustees must have taken a fee, in which case Susanna's estate would be an equitable estate tail.

The testator evidently contemplated that in default of issue, his daughter should be enabled to suffer a recovery, or should have a power of appointment. He had a perfect confidence in her; his apprehensions seem to have been from the parties in remainder. He expressly declares that he does not mean to "restrain her as a tenant for life." In case of misconduct in the remaindermen, he recommends to her for want of issue to herself not to leave above a certain sum in legacies, (which cannot mean legacies of personalty, because the \*52] leaving of those would not depend upon her having or \*wanting issue,) and he advises her to entail the rest for the further support of his house. He must therefore have looked to her suffering a recovery, or exercising a power of appointment to bar the remainder-men, in case they should ill treat her, or prove immoral or bad members of society. Either, then, she took an estate tail. which is barred by the recovery, or she had a power of appointment, which is

well executed by her will.

E. V. Williams, in reply. As to the first point, in the cases cited for the defendant, there were generally some words of inheritance used by the testator, which constrained the Court to hold that an estate tail passed, notwithstanding the expressed inconsistent intent. As to the second point, the trustees must have taken a legal estate during the lifetime of Susanna to enforce the condition of residence, which was a principal object of the testator. [PARKE, J. If so, the same observation would apply to the remainder by virtue of which you claim; for John Jones is to take on condition of residence if he shall be of age when the remainder vests in him; or if a minor, he is to give security to the trustees for residing when he shall come of age. LITTLEDALE, J. It was not necessary that the trustees should take a legal estate for the maintenance of Susanna's child: they could do all that was requisite as to that by the assistance of the Court of Chancery. It seems to me that the clause recommending to the daughter for want of issue not to leave more than 600l. in legacies, refers to the Our. adv. vult. personalty.] \*PARKE, J., in this term, delivered the judgment of the Court.

The questions discussed in this case arise on the will of Henry Jones, and the one on which the argument has principally been, is what estate did the daughter of the testator, Susanna Maria, take? It being contended on the part of the lessor of the plaintiff, Mr. Jones, that she took only for life, and, consequently, the recovery was bad; and on the other side, for the defendant, that

she took an estate in tail.

The will appears to have been drawn by the testator himself, and is one of those unfortunate instances of a person wishing to tie up his estate with limitations and upon contingencies, without knowing what language to use for the purpose. The construction must be according to the plain and manifest intent of the testator, and although there be no words of limitation annexed to the devise in favour of the daughter, yet if the paramount intent cannot be satisfied without her taking an estate tail, and the language of the will will justify it, such must be the construction; and, upon the best consideration, we are of opinion that she took an estate tail.

First with respect to the intent, the testator says, "if his daughter should dieunmarried," he would not have his small estate, which he had been at the pains. Vol. XXIV.—8.

of improving and enlarging, sold or frittered away after her decease, or left to any body who would be above residing upon it, but that it should be entailed, &c.

Now, upon this a very strong inference arises, that the issue of the daughter if she married, were within his view, for he contemplates the possibility of the estate going over to the remainder-man in the event only of \*his daughter dying unmarried; and this is made the foundation of the subsequent devise, [\*54] for he goes on, "I therefore give, devise, and bequeath unto W. L., &c. all my real estate, but to permit my daughter, not only to receive the rents and profits to her own use, or to sell or mortgage any part if occasion require, but to settle on any husband she may take, the same or any part thereof should he survive her," but on certain conditions. Then he goes on, "But should my daughter have a child, I leave it to the use of such child, from and after my daughter's decease, with a reasonable maintenance for the education of such child in the mean time. Should none of these cases happen, I give and devise my said real estate from and after my said daughter's decease unto the said trustees, and the survivor of them, and the heirs of such survivor, to the use of my nephew John Jones," on certain conditions, "and to the first and every other son of the said John Jones." Now here the limitation over to the use of John Jones is only "if none of these cases should happen," of which the principal was his daughter leaving a child at the time of her death; which is equivalent to saying, if my daughter should die leaving no child; and shows an intent that the estate should only go over on failure of the issue of the daughter. If it were otherwise, if the daughter had had a child, and that child had died in her life time leaving issue, the estate would have gone over.

This brings us, secondly, to the consideration, whether the words will warrant the construction of the daughter taking an estate tail. At the the time of makthe will, and at the testator's death, the daughter was unmarried, and had no child. We think, then, that the word "child" was not a designatio personæ, but \*comprehended a class, and this case is like Bifield's, cited and relied on by Lord Hale in King v. Melling, 1 Ventr. 231, "A devise to A., and if he dies to having a son, then to remain to the heirs of the testator. Son was there taken to be used as nomen collectivum, and held an entail:" and other cases to

the same effect were cited in the argument.

Another question was raised in favour of the lessor of the plaintiff, that the recovery was insufficient in consequence of the estates not being of the same quality. But we think that there is no reason for making any distinction of this sort, and that the interest vested in the daughter of the testator was throughout of the same quality.

Being of opinion, therefore, that the daughter was seised of an estate tail, we think the recovery was good. The postea in consequence must be delivered to the defendant. Postea to defendant.

# \*DOE dem. THOMAS HICKMAN v. JOHN HICKMAN, WILLIAM HICKMAN, ABRAHAM PASSMORE, and HENRY HICKMAN. [\*56]

J. H. was admitted on such surrender, and afterwards by will attested by two witnesses only, devised the premises to W. and J., and died without having made any other sur-

render or will:

At a Court Baron C. surrendered copyhold premises to the use of J. H. for life, and after his decease to the use of such person for such estate as J. H. should by will attested by three witnesses appoint; and in default of such appointment to the use of the heirs and assigns of J. H. for ever.

Held, that although the will, attested by only two witnesses, was not a good execution of the power given to J. H. by the surrender, it operated on the reversion vested in him in default of appointment, and that the want of a surrender to the use of such will was cured by 55 G. 3, c. 192.

EJECTMENT for lands and premises in the county of Stafford. The declaration contained two demises in the name of Thomas Hickman. Plea, the general issue. The cause came on at the Spring assizes for the county of Stafford, 1832, when the jury found a verdict for the lessor of the plaintiff, subject to the

opinion of this Court on the following case:-

On the 16th of July 1806, at a court baron holden for the manor of Sedgley in the county of Stafford, Edward Cox of Sedgley, gentleman, and Mary his wife, surrendered into the hands of the lord of the said manor, all that cottage, or dwelling-house (therein particularly described) in the occupation of John Hickman, together with the use of taking water from a well in the adjoining premises, as then used and enjoyed by the said John Hickman, to the use of him John Hickman, for and during the term of his natural life; and after his decease to the use of such person or persons, and for such estate and estates, ends, intents and purposes, as the said John Hickman should by any other surrender or by his last will and testament in writing, such will to be by him duly executed in the presence of and attested by three or more credible witnesses, surrender, devise, limit, \*direct or appoint; and in default of such surrender ever at the will of the heirs and assigns of the said John Hickman for ever at the will of the lord according to the custom of the said manor. At the same court John Hickman was duly admitted upon the said surrender. This ejectment was brought to recover possession of the surrendered premises. Thomas Hickman, the lessor of the plaintiff, is the eldest son and heir, at law, and heir according to the custom of the said manor of John Hickman the surrenderee.

On the 19th of December, 1806, the said John Hickman made his will in writing, in the presence of and attested by two witnesses only, and thereby devised the premises to his wife for her life, and after her death to the defendants William and John Hickman, subject to certain charges. The testator's wife died in his lifetime. John Hickman the testator died on the 17th of April, 1817, without having made any surrender of the premises, or executed any other will than that before-mentioned. The question for the opinion of the Court was, whether Thomas Hickman, the lessor of the plaintiff, was entitled to recover possession of the premises? This case was argued in last Trinity term.

R. V. Richards for the lessor of the plaintiff. The lessor of the plaintiff, the heir at law of John Hickman the surrenderee, is entitled to recover, because the will under which the defendants claim was not executed in the presence of three witnesses, as required by the terms of the surrender. It may be said, that although the will does not operate as an execution of the power, it may operate

\*58] on the reversion in fee which in default of \*appointment was vested in the testator, and that the case is then to be considered as if no surrender whatever had been made, which defect will be supplied by the statute 55 G. 3, c. 192. That statute, however, applies to cases where there has been no surrender whatever to the use of a will, and not to a case where a surrenderee having taken a surrender to the use of a will which he himself has required to be executed in a particular form, afterwards makes a will wanting these formali-. ties. The statute recites that inconvenience has resulted from the necessity of making surrenders, and enacts that where copyhold tenants may, by will, dispose of copyhold tenements, the same having been surrendered to such uses as should be declared by such will, every disposition made by such will of any such copyhold tenements shall be as valid, although no surrender shall have been made to the use of the last will and testament of such person, as it would have been if a surrender had been made to the use of such will. Here there has been a surrender to the use of a will, to be executed in a particular form pointed out in the surrender. Before the statute, it is quite clear that the copyhold land would not have passed except by a will so executed. Section 3, enacts that nothing in that act contained shall be construed "to render valid and effectual any devise or disposition of any copyhold lands, tenements, or hereditaments which would

**Г\*61** 

be invalid or ineffectual if a surrender had been made to the use of the last will and testament of the person attempting to dispose of the same." Construing the first and third sections together, it is quite clear that the statute does not

apply to a case like the present.

\*Jervis, contra. The surrender was to the use of John Hickman for life, and after his decease to the use of such person as he should by will executed in the presence of three witnesses appoint; and in default of such surrender or appointment, to himself in fee. There has been no will executed in the presence of three witnesses, and consequently there has been a default of such appointment as is pointed out in the surrender; the fee, therefore, vested in the testator; and the will afterwards made, though it does not operate as a good execution of the power, will operate on the reversion in fee, and the want of a surrender to the uses of that will which was actually executed in this case, will be supplied by the statute.

\*Cur. adv. vult.\*

PARKE, J., in the course of this term, delivered the judgment of the Court. It was admitted in this case, on the part of the defendants, that the will of John Hickman was not a good execution of the power given to him by the surrender of the 16th of July, 1806, in consequence of its not having been executed in the presence of, and attested by, three witnesses; but it was contended, that it might operate on the reversion in fee which was vested in him in default of appointment, and that the want of a surrender to the use of his will was cured by the statute 55 G. 3, c. 192. It is clear that if there had been a surrender previously made by John Hickman to the use of his will, the will would have conveyed his interest, notwithstanding it was attested only by two witnesses, for copyholds are neither within the statute of wills nor the statute of frauds. And where a man hath both a power and an \*interest, an instrument, if it be [\*60] sufficient for the purpose, may operate as a conveyance of the interest, although it be defective as an execution of the power. It was argued for the lessor of the plaintiff, that this was not a case within the statute 55 G. 3, c. 192: but we see no reason for saying so. That statute enacts, that in all cases where, by custom, any copyhold tenant may, by his last will, dispose of or appoint his copyhold tenements, the same having been surrendered to such uses as should be declared by such last will, every disposition made or to be made by any such last will, by any person who shall die after the passing of that act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will. Here John Hickman died after the passing of that act; and, therefore, the disposition by his will was as valid as if a surrender had been made to the use of it.

We think, therefore, that judgment must be entered for the defendants.

Judgment for the defendants.

### \*The KING v. THOMAS ANDREWS ADAMES.

Lands are rateable to the relief of the poor, in proportion to the net rent which a tenant at rack rent would pay, he discharging all rates, charges and outgoings: and therefore an occupier (whatever be his interest) of land which requires to be protected from floods at an occasional expense defrayed by a sewer's rate is not rateable to the poor at the same sum as the occupier of lands of similar quality and equal annual produce in the same parish not liable to the sewer's rate; but he should be rated at that sum, minus the sewer's rate.

By a rate for the relief of the poor of the parish of Pagham in Sussex, allowed November 1830, the defendant, who was owner and occupier of lands lying with-

in a district of the parish called Pagham Level, was assessed at 1s. 8d. in the pound on the sum of 312l. 14s. 5d. annual value, against which he appealed. The appeal coming on, to be heard at the April sessions 1831, was respited; and in the mean time it was referred by the Court to three valuers, to survey and value the parish. At the July sessions, 1831, the valuers, having made their valuation, stated that the amount assessed by them upon each occupier of lands within the parish, was the sum which they considered the land would let for, but that they had not made any allowance for moneys paid for sewers' rates. The sessions confirmed the valuation, subject to the opinion of this Court, on the question whether or not the sewers' rate paid by the defendant ought to have been deducted from the sum assessed on him? The valuers stated in evidence that the sewers' rate was universally understood to be a landlord's tax; that they had never been called upon to make any deduction from the value of lands in respect thereof; and that they would not have thought of making any special note on the point, had they not been requested on the part of the appellant to do so, in consequence of the pending dispute. The sum assessed on the defendant in this valuation was 306l. 6d. The sewers' rate is paid by those only \*62] who are owners \*of lands within Pagham Level. This case was argued in last Easter term.( $\alpha$ )

Capron in support of the rate. This being a landlord's tax, the question is whether it ought to be deducted from the sum at which the appellant is rated, he being proprietor as well as occupier? As a matter of convenience, the rent bona fide paid by a tenant has for many years been adopted as the critterion on which the poor rates are framed. The poor rate is therefore necessarily considered as an occupation rate. The sewers' rate, on the contrary, is admitted to be a burthen on the landlord, depending, like many other charges, on the nature and situation of his estate or his interest therein. Land-tax, ground and quit rents, &c., which are charges on the landlord, are never deducted. [PARKE, J. The effect of the decision of the sessions, is to make land requiring expense to protect it from the sea of the same value as land not requiring that expense.] It is of the same value to the party liable to the poor rate, i. e. the occupier. [Parke, J. But the real profit derivable from the land is pro tanto diminished.] So it is where the land-tax is unredeemed, yet no deduction was ever claimed on that ground. Again, where money is laid out in improvements, as drainage, &c., under which head the sewers' rate may be fairly classed, no allowance is made in respect of it, even for interest on the capital so employed. Neither is the state of the farm buildings ever made the subject of consideration, though, in order to render them available for the beneficial occupation of the property, an extensive outlay may be often necessary, and the landlord has a right to debit the land with interest on his capital so expended, as well on that more immediately applied to the cultivation of the farm and the purchase of stock for that purpose. If this be so why should the sewers' rate be deducted? The profits of the land are equally affected in both cases. There is another view of the subject, with reference to the amount of the landlord's interest. Suppose he holds under an ecclesiastical lease, paying every seventh year a heavy but certain fine for renewal, this fine must constitute a portion of his necessary expenses in respect of the land, yet cannot either annually or in any other mode affect the rate. It might even be contended that annuities payable out of the landlord's estate, interest on mortgages, and other incumbrances of this kind must become the subjects of consideration, if we lose sight of what has always been, in practice at least, the basis of the poor rate; viz., the beneficial occupation. According to the argument which must be maintained on the other side, two adjoining farms of equal productive value, and under precisely similar circumstances, must be differently rated if the owner happens to occupy one and let the other; for it will

not be contended that the tenant can claim relief, as he is clearly not aggrieved

(a) Before Lord Tenterden, C. J., Littledale, Park and Patteson, Js.

by the rate. The whole present system of rating must be abandoned, and a new

principle adopted in almost every parish.

Long and W. H. Scott contrà. Undoubtedly in assessing land to the relief of the poor, rent is in ordinary cases to be the criterion of the annual value of the land to an occupier. That is a good general rule, but it is not universal, for suppose land would give a profit just sufficient to pay the expenses of cultivation and no \*more, there would then be no rent, but it cold not be said that such land should pay nothing. The statute 43 Eliz. c. 2, requires the churchwardens and overseers to raise competent sums by the taxation of every occupier of land according to the ability of the parish. The object undoubtedly was to subject to rate the profit equally which accrues from every species of property in the parish. In practice, personal property has been given up, on account of the difficulty of ascertaining its amount, but as to real property, the principal of equality is preserved. It cannot be said that a farm burdened with a tax by reason of its being necessary to provide against the ravages of the sea, is of equal value with another which is not burdened with that tax. It may be considered in the same light as if part of the land had been swallowed up by the sea. It is difficult to say why rent, which is the landlord's share of the profit of the land, has been made the criterion of the annual value to an occupier. It may be convenient that it should be so, but it is not the true The tenant's and landlord's profit will vary respectively according to the fertility of the land. If it be a very rich soil, the landlord's share of the profit (the rent) will be in greater proportion to the whole value; if it be very poor land, it will be smaller. [Lord Tentenden, C. J. Is there any instance of an express deduction in the rent on account of paying sewers' rate or land tax?] There is none known of. [Lord TENTERDEN. Suppose one owner of land in a parish to redeem his land tax and others not. The person who has redeemed the land tax has paid his money; the other has it to pay. Then if the land got into other hands, could the tenant on whose land \*the land tax has not been redeemed, claim to be rated differently? The subject of rate is the landlord's profit. Whatever diminishes that profit ought also to reduce the The rent here is not the landlord's real share of the profit, because his profit is the rent less the sewer's rate. The net annual profit is the gross profit, deducting thereout the expenses of cultivation, the interest of money laid out in stocking the land, &c. Rex v. Lord Granville, 9 B. & C. 188; Rex v. Lower Mitton, 9 B. & C. 810; Rex v. Tomlinson, 9 B. & C. 163; Rex v. The Oxford Canal Company, 10 B. & C. 163; Rex Joddrell, 1 B. & Ad. 403. [Lord Tenterden, C. J. Suppose the land had been let and the landlord had paid sewers' rates, could the tenant have been relieved?] There is no reason why he should not if he and the landlord had entered into an agreement on this point; but even without an agreement, the sewers' rate would be considered in fixing the rent. The rent, if the land were let and the sewers' rate allowed for in it, would be a fair criterion of the value. [Lord TENTERDEN, C. J. Of the value to the occupier, but not of the property. PARK, J. It is immaterial whether the landlord or tenant occupies. The sewers' rate is an outgoing which diminishes the annual profit to whoever pays it.]

PARKE, J., now delivered the judgment of the Court.

The question for the opinion of the Court in this case, is, in effect, whether the occupier of lands in a district of the parish of Pagham, which is liable to be flooded, and is protected from floods at a certain occasional expense, (for that is the nature of the sewers' rate), ought to be rated at the same sum as the occupier of lands of similar \*quality and of equal annual produce, lying in the same parish, but not liable to the same expense.

We are of opinion that he ought not. It is obvious that the average annual net profit of one description of land is not the same as that of the other; and, both upon principle and authority, we think the rate ought to be made in proportion to that profit. The statute 43 Eliz. c. 2, requires the churchwardens

and overseers to raise competent sums, by the taxation of every occupier of lands, according to the ability of the parish: nothing is expressly said as to the principle upon which the rate should be made, but it is implied that it must be made

with equality, and with some reference to the subject of occupation.

Now it is quite clear it ought not to be made according to the profit derived by the occupier himself; for if that were so, the rate must vary according to the nature of the occupier's interest. An occupier who is tenant at will at rack-rent, and therefore receives a less share of the annual profit of the land than one who is tenant for years at a small rent, and still less than one who is a tenant in fee simple, and pays none at all, would be rateable at a less sum; a proposition which was never yet contended for.

Again, it is quite clear, that though the occupier is the person who nominally pays the tax, it is in reality paid by the beneficial owner, and is a charge upon the land. In proportion as the average tax which the tenant has to pay, is greater, in the same proportion will he give less rent to the owner. Ultimately, in the long run, this will always be the case; though when the tenancy is for a term more or less long, the burthen upon the land is postponed for a greater or less period. This being so, it follows that, in order to make an equal rate, the

posed according to some value of the subject of occupation. Usage and convenience have established this value to be not that of the estate or property itself, but that of the profit which is or might be made from the estate or property; and as it would be very difficult and extremely troublesome to ascertain the precise value of that profit during the time for which each rate is made, and in case of occasional profit both troublesome and unjust, (Rex v. Mirfield, 10 East, 219, Rex v. Hull Dock Company, 5 M. & S. 394,) to make a rate for a large sum at one time and a small one or none at another, upon the same land, the rule has been to assess according to the annual profit of the land; or where the produce is not matured in one year, then upon an average of years, from which profit deductions are allowed for all the expenses necessary to its production. It is not material whether the whole or a certain aliquot part of that net profit be rated, provided all lands of the same description are rated equally upon that aliquot proportion of the profit; and in practice it is usual, and it is most convenient, to rate lands at the rack-rent which they would pay to a landlord, or some certain portion of it, the tenant paying all rates, charges and outgoings; which is in effect rating according to a part of the net profit only; but provided it be the same aliquot part in all cases, it makes no difference.

Further, if the subject of occupation be of a perishable nature, or require an annual expense to secure its existence, an allowance ought to be made on this account; for the total annual profit is not the net annual profit; a part must be \*681 set aside for the restoration and maintenance \*of the subject of occupation. It is on this principle that buildings have been permitted to be rated at less in proportion than arable and other land. The cases, especially those of a more recent date, in which the principle of rating has been more fully discussed and considered, will be found to have established this rule of rating, which is, in other words, that all lands are to be assessed in proportion to the net rent which a tenant at rack-rent would pay, he discharging all rates, charges and

outgoings.

It may be sufficient to refer to the following authorities in support of this position. Rex v. The Birmingham Gas Light and Coke Company, 1 B & C. 506, Rex v. Hull Dock Company, 3 B. & C. 516, Rex v. Attwood, 6 B. & C. 277, Rex v. Trustees of the Duke of Bridgewater, 9 B. & C. 68, Rex v. Tomlinson, 9 B. & C. 163, Rex v. Lower Mitton, 9 B. & C. 810, Rex v. The Oxford Canal Company, 10 B. & C. 163, Rex v. Joddrell, 1 B. & Ad. 403. It remains only to apply the principle to the present case, and there can be no difficulty in saying, that land which requires some occasional expenditure to preserve it from being damaged by water, and to make it as productive as it is, would let for

less rent than similar land which requires none, the tenant defraying amongst others that occasional expenditure. In other words, the net average annual profit of both is not the same, and consequently the rate ought not to be the same.

In the course of the argument a question was asked, whether land of which the land-tax was redeemed ought to be rated higher than land of the same quality, which is still chargeable with the tax. The answer is, that it ought not: the annual net profit of both is the same, \*though such annual profit in the latter case is liable to a tax from which it is by law exempted in the former. The rate in the present case must therefore be amended.

I must add that this is the judgment of myself and my brothers Littledale and Patteson, who heard the argument. Lord Tenterden was of a different

opinion.

TAUNTON, J., then said that he concurred in the judgment delivered.

The Company of Proprietors of the WITHAM Navigation v. PADLEY and Others. Nov. 2.

In trespass against surveyors of the highways for pulling down a watch-house, the act 13 G. 3, c. 78, s. 62, does not enable them under a plea not guilty, to justify the removing it as being a nuisance on the highway.

TRESPASS for breaking and entering the plaintiff's close, and pulling down a watch-house. Plea, general issue. At the trial before Parke, J., at the Lincoln Summer assizes, 1832, the pulling down the watch-house was admitted; and the defence was that it was placed on the highway, and that the defendants, as surveyors of the highways, (after notice) pulled it down, being a public nuisance and obstruction. The learned Judge was of opinion that though the locus in quo was a highway, and the watchhouse erected thereon a nuisance, the defendants could not justify the pulling of it down under the general issue; and

he directed the jury to find a verdict for the plaintiff.

Amos now moved for a new trial, on the ground of misdirection. The 13 G. 3, c. 78, s. 82, enacts, that "if any action shall be commenced against any person for any \*thing done in pursuance of that act, the defendant may plead the general issue, and give the act and the special matter in evidence, and that the same was done in pursuance and by the authority of the act." The removal of an obstruction of this sort was incident to the general duties of a surveyor of the highways. By section 12, "the surveyors are to view all highways, &c.; and in case they shall observe any nuisances, encroachments, obstructions, or annoyances, contrary to the directions of that act, they are to cause notice to be given to any person doing, committing, or permitting the same; and if such nuisance, &c. shall not be removed within twenty days after such notice, then the surveyors are authorized to remove the same, and are to be reimbursed their expenses by the party offending." The ninth section is confined to moveables only, but this is general, and extends to every obstruction. case of obstructions and nuisances to highways, the remedy by indictment is often inadequate, and more prejudicial to the prosecutor than the evil complained A summary power of removing annoyances is highly desirable: and the surveyors, rather than private individuals, ought to execute that power. surveyors may not be obstructed by a nuisance of this kind in respect of their individual convenience of passage, and, if not, they cannot plead the special justification which would be adapted to such a case. They justify, as acting in exercise of their public duty; and it is clear that whatever they are authorized to do in discharge of that duty, may be given in evidence under the general issue. The watch-house in question was an impediment to the execution of "the directions of the act," inasmuch as it impeded the freedom of the passage, which the sur\*71] veyors were directed to preserve, and prevented \*the repair of the highway, which it was their duty to superintend.

I can find no provision in the act of parliament, authorizing the surveyors to remove a building or house erected upon the highway. They are empowered by section 12, to remove any nuisances, encroachments, obstructions, or annoyances, made, committed, or permitted contrary to the directions of that act. By section 9, persons laying any stone, timber, &c. upon the highway are subjected to a penalty; and, by section 10, after notice by the surveyor, stone, timber. &c. laid within fifteen feet of the centre of the highway, may be removed by the owner of the adjacent lands, or any other person, by order of a justice of peace. But there is no clause which authorizes the removal of a building by the surveyors. The making of this watch-house, therefore, was not a thing done contrary to the directions of that act, within the twelfth section; and the pulling of it down was not a thing done in pursuance of the act, within the eighty-second section; the defendants, therefore, could not give it in evidence under the general issue.

TAUNTON, J. concurred.

PATTESON, J. Section 7, compels the possessors of land to lop the trees in a particular manner; and if they omit to do so after notice, two justices may order them to be cut. This seems to show that it was not intended, by that act, to give the surveyors a power of removing things fixed to the freehold.

Rule refused.

#### \*72]

#### \*BAXTER v. TAYLOR. Nov. 3.

A reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way; such an act during the tenancy not being necessarily injurious to the reversion.

DECLARATION stated that a certain close called Stoney Butts Lane, situate in the parish of Halifax in the county of York, was in the possession and occupation of J. H., J. E., and J. A., as tenants thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff; yet the defendant, well knowing the premises, but contriving to prejudice and aggrieve the plaintiff in his reversionary estate and interest, whilst the said close was in the possession of the said J. H., J. E., and J. A., to wit, on, &c. wrongfully and unjustly, and without the leave and license, and against the will of the plaintiff, put and placed upon the said close diwers large quantities of stones, and continued the same for a long space of time, to wit, from thence hitherto; and also with the feet of horses, and the wheels of carriages, spoiled and destroyed divers parts of the said close, whereby the plaintiff was greatly injured in his reversionary estate and interest therein. Plea, not guilty. At the trial before Parke, J. at the last assises for the county of York, it appeared that the plaintiff was seised in fee of the closes mentioned in the declaration, which he had demised to tenants; that the defendant had with his horses and cart entered upon the close called Stoney Butts Lane; and that after notice had been given him by the plaintiff to discontinue so doing, he claimed to do so in exercise of a right of way. The learned Judge was of opinion, that although that might be good ground for an action of trespass by the occupier of the plaintiff's farm, \*it was not evidence of any injury to the reversionary estate, and therefore that the action was not maintainable; and he nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict.

F. Pollock now moved accordingly Although the plaintiff had demised his land to tenants, yet this action is maintainable for the injury to the reversion. The defendant claimed a right of way, and persisted in going on the land after notice. The trespass, having been committed for the purpose of asserting a right, was calculated to weaken the evidence of the plaintiff's title. [PARKE, J. The tenant might have maintained trespass.] The landlord could not compel his tenant to bring an action; and, therefore, unless he has a remedy in this form of action, he has none; and he ought to have some. It is undoubtedly true that he could not maintain this action for a mere trespass, unaccompanied by any permanent injury or any claim of right; but it is different where the act is done to assert a right, and might be evidence of a right of way. [PARKE, J. Such an act done while the premises were out on lease, would not be evidence of any right as against the reversioner.] In Young v. Spencer, 10 B. & C. 145. which was case by the owner of a house against his lessee for years for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises, the facts were, that the lessee did open the door without leave, but the house was not in any respect weakened or injured by it: and it was held \*that it ought to be left to the jury to say whether there was not an injury to the plaintiff's [\*74 reversionary right. And Lord Tenterden, C. J. said, that it seemed to be clearly established, that if any thing be done to destroy the evidence of title, an action is maintainable by the reversioner. Here then it ought to have been left to the jury, whether the acts done by the defendant under a claim of right were not injurious to the plaintiff's reversionary interest, inasmuch as they were calculated to weaken his evidence of title.

TAUNTON, J. I think there should be no rule in this case. Young v. Spencer, 10 B. & C. 145, is not in point. That was an action on the case in the nature of waste by a lessor against his own lessee. Here the action is by a reversioner against a mere stranger, and a very different rule is applicable to an action on the case in the nature of waste brought by a landlord against his tenant, and to an action brought for an injury to the reversion against a stranger. Jackson v. Pesked, 1 M. & S. 234, shews, that if a plaintiff declare as reversioner, for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such permanent nature as to be necessarily prejudicial thereto, and the want of such an allegation is cause for arresting the judgment. If such an allegation must be inserted in a count, it is material, and must be proved. Here the evidence was, that the defendant went with carts over the close in question, and a temporary impression was made on the soil by the horses and wheels; that damage was not of a permanent but of a transient \*nature; it was not therefore necessarily an injury to the plaintiff's reversionary interest. Then it is said that the act being accompanied with a claim of right, will be evidence of a right as against the plaintiff, in case of dispute hereafter. But acts of that sort could not operate as evidence of right against the plaintiff, so long as the land was demised to tenants, because, during that time he had no present remedy by which he could obtain redress for such He could not maintain an action of trespass in his own name, because he was not in possession of the land, nor an action on the case for injury to the reversion, because in point of fact there was no such permenant injury as would be necessarily prejudicial to it; as therefore, he had no remedy by law for the wrongful acts done by the defendant, the acts done by him or any other stranger would be no other evidence of right as against the plaintiff, so long as the land was in possession of a lessee. In Wood v. Veal, 5 B. & A. 454, it was held, that there could not be a dedication of a way to the public by a tenant for ninety-nine years, without consent of the owner of the fee, and that permission by such tenant would not bind the landlord after the term expired. I think therefore that the plaintiff cannot maintain the present action; and there is not doubt sufficient to induce me to think that there ought to be a rule nisi for a new trial.

PATTESON, J. I am of opinion that the nonsuit was right. Young v. Spencer, 10 B. & C. 145, was not an action by the reversioner against a stranger,

but by a landlord against his tenant. It was an action on the case in the nature \*76] \*of waste to entitle a reversioner to maintain an action on the case against a stranger, he must allege in his count, and prove at the trial an actual injury to his reversionary interest. It is said that this action is maintainable because the plaintiff's title may be prejudiced by a trespass committed under a claim of right; but then for such an injury the action must be brought in the name of the tenant, who is the person in the actual possession of the land. It is true the landlord cannot bring an action in the tenant's name without his assent; but that generally speaking, would be obtained without difficulty, and may be always made matter of arrangement between the landlord and his tenant. The landlord may even provide by covenant in his lease that he shall be allowed to sue in his tenant's name for any trespass committed on the land.

Parke, J. I am clearly of opinion that there was no injury the plaintiff's reversionary interest; and to entitle him to maintain this action it was necessary for him to allege and prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied with a claim of right is not necessarily injurious to the reversionary estate, and what Lord Tenterden said in Young v. Spencer, 10 B. & C. 145, must be construed with reference to the subject-matter then under consideration, an action on the case in the natures of waste by a reversioner against his tenant. Rule refused.

#### \*77] ROOTS v. LORD DORMER. Nov. 3.

Where several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue, a distinct contract arises for each lot; and a memorandum signed afterwards by the bidder, stating that he agrees to become the purchaser of the several lots set against his name, does not require a stamp, though the aggregate exceed 20*l*. in value, no single lot being of that price.

Case by the plaintiff as purchaser of growing crops sold under a fi. fa., for distraining and converting the said crops. Plea, the general issue. At the trial before Gaselee, J., at the Buckinghamshire Summer assizes, 1832, it appeared that the crops were sold by auction under certain conditions, which were in writing. The sixth condition stated that the crops, lots 57, 58, &c., (to 67, inclusive), would be sold, subject to the covenants contained in a certain indenture of lease therein recited. The eighth condition was, "each purchaser of the crops to sign an agreement to fulfil, so far as they legally ought to do, the said covenants." Four lots were knocked down to the plaintiff at prices below 201. respectively, but amounting in the whole to 381.; and on the same day he, and three other purchasers, subscribed the following acknowledgment at the foot of the conditions:—"We do hereby consent and agree to become the purchasers of the lot or lots specified in the annexed catalogue of sale, set against our names respectively, according to the terms mentioned in the foregoing conditions. Witness our hands this 8th of March, 1830.

(Signed)

W. Roots, lots 57, 59, 60, 66. Thomas Jones, lot 62. Charles Bush, lots 58, and 63. Thomas Miller, lot, &c.

No stamp was affixed.

A verdict was found for the plaintiff, and leave given to move for a nonsuit on a point which it is unnecessary to state, and on which the Court refused a rule.

Storks, Serjt., in making this application, contended \*that the defendant was at all events entitled to a new trial, as the acknowledgment subscribed to the conditions was an agreement for the purchase of an interest in lands, to the value of more than 20l.; and, therefore, ought not to have been received in evidence without a stamp. The lots were, indeed, knocked down separately; but the agreement for them, as afterwards reduced into writing, was for the purchase of all in the aggregate.

PARKE, J. I think this was a separate agreement for each lot. There was a distinct contract as each lot was knocked down. No stamp, therefore,

was requisite.

TAUNTON, J., concurred.

PATTESON, J. I am of the same opinion. Suppose the plaintiff had complied with the conditions of sale as to three lots, and not as to the fourth. In declaring against him, must the agreement have been stated as to one entire contract for all the four lots?

Rule refused. (a).

#### HORN v. ION. Nov. 5.

It is a good answer to a plea of bankruptcy, that the certificate was obtained by fraud, though the enactment to that effect in 5 G. 2, c. 30, s. 7, is not repeated in 6 G. 4, c. 16.

This was an action on a promissory note for 481., payable on demand. Plea, first, the general issue; secondly, a general plea of bankruptcy; and thirdly, a \*special plea of bankruptcy. Replication to the last plea that the supposed certificate in that plea mentioned was had and obtained by the defendant unfairly and by fraud, and upon this issue was joined. At the trial before Parke, J., at the Summer assizes for Westmoreland, 1831, evidence was given to prove, and the jury found, that the defendant had promised to pay Thomas Allen, one of the creditors who signed the certificate, in full, and that Allen was thereby induced to sign it. It was objected that under the 6 G. 4, c. 16, s. 121, it was not competent to the plaintiff to insist on a trial at nisi prius that a certificate was void on the ground of fraud. The learned Judge reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for entering a nonsuit

upon the objection made at the trial,

John Williams and Archbold in last Trinity term shewed cause, before Lord Tenterden, C. J., Littledale, Parke, and Taunton, Js. Wherever any one of the creditors is induced by money given by the bankrupt or by a third person, to sign the certificate, it is void on the ground of fraud generally, though there be no express provision in the 6 G. 4, c. 16, to that effect; first, because it contravenes the general spirit of the bankrupt laws, which is, that all the creditors should be placed on an equal footing, and that no one should have an advantage over another: secondly, because, as some creditors may be induced to sign because others have done so before, whom they suppose to be on a par with themselves, if the first creditors be in reality paid for signing, it will be a fraud on those who have received nothing, and who \*have been induced to sign by seeing the previous signatures. Robson v. Calze, Doug. 228, Holland v. Palmer, 1 Bos. & P. 95. [PARKE, J. The question is, whether since the late statute 6 G. 4, c. 16, a plaintiff is at liberty to show at nisi prius that the certificate was obtained by fraud, or whether that be only a ground for an application to the Lord Chancellor to set it aside.] It is actually void at common law, because fraud vitiates

<sup>(</sup>a) See Emmerson v. Heelis, 2 Taunt. 38, and the notice of it by Best, J., in Baldey v. Parker, 2 B. & C. 44.

every transaction. It is true that the 5 G. 2, c. 80, s. 7, enacts that in case any bankrupt shall be impleaded for any debt due before he became bankrupt, he may plead the general plea of bankruptcy, and the certificate shall be evidence of all prior proceedings, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove that the certificate was obtained unfairly and by fraud; and this latter provision is not re-enacted by 6 G. 4, c. 16; but as a certificate so obtained would be void at common law, the latter part of the enactment was unnecessary, and the omission of it therefore in the present statute is wholly immaterial.

T. Clarkson, contrà. Robson v. Calze, Doug. 228, and Holland v. Palmer. 1 Bos. & P. 95, were decided when the 5 G. 2, c. 30, was in force. The replication is clearly bad. By section 121, of the 6 G. 4, c. 16, every bankrupt is discharged from all debts, &c., in case he shall obtain his certificate of conformity, signed and allowed, and subject to such provision as is thereinafter directed. Now here the certificate has been signed and allowed as directed. Section 130, enacts, that any certificate obtained shall be void in certain cases:

\*81] viz., if the bankrupt shall have lost \*by gaming in one day 20l., or within a year before his bankruptcy 200l., by gaming or stock-jobbing, or if he shall have destroyed books, &c. If it had been intended to make a certificate void in other instances, that intention would equally have been expressed. The very omission of the enactment contained in the previous statute, as to a certificate obtained unfairly or by fraud, shows, evidently, a change of intention by the legislature.

\*\*Cur. adv. vult.\*\*

PARKE, J. now delievered the judgment of the Court.

The question in this case was, whether, under the 6 G. 4, c. 16. s. 121, it is competent for the plaintiff, on the trial of a cause, to insist on the objection to a certificate, that one of the creditors had been induced to sign it by a promise made by the bankrupt, that he would pay him in full; and that point was reserved for the consideration of the Court. A rule nisi was granted; and cause has been since shewn. We have considered the case, and are of opinion that it is competent for the plaintiff on these pleadings to take this objection, and that it must prevail. The question arises entirely from the difference in the language of the 5 G. 2, c. 30, s. 7, and 12, and the 6 G. 4, c. 16, s. 126, and 130. former act, s. 7, after providing that the general plea of bankruptcy may be pleaded, and that the certificate shall be evidence of all prior proceedings, goes on to enact that a verdict shall thereupon pass for the defendant, "unless the plaintiff can prove that the certificate was obtained unfairly and by fraud, or unless the plaintiff can make appear any concealment by the bankrupt to the value of 107."

But in the new bankrupt act, in the section (126,) which \*gives the general plea of bankruptcy, and makes the certificate evidence, there is no condition inserted; and in the 130th section, which enacts in what cases the bankrupt's certificate shall be void, the case of its being obtained unfairly or by fraud is not mentioned. And the point to be decided is whether the intention of the legislature in making this omission, was to prevent a certificate being thereafter impeached on the ground of fraud or not. Now if the former bankrupt act had never existed, and the present statute alone been enacted, we conceive that there is no doubt but that under this statute a certificate obtained by fraud would have been void; on the general principle, that fraud vitiates all contracts and instruments. It is only from the comparison between the language of the repealed and the existing statute, that the argument of intention is derived. But that difference may be explained without resorting to the supposition of a change The provisions of the new law are differently arranged, and in of intention. making that new arrangement, the clause in the old act may have been omitted simply on the ground that it was unnecessary to introduce an express enactment of that which the law implies. And indeed, when it is considered how imporant such an alteration is, and what serious consequences to the honest creditor

would arise from it, it is difficult to imagine that the legislature would have made it at all; and if they intended to make it, it is reasonable to suppose that they would have made it by a positive and express enactment. It is true, that the 130th section contains provisions expressly avoiding the certificate in certain cases; but those are for matters extrinsic, as for losing money at play, gambling in the funds, destroying or \*falsifying or making false entries in his books, concealing property to the value of 10% or upwards, &c. But no inference arises from this section, we think, that the legislature did not mean to impeach the certificate for fraud connected with the very obtaining of the certificate; and if it were otherwise, the consequences would be serious; for then the legislature would have provided no check against this sort of fraud, except the provision in the 125th section, rendering the contract to pay the stipulated consideration invalid. The certificate could not be impeached at law for fraud; and it would be difficult to support the authority of the Chancellor to cancel the certificate for the same reason; for if the legislature have meant that the objection of fraud shall not be used against a certificate, it must apply equally to all courts. The result would be, that the fraudulent bankrupt would obtain an advantage which he would not be backward to use.

Our opinion therefore is, that the legislature had no such intention as has been contended for, and that the certificate of the defendant may be and is invalidated on the ground of the fraud which has been found by the jury. rule for entering a nonsuit must be discharged. Rule discharged.

#### \*DOE dem. RANKIN v. BRINDLEY. Nov. 5. Γ \*84

A lease contained a proviso for re-entry in case of non repair within three months after notice. The landlord gave notice, and before the end of the three months, (which would have expired in Hilary vacation 1832,) brought an ejectment. During the three months the cause came on for trial, and the parties agreed to an order of Court, directing that a juror should be withdrawn, and the repairs done by Midsummer. Default being made, the landlord brought a second ejectment, without further notice, in Trinity vacation, under the statute 11 G. 4, and 1 W. 4, c. 70, s. 36. Held, first, that the former notice had not been waived.

Secondly, that it could not be objected at nisi prius that the action had not been commenced within ten days after the right of entry accrued, pursuant to the act, this being merely matter of irregularity: and further, that the objection was not well founded, the right of entry having been only suspended by agreement of the parties.

EJECTMENT for messuages, mills, &c. At the trial before Lord TENTERDEN. C. J., at the last Summer assizes for Kent, the facts appeared to be as follows: The defendant held oil-mills, &c. of the lessor of the plaintiff, by a lease containing covenants to repair, to fence and keep up fences, and to insure; and there was a proviso for re-entry, if at any time the premises or the fences should not be repaired within three months next after notice in writing given by the landlord, or in case of breach or default in the other covenants. There was no specific covenant to repair within three months after notice. On the 6th of January 1832, the lessor of the plaintiff gave the defendant a written notice to do certain repairs to the mills within three months. On the 10th he served the defendant with a declaration in ejectment. That action, as appeared by the particulars of demand, was grounded on forfeitures said to be incurred by not sufficiently fencing the premises, and by not insuring; but the first ground was The cause came on for trial at the ensuing Lent assizes (March 12th, 1832); when an order of Court was made by consent of the parties, that a juror should be withdrawn, and that the defendant should put the mills in repair, to the satisfaction of surveyors and an umpire, on or before the following

24th of June. On the 28th of March the lessor of the \*plaintiff accepted rent for the quarter ending on the 25th. The repairs were not done pursuant to the order of Court; and the defendant was thereupon served with a declaration in the present action, entitled, "Thursday, 28th of June, in Trinity term, 2 W. 4," the demise being laid on the 27th under the statute 11 G. 4, and 1 W. 4, c. 70, s. 36, 37. The particulars of demand stated this action to be brought for breach of covenant in not repairing. A verdict having been found for the plaintiff,

Thesiger now moved for a new trial, on two grounds. First, no power of reentry for non-repair is given by the lease, without a three months' notice. Here a notice was given previously to the first ejectment, but the landlord waived it by assenting to the order of Court, made at the Spring assizes, which enlarged the time for repairing, and in other respects introduced new terms. Doe dem. Morecraft v. Meux, 4 B. & C. 606. The acceptance of a quarter's rent afterwards was also a waiver. And no further notice having been given, it is the same with reference to this action, as if there had never been any. Secondly, if the notice of the 6th of January continued in force, the landlord became eatitled to re-enter in the following April; and the statute 11 G. 4, and 1 W. 4, c. 70, s. 36, which authorizes the service of declaration in Hilary and Trinity vacations, requires it to be served within ten days after the right of entry ac-

The present ejectment, therefore, was improperly commenced.

\*PARKE, J. I think there ought to be no rule. As to the first point, the notice to repair was given on the 6th of January, 1832; and the right of re-entry, in default of repair, would have accrued in three months from that time. Before the expiration of the three months, an ejectment was brought; and the lessor of the plaintiff being unable to support that action, put an end to it by consenting to the order of Court made at the March assizes, 1832. It was the same as if the parties after the 6th of January, and before the expiration of the three months, had made an agreement between themselves, that the time for repairing should be extended to the 24th of June: it was merely a consent to postpone the time of completing the repair for the benefit of the defendant; and on his failing to comply with the terms, the lessor of the plain-tiff might justly insist on his right of entry, and bring a new ejectment after the expiration of the enlarged time. The receipt of rent was only an admission that the defendant was tenant until the 25th of March, and could not operate as a waiver of the forfeiture. As to the objection founded on the statute 11 G. 4, and 1 W. 4, c. 70, s. 36, it seems to me that that could not be taken at nisi prius; and if it could, the answer is, that the landlord's right to re-enter, which is said not to have been enforced in proper time, was postponed by agreement of the parties.

TAUNTON, J. I am of the same opionion. The order of nisi prius did not supersede the notice, but only enlarged the time and suspended the right of

\*Patteson, J. The notice to repair may be connected with the agreement at nisi prius in the first ejectment. The other point is mere matter Rule refused. of irregularity.

#### CROSFIELD and Another, Assignees of BROSTER, v. Sir THOMAS STANLEY MASSEY STANLEY, Baronet. Nov. 5.

The statute 1 W. 4, c. 7, s. 7, exempting judgments on cognovit, and by default, confession, or nil dicit, in any action commenced adversely and without collusion, from the operation of s. 108, of the bankrupt act, 6 G. 4, c. 16, does not extend to judgments on warrant of attorney, though given without collusion or intention of fraudulent preference. And a sheriff having seized and sold goods on an execution issued upon such judgment,

and paying over the proceeds after notice of an act of bankruptcy committed by the defendant, is answerable to the assignees for money had and received.

Assumpsit for money had and received by the defendant, late sheriff of the county of Chester, to the use of the plaintiffs as assignees of Broster. Plea the general issue. At the trial before Lord Lyndhurst, C. B., at the last Summer assizes for Chester, it appeared that Broster, in April, 1831, executed a warrant of attorney to one Stringer, to confess judgment for 9391., as an indemnity to Stringer for the payment of such moneys, costs, &c., as Stringer might have to pay by reason of having joined Broster in certain promissory notes. having been afterwards obliged to pay money on the notes, signed judgment on the warrant of attorney on the 6th of February, 1832, and a fi. fa. was thereupon issued, under which a sheriff's officer took possession, and began to sell. On the 15th of February, during the sale, but when it was nearly over, notice was given to the sheriff's officer on behalf of Broster's creditors, that he had committed an act of bankruptcy, and that a docket was struck against him. The act of bankruptcy had in fact been committed on the 12th. The sheriff's officer finished the sale, and afterwards paid over the balance of proceeds to Stringer, on an indemnity. This action was brought to recover the amount \*of proceeds. The jury, under the direction of the learned Judge, found a verdict for the plaintiffs.

Jones, Serjt. (pursuant to leave reserved) now moved for a rule to show cause why a nonsuit should not be entered. This payment by the sheriff was protected by the statute 1 W. 4, c. 7, s. 7.(a) By the bankrupt act, 6 G. 4, c. 16, s. 108, it is provided that no creditor suing out execution on any jugdment by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but he shall be paid rateably with them. The act of 1 W. 4. c. 7, s. 7, reciting this enactment, provides that no judgment or execution on a cognovit actionem, signed after declaration filed or delivered, or judgment by default, confession, or nil dicit, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be deemed within the former provision. It is true this act does not expressly mention warrants of attorney; but the object is to protect all judgments not obtained \*by collusion, or with a view to fraudulent preference, and a judgment like this comes within the meaning of the clause. Another point taken at the trial was, that the action did not lie for the produce of goods sold before the sheriff had notice of the bankruptcy. Notley v. Buck, 8 B. & C. 160, is no authority to the contrary, for there the sheriff was informed of the bankruptcy before he sold. Here, it is true, the sheriff had had no notice when he received the purchasemoney and paid it over; but he had sold the goods, and bound himself by that contract of sale to the purchasers, before any notice: and (if the recent decision in Balme v. Hutton, 2 Tyr. 17; 2 Cro. & Jer. 19, be correct) the seizure and sale, without notice of the bankruptcy, did not render him a wrong-doer.

PARKE, J. There is very little difficulty in this case, when the clauses of the two statutes are compared. The 1 W. 4, c. 7, s. 7, only alters the provision of

<sup>(</sup>a) 1 W. 4, c. 7, s. 7, "And whereas by an act passed, &c. (6 G. 4,) intituled An Act to amend the Laws relating to Bankrupts, it is provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors. And whereas, by reason of such provision, plaintiffs have been and may be deterred from accepting a cognovit actionem, with stay of execution, whereby the expense of further proceedings in such action might have been and may be saved or diminished; for remedy thereof be it enacted, that no judgment signed or execution issued after the passing of this act on a cognovit actionem signed after declaration filed or delivered, or judgment by default, confession, or nihil dicit, according to the practice of the Court, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be deemed or taken to be within the said provision of the said recited act."

the 6 G. 4, c. 16, s. 108, in the cases of a judgment or execution on a cognovit after declaration, or a judgment by default, confession, or nil dicit, in an action commenced adversely, and not by collusion for the purpose of fraudulent pre-Now this was not an execution on judgment by cognovit after declaration, or judgment by default, confession, or nil dicit in any action commenced adversely, but upon a warrant of attorney. The case, therefore, is not within the statute 1 W. 4, c. 7. Then is it within section 108, of the bankrupt act? To take it out of that section, the endeavour must be to engraft upon the words there [\*90 used, "any judgment obtained by default, confession, or nil \*dicit;" the terms of the other act, "by collusion for the purpose of fraudulent preference;" but we cannot adopt that construction; the clause is general and applies to all cases. As to the other point, there is no occasion here to be embarrassed with the case of Balme v. Hutton: (a) because, in this instance, all the money was received and paid over by the sheriff after notice of the bankruptcy; and the action is for money had and received. I am therefore of opinion that there should be no rule.

Taunton, J., and Patteson, J., concurred.

Rule refused,

## JOHN CASTLEDINE and MATTHEW CASTLEDINE v. MUNDY. Nov. 5.

(In Error.)

Error will lie to B. R. on a judgment of C. B. for error in fact.

A court of error will give judgment of reversal, if there be error in law apparent on the face of the record, though error in fact only be assigned.

This was a writ of error on a judgment of the Court of Common Pleas. Declaration stated that the defendants below after the making of the statute 8 Hen. 6, c. 9, on, &c., with force and arms, with a strong hand, and against the form of the statute in such case made and provided, entered a certain messuage, &c. of the plaintiff, and in a forcible manner put out, disseised, and dispossessed and expelled the plaintiff therefrom, and with a forcible manner, and with a strong hand, kept and continued the plaintiff therefrom for a long \*space of time, to wit, from thence hitherto, &c., by means whereof the plaintiff lost and was deprived of the use of the said dwelling-house, to wit, at, &c. The second and third counts charged the defendants with breaking and entering the plaintiff's dwelling-house, &c., to plaintiff's damage of 500%. defendants appeared in person, and suffered judgment by default. before the sheriff, the jury found that the plaintiff had sustained damages on occasion of the premises, besides costs, to the amount of 100%; and the judgment was, that the plaintiff do recover against the defendants the sum of 3001., being treble the amount of the damages found by the inquisition, and the sum of 1931. 18s., being treble costs. Upon writ of error to this Court, the plaintiffs (the defendants below) assigned for error that Matthew Castledine appeared in the suit in his own proper person, although at the time of his said appearance. and also at the time of giving judgment, he was under the age of twenty-one years, to wit, of the age of seventeen years and no more, in which case the said Matthew ought to have been admitted to appear in the Court below, to defend the suit aforesaid by his guardian, and not in his own proper person; wherefore they prayed that the judgment might be revoked, annulled, and altogether held

Vol. XXIV.-4

<sup>(</sup>a) The judgment of the Court of Exchequer in this case, which was contrary to the recent decision of the Court of K. B. in Dillon v. Langley, 2 B. & Ad. 131, was reversed in the Exchequer Chamber, on error, during this term. Hutton v. Balme, 2 Tyr. 620; 1 Cro. & M. 262.

for nothing, and that they might be restored to all things which they had lost by occasion of the judgment, &c. To this the defendant in error pleaded in nullo est erratum. The case was argued in Trinity term by

Platt for the plaintiffs in error. An infant defendant can only appear by guardian, even when he is sued as \*co-executor with others, Frescobaldi v. [\*92] Kinaston, 2 Str. 784, and in Tidd's Practice, 9th edit. 99, it is said, that common bail cannot be filed for him under the statute, though he be sued jointly with other defendants; and for this Bligh v. Minster, Trin. 28 G. 3, K. B., It may be said that this was a defective assignment of error in fact; but assuming that to be so, or that the matter assigned is no error, then, the defendant in error having pleaded in nullo est erratum, and that plea being in effect, a demurrer, the Court may look at the whole record, and pronounce that judgment which, upon the whole, appears to be right: Le Bret v. Papillon, 4 East, Now here, even assuming that the infancy of one defendant below cannot be insisted on as a ground of error, still the judgment is erroneous, because general damages are assessed on all the counts, and it is therefore, impossible to say what portion is to be ascribed to the first count, on which alone the plaintiff is

entitled to recover treble costs and damages.

Fynes Clinton, contrà. The assignment of errors itself is bad, inasmuch as it concludes with a prayer that judgment may be reversed, whereas it ought to have concluded with a verification: King v. Gosper and Shire, Yelv. 58. And the plaintiffs in error having assigned an error in fact, viz., that Matthew Castledine was within age, and had not appeared by guardian but in his own proper person, could not afterwards also assign error in law; and, if so, they must not now be permitted to do that indirectly which they could not do directly. They cannot, in this state of the proceedings, be in a better situation than they would have \*been if they had offered to verify the fact alleged, and the parties had pleaded to issue; and then they could not have assigned as error in law [\*93] that general damages were assessed on all the counts. This case differs from Frescobaldi v. Kinaston, 2 Str. 784: there the assignment of error was that the defendant below had appeared by attorney. Here he appears in his own proper person. [Parke, J. It is said in an Anonymous Case, in Sayer's Rep. 51, that an infant cannot bring a penal action, because he cannot appear in person or by attorney; and in Co. Litt. 135, b, that when an idiot doth sue or defend, he shall not appear by guardian, or prochein amy, or attorney, but he must be ever in person; but an infant or a minor shall sue by prochein amy and defend by guardian. The fact of one of the defendants being an infant, and having appeared by guardian, is not a ground for reversing the judgment altogether. [PARKE, J In Bird v. Orms, Cro. Jac. 289, an entire judgment against two in trespass was reversed, one of them having appeared by attorney instead of by guardian. So in King v. Marlborough and Craker, Cro. Jac. 303, in ejectment, "the error assigned was that Craker, one of the defendants, at the time of the judgment was within age, and appeared by attorney where it ought to have been by his guardian, the judgment being upon verdict, and it was thereupon demurred; for it was said that this was not error, but quoad him within age." But it was decided, the damages and costs being entire, that the judgment was reversable for both.] There the judgment was after verdict; here it was by default. In both cases the action was founded in tort, and it was not then settled, as it has been since \*in Mcrryweather v. Nixan, 8 T. R. 186, that there is no contribution between tort-feasors. [Lord Tenter- [\*94] DEN, C. J. Will a writ of error for a matter in fact lie in this Court on a judgement of C. B? In Com. Dig. Pleader, 3 B. 1, it is said that error may be brought in the same Court where the judgment was given, for error in fact, as that the defendant appeared by attorney, being an infant; and then it is added, for error in fact it must be in the same Court, and 1 Sid. 208, is cited.] Platt in reply. In Frescobaldi v. Kinaston, Str. 784, and Bird v. Orms,

Cro. Jac. 289, matters of fact were assigned for error in this Court upon a judgment in C. B. Cur. adv. vult.

PARKE, J. now delivered the judgment of the Court.

This was a writ of error from the judgment of the Court of Common Pleas in an action of trespass for forcible entry on the statute 8 Hen. 6, c. 9. The declaration contained three counts; one on the statute, and two for trespasses at The defendants appeared in person and suffered judgment by common law. default, and general damages were assessed on all the counts, for the treble amount of which, and treble costs, final judgment was given. The assignment of errors was as follows: "that the said Matthew appeared in the suit aforesaid in his own proper person, nevertheless the said Matthew at the time of his said appearance, and also at the time of giving the judgment aforesaid, was under the age of twenty-one years, to wit, of the age of seventeen years, and no more; in which case the \*95] said Matthew ought to \*have been admitted to appear in the court afore-said to defend the aforesaid suit by his guardian, and not in his own proper person; therefore in that there is manifest error, wherefore they pray that the judgment aforesaid may be revoked, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment aforesaid," &c. To this the defendant in error pleaded in nullo est erratum.

An assignment of error in fact ought to conclude with an "hoc paratus est verificare:" and the case of King v. Gosper and Shire, Yelv. 58, (Walker v. Stokoe, Carth. 367; Sheepshanks v. Lucas, 1 Burr. 410,) is in point, that such an assignment of error as this, without a verification, is bad; and if there be no other error on the record, the judgment ought to be affirmed. But in this case the judgment is clearly erroneous, for general damages are assessed on all the counts, and it is, therefore, impossible to say what portion is to be ascribed to the first count, on which alone the damages and costs could by law be trebled; and yet judgment is given for the treble amount of the whole. The only question, then, is, whether it is competent for the plaintiff in error to avail himself of this objection; or, more properly, whether the Court is bound, ex efficio,

to take notice of it, there being no assignment of error in law.

The general rule is, that the Court, ex officio, must give the proper judgment according to the right appearing upon the whole record, Le Bret v. Papillon, 4 East, 502; Charnley v. Winstanley, 5 East, 271; Fraunces's case, 8 Coke, 93, \*361 a. In a case cited in Dive v. Manningham, Plowden, 66, on not \*guilty by one found against him, and a plea in bar by another found for him, it is said, "inasmuch as it appears to the judges by the record, that the plaintiff had no title, they, ex officio, ought to give judgment against the plaintiff;" and afterwards it is said, "So always, if it appear to the Court that the plaintiff has no title, he shall not have judgment, although the defendant admits his title: and though the defendant by his bad conclusion has concluded himself of his advantage, the plaintiff shall be barred by the Court ex officio, if so be it appears he has no title."

And there is no difference, in this respect, between the office of a court of error, and of a court of original jurisdiction, 4 East, 502. Thus, in Bishop's case, 5 Coke, 376, the Court agreed, that where an original writ was removed by certiorari, and varied from the declaration, the judgment should be reversed,

although that error was not assigned.

In Carleton v. Mortagh, 6 Mod. 208, Lord Holl says that, "if a bad plea in bar be pleaded to a bad declaration, or to a bad assignment of error, it is idle; and the Court shall take no notice of the insufficiency of it, but shall judge on the record."

The result of these authorities is, that the Court ought to give judgment of reversal, if there be error in law; notwithstanding no error in law is assigned: and though it be true, that a plaintiff in error will thus have the same advantage indirectly, as if error in fact and in law were both assigned (which cannot be permitted directly); this does not appear to us to be valid objection. It is somewhat analogous to the case of a plea and demurrer \*to the declaration, which cannot be joined; and yet a defendant after a plea, may, on demurrur to the plea, in arrest of judgment, or on a writ of error, take all the objections which are not cured by the plea or otherwise, and which he could have done on general demurrer to the declaration.

One question was raised on argument, whether a writ of error for a matter of fact would lie in this Court, on a judgment of the Common Pleas? It is clear from the authorities that such a writ of error may be brought in the Court of Common Pleas, but there is no authority that it must. It will not lie in the Exchequer Chamber; not because that Court could not try an issue, but because the statute 27 Eliz. c. 8, under which it was constituted, was enacted to give a more speedy remedy for error which lay in parliament; but errors in fact were examinable in the King's Bench and not in parliament; and, therefore, the Court of Exchequer Chamber had no cognizance of such errors, Roe v. Sir John Moore, Comyns, 597. But that a writ of error for error in fact will lie in the King's Bench from the Common Pleas, the cases cited in argument show; for they were instances where such errors were assigned in this Court. The judgment of the Court below must, for these reasons, be reversed.

Judgment reversed.

#### BUSSEY v. STOREY. Nov. 5.

**F\*98** 

By an act of the 52 G. 3, entitled "An Act for more effectually repairing the road from Boroughbridge, in the County of York, to the City of Durham," it was in section 25 enacted, "That the respective tolls therein mentioned should, subject to the restrictions thereinafter contained, be demanded and taken at every toll-gate and turnpike which should be continued or erected by virtue of that act, from the persons using or attending any carriage, before any such carriage should be permitted to pass through the same."

By section 28, it was enacted, that no more tolls should be taken from any person for passing and repassing the same day, with the same horses or carriages, through any of the toll-gates or turpikes erected by virtue of that act in the whole length of the said road from Boroughbridge to the city of Durham, nor upon the several parts thereinafter specified, than as thereinafter mentioned, viz., six tolls on the whole length, and on certain specified parts, two tolls each.

By section 37, it was enacted, that no toll should be demanded or taken for any carriage which could only cross the said road, and which should not pass more than 100 yards

thereon

By section 68, all persons, counties townships, &c., and bodies corporate, who, by reason of tenure or otherwise had been used to repair any part of the said road, should con-

tinue liable to such repairs:

Held, that the words said road in the exempting clause, by reference to the title of the act, and to the nearest description of the road, which was in section 28, imported the whole space between Boroughbridge and the city of Durham, and, therefore, that a cart which had passed more than 100 yards along the road, including a part repairable by the county as being at the end of a bridge, but which had gone less than 100 yards, exclusive of that part, was not exempt from toll: and that the liability of the county to repair that part did not render it unreasonable that such part should be included in the 100 yards for passing over which toll was demandable.

And quære whether, under this act, the road trustees might not be liable, in case of default by the county, to employ their money in repairing the 300 feet at the end of a

bridge?

Assumpsit for money had and received. Plea, general issue. At the trial before Bayley, B., at the Summer assizes for the county of Durham, 1830, the jury found a special verdict to the following effect:—

By an act of parliament of the 18 G. 2, c. 8, entitled an Act for repairing the high Road leading from Boroughbridge in the County of York, through

North-allerton in the same County, to Croft Bridge on the River Tees, and from thence through Darlington, in the County of Durham, to the City of Durham, certain trustees were appointed for surveying, ordering, amending, and keeping in repair the said road, and likewise for putting in execution the powers by the \*99] said act given, and they were by the said act empowered to erect \*turnpikes in or across any part or parts of the said road, and also toll-houses upon the same, and to demand and take thereat the tolls in the said act specified, which tolls were vested in the trustees, to be applied to and for the amending and keeping in repair the road aforesaid in such manner as in the act is directed. This act was continued and enlarged (certain new tolls being granted to the said trustees) by an act, 22 G. 2, c. 32, entitled An act for enlarging the terms and powers granted by the act passed in the 18 G. 2 (the act above recited), and for making the same more effectual. By an act of the 32 G. 3, c. 118, for enlarging and altering the terms and powers of the two acts of parliament passed in the 18 & 22 G. 2, and for reducing the said acts into one, and for more effectually repairing and keeping in repair the said road, the several powers contained in the said two recited acts were, by the second section, consolidated, and further term granted for the purpose of widening, repairing, and keeping in repair the said road leading from Boroughbridge, &c., describing it as in the firstmentioned act. The 32 G. 3, was continued and amended by an act of the 41 G. 3, c. 4.

By a subsequent act, 52 G. 3, c. 38, entitled An act for more effectually repairing the rord from Boroughbridge, in the county of York, to the city of Durham, after reciting the last two acts by their titles (in which the road is described as before stated), and that the trustees had borrowed considerable sums upon the credit of the tolls to be taken on the said road, which remained unpaid, and that it was necessary to grant further tolls and a further term, and further, that it would be convenient that all the requisite tolls, powers, and \*provisions in respect of the same road, should be consolidated in one act of parliament; the said two acts were repealed, and a new term and tolls granted. the 37th section of this last act, amongst other exemptions from tolls, it was enacted, that no tolls should be paid for any horses, cattle, beasts or carriages, which should only cross the said road, and should not pass more than 100 yards thereon. The 68th section of this act is as follows:—"And be it further enacted, that all and every person and persons, counties, townships, parishes, hamlets, vills, and places, and the inhabitants thereof respectively, and bodies politic and corporate, who, before the making of the said recited acts or this act, have or hath used, or of right ought, by reason of the tenure of any lands, tenements, or hereditaments, or on any other account or accounts, to repair any part or parts of the said road, or any bridge, drain or watercourse in or upon the same, shall, notwithstanding this act, be subject and liable to such repairs, in the same manner as they and every of them have or hath heretofore usually been, or would have been in case the said recited acts or this act hath not been made." The 69th section provided for the statute duty. The 70th section is as follows:— "That it shall be lawful for the said trustees, and they are hereby authorized and empowered, to compound or agree by the year or otherwise with any of the inhabitants or occupiers of lands, tenements, or hereditaments, of or in any of the parishes, townships, or places, in which the said road shall lie and be situate, for a certain sum of money in lieu of the whole or any part of their statute work; or to compound with the surveyor of the highways for any such parishes, town-\*101] ships or places, for the whole or any part of the \*statute work liable to be performed within the same respectively; all which composition moneys shall be from time to time paid in advance, and shall be applied in the repair of the said road.(a)

<sup>(</sup>a) Section 28, which was also much relied upon in the argument, will be found at p. 107, post.

On the 7th of June, 1830, the defendant was collector at Croft Bridge of the tolls authorized to be taken by the recited act of the 52 G. 3.; and on that day the plaintiff came upon the road in question with two laden carts, each drawn by one horse from a road leading from the depot of the Stockton and the Darlington Railway Company, within the distance of 100 yards from the foot of Croft Bridge on the Durham side, and passed over Croft Bridge and along 186 yards of the road beyond the foot of it on the Northallerton side, and then turned out of and finally quitted the road in question for one leading to Richmond. The plaintiff claimed to pass through the said gate with his carts and horses without payment of toll, by reason, as he alleged, of not passing 100 yards on the road maintained by the trustees of the said road. The defendant refused to allow him to pass through the toll gate, with the said carts and horses, until he had paid 10d., being the amount of toll appointed by the table of tolls at the said toll-gate to be taken, for two carts, each drawn by one horse and laden with coal, which sum the defendant demanded and received from the plaintiff.

The trustees of the said turnpike road do not repair or contribute to the repair of the road over Croft Bridge, and 300 feet at each end thereof; but the inhabitants of the respective counties of York and Durham exclusively repair the same out of the county rates. The gate at Croft Bridge, and also a gate near to Topcliffe \*Bridge, were erected and continued at those places for taking toll for the road, and they are built upon parts of the approach to the respective county bridges there; which parts are severally repairable by the counties of York and Durham, and not by the trustees of the said road. No statute work is done by the inhabitants of the respective parishes, townships, or places of Harworth in the county of Durham and Croft, in the county of York, in respect of the said road over Croft Bridge, and 300 feet at each end thereof.

The plaintiff with his carts and horses did not, on the said 7th day of June, pass over a greater extent than eighty six yards of the said turnpike road; unless the road over Croft Bridge, or the 300 feet at either end thereof, repairable by the respective counties of York and Durham as aforesaid, is to be taken as part

of it.

TINDAL, C. J. and BAYLEY, B. sitting as the Court of Pleas of Durham, were of opinion (after argument), that the carts in question were liable to the toll, and gave judgment for the defendant. A writ of error having been brought, the

case was argued in last Trinity term.(a)

The carts mentioned in the special ver-Cresswell for the plaintiff in error. diet were not liable to toll, inasmuch as they had not travelled along 100 yards of the road repaired by the trustees under the statute 52 G. 3, c. 38, by which the toll was imposed. The toll, being a charge upon the subject, must be imposed in clear and unambiguous words. If there be any doubt, the public must have the benefit of it, The Leeds and Liverpool Canal Company v. Hustler, 1 B. & C. 424. There, but for the act imposing the toll, the party would never have had \*the use of the canal. It was not, therefore, a burden in derogation of any pre-existing right
Here it is, and therefore the rule of construction applies more strongly, for, with or without the toll, the plaintiff would have had the use of Croft Bridge. It cannot be supposed that the legislature would have imposed this toll without giving some adequate consideration, and that consideration, is the repair of the road, and the statute itself only gives the toll where the road has been used for 100 yards and upwards. Besides, turnpike acts imposing tolls on those who use the road, are intended for the relief of parishes though which the road runs, and not of counties, and the act in question must be construed with reference to that object. The 32 G. 3, passed for amending the first two acts for repairing the road in question, enacts by section 38, that persons liable to repair any particular part of the road, or any bridge or bridges upon the road, shall continue so. The turnpike act, 13 G. 3, c. 84, s.

<sup>(</sup>a) Before Lord Tenterden, C. J., Littledale, Parke, and Taunton, Js.

34, provides that no person shall be liable to pay toll at any toll-gate across or on the side of any turnpike road, or be subject to any penalty for any carriage, horse, or beast, which shall only cross such road, and shall not pass above 100 yards theron, except over some bridge erected at a considerable expense by the trustees of such turnpike road. This clearly proves that the legislature did not consider that the use of any bridge not occasioning expense to the trustees would be a consideration for the payment of toll. And where a toll is claimed by prescription, in consideration of repairs done, it is clear that the repair of a road from A. to B. is no legal consideration for demanding a toll on a road from A. to C.: the toll can only be taken for the use of the very road repaired. should it be presumed that \*the legislature meant to adopt a different rule \*104] should it be presumed that the registered by the here, and to make the use of a road along a bridge not repaired by the trustees a consideration for paying the toll to them? The presumption is against the present claim of toll, and the question, then, is whether the language of the statute it is so clear and precise that no doubt can be entertained as to the true construction? The point to be ascertained is the meaning of the expression said road in the exempting clause in the 52 G. 3. It is manifest, from an examination of the different provisions in that and the former statutes relating to the road, that "the said road" means the road to be repaired by the trustees with the tolls to be taken for the use of it. In a great many instances the expressions "the said road," or "the road intended to be repaired," appear to be used in a manner that clearly excludes the bridge in question, and the 100 yards at each end which are not repairable by the trustees. Nor is it clear that those expressions do, in any one instance, include the bridge. Before any of the statutes in question were passed, the plaintiff might have passed, with his carts, along the road in question without payment of any toll. Then, the road being found so bad that it could not be repaired by the ordinary method provided by the common law, the legislature passed the first statute, 18 G. 2, c. 8, entitled An Act for repairing the Road from Boroughbridge, through Northallerton, to Croft Bridge, on the River Tees, and from thence through Darlington to Durham, and by that act, s. 1, the trustees are empowered to erect toll gates in or across any part of the said road, and to take the tolls therein mentioned, which are to be applied to the keeping in repair the said road. By section 10, the trustees are em-\*powered to dig for gravel for repairing the roads aforesaid. This would give them no power to take gravel to repair the bridge. Neither would the power given to them to widen the road entitle them to widen the bridge. The statute duty to be done on the roads directed to be repaired is to be settled by justices at petty sessions. But no statute work is to be done on the bridge, or on the 100 yards at the end; that is, therefore no part of the said road. Again, lands liable to the repair of roads directed by the act to be repaired are to continue so, and the rents to be paid to the trustees or their collector. would not authorize them to receive the rents of lands liable to the repair of Croft Bridge. The second statute, 22 G. 2, c. 32, is in terms similar to the former act, and throughout speaks of the said roads, and by one clause, persons travelling on the road intended by the former act and that act to be repaired, are subjected to a penalty for going over any person's ground to avoid the toll. That would not apply to a person travelling only along the road repaired and repairable by the county, and not by the trustees. By the stat. 32 G. 3, c. 118, the road to be repaired is described in the title and preamble, and by sect. 2, the powers of the former act are continued for repairing the said road, again describing it as before. The property in gates, lamps, &c., and in all dung and soil gathered off the said road, is vested in the trustees. That would not give to them lamps, gates, &c. upon, or soil gathered off the bridge or the approaches to it; and if so, the words "said road" do not include the bridge or 100 yards. By s. 12, the tolls are to be taken for repairing the said road; by s. 21, the \*106] tolls are to be applied to the repair of the \*said road; and there is afterwards a power given to get materials for repairing the said road; that

cannot include the bridge: and by s. 38, persons or counties liable to repair any part of the said road, or any bridge in the said road, are to remain liable as before; and where lands are liable to the repairs of the said road (omitting bridges,) the rents are to go to the person appointed by the trustees. There the word road clearly does not include bridge. By the statute 41 G. 3, c. 4, the former acts are recited and continued, and larger tolls given. The 52 G. 3, c. 38, recites the former acts, and that it would be convenient to continue all former provisions relating to the said road, and to consolidate them; and s. 21 gives power to erect or continue toll-houses and gates "in, or upon, or across the said road intended to be repaired." It may be said, that where individuals are liable to repair the road ratione tenurse, the use of that part of the road for 100 yards would make a person liable to the toll. But that does not create any substantial difficulty. The person liable to repair ratione tenurse, or a township liable by prescription, are only substituted for the parish upon which the common-law liability rests; and notwithstanding such special liability the trustees are authorized, and if so, compellable, to expend the tolls in those parts of the road as well as the parts repairable by parishes: consequently the use of those roads, inasmuch as they derive benefit from the tolls, is a consideration for the

payment. Alexander contrà. The plaintiff's carts were liable to toll, inasmuch as they travelled along 100 yards of the road leading from Boroughbridge to the city of Durham. There is nothing in any of the acts to \*restrain the meaning [\*107 of the exempting clause to the parts of the road repairable by the trustees; and such a distinction would be very inconvenient, for many parts would be free from toll which are repairable by individuals ratione tenurse: and in some parts one side of the road might be so repairable, and not the other. The question must mainly depend upon the construction put upon the statute 52 G. 3, c. 38, which repeals the former acts. Section 25, enacts, "that the respective tolls therein mentioned, subject to the restrictions thereinafter contained, shall be demanded and taken at each and every toll-gate and turnpike which shall be continued or erected by virtue of that act, from the person or persons using or attending any horse or carriage, before such horse or carriage shall be permitted to pass through the same." By this clause, the toll is imposed in plain, unequivocal language: and the question is, whether the carts mentioned in the special verdict, are exempted from the toll, to which they are otherwise clearly subject, by the enactment in section 37, that no toll shall be payable for any horses or carriages "which shall only cross the said road, and shall not pass more than 100 yards thereon." Now the said road, by reference to the title and preamble of the act, imports the whole line of road from Boroughbridge to the city of Durham; and by reference to section 28, which contains the nearest preceding description of the road, it has the same import. That section enacts, that no more toll shall be demanded for passing and repassing on the same day, with the same horses or carriages, through all or any of the toll-gates to be continued or erected by virtue of that act, in the whole length of the said road from Boroughbridge to the city of Durham, nor upon the several parts \*thereof after specified, than as thereinafter mentioned, viz. upon the whole length of the said road, no more than six tolls; and upon other parts therein specified, (of which that between Northallerton and Darlington is one) no more than two tolls. The toll-gate, where the toll in question was taken, is recognized by the 22 G. 2, c. 32, s. 6, as being in and upon the said road. It is there described as the gate built, and now standing in and upon the said road at Croft Bridge; and in the 32 G. 3, s. 38, county and riding bridges are spoken of as lying in and upon the said road; they are treated, therefore, as part of the road, that is, the road from Boroughbridge to Durham.

PARKE, J. now delivered the judgment of the Court. This question arises on a writ of error from the judgment of the two learned Judges (Lord Chief Justice Tindal and Mr. Baron Bayley) constituting the Court of Pleas at Dur-

ham, upon a special verdict. The question is, whether the plaintiff's carts, which passed through the turnpike at Croft Bridge, in that county, but did not pass more than 100 yards on the road, exclusive of the part at the end of the bridge which the county are bound to repair, were exempt from toll under the 52 G. 3, c. 38, s. 37, a local turnpike act. We are of opinion that they were not, and that the judgment of the Court below ought to be affirmed.

This act of parliament repeals those of the 32 G. 3, and 41 G. 3, the provisions of which, and of the older statutes relating to this road, are only so far material as they may aid in the construction of the enactments of the existing statute. In order to decide the point in question, we must look to the language

of this act.

\*Before I proceed to do this, it is to be observed, that it is a mistake to suppose, as was urged in the argument on behalf of the plaintiff in error, that the object of this and other turnpike acts is to relieve parishes and townships from the burthen of repairing the highways. Their object is to improve the roads for the general benefit of the public, by imposing a pecuniary tax in addition to the means already provided by law for that purpose. The obligation to maintain all public roads (with the exception of those which are to be repaired ratione tenuræ or clausuræ) is a public obligation, and in the nature of a public tax. The repairing by parishes or townships of some part, and by counties of other parts, are merely modes which the law has provided for discharging that obligation. It is their share of the public burthen, which those districts have to pay, and which is imposed for the general benefit of the community, and tolls are an additional tax for the same purpose.

But as this statute does impose a tax, the usual rule of construction must be applied to it which is adopted in similar cases, and the subject must not be

charged unless the intention to charge clearly and distinctly appear.

Are, then, the words of this statute clear and distinct? It is entitled "An Act for more effectually repairing the Road from Boroughbridge, in the County of York, to the City of Durham;" and it enacts (section 25) that certain tolls shall be demanded and taken at each and every toll-gate and turnpike which shall be continued or erected by virtue of the act, from any person attending a carriage, before such carriage shall be permitted to pass; but it provides (section 37) that no toll shall be\* taken for any carriages which only cross the said road, and shall not pass more than 100 yards thereon.

The statute therefore, in clear words, imposes the tax on carriages which go through a turnpike gate, and pass more than 100 yards on the said road; and the term "the said road," in grammatical construction, refers either to the title of the act or to the nearest preceding description of the road (which is in section 28); and on either supposition, the road is the whole space between Boroughbridge and the city of Durham. And, besides, the act (section 68) contemplates that counties will have to repair some parts of the road; and what other parts can those be, than the space of 300 feet at the ends of the bridges?

Add to this, that the toll-gate in question, which is erected within that distance, is recognized as being on the road, by 22 G. 2, c. 32, s. 6, and no doubt its continuance is authorized by the twenty-first section of the present act,

as a toll-gate "across the road thereby intended to be repaired."

The words, therefore, of the act are clear; and the construction should be according to those words, unless it can be shewn that such construction would be unreasonable, or inconsistent with the apparent intention of the framers of the act. It is said that it would be unreasonable, because toll is given as a compensation for the use of the road; and that the plaintiff had a right to use this part of the road before without paying toll, and gains nothing by the payment of the toll, because that toll could not be laid out in its improvement. But it is obvious that the first part of this objection applies equally to the parts of the road

repairable by parishes, townships, or individuals; and the latter proceeds\* on an assumption which, as far as we are aware, is not founded upon any express provision in the act, that the trustees would violate their duty in laying out any portion of their funds upon this part of the road. It is true that they are not likely to be called upon to do so, because the county being in general provided with an ample fund, fulfils its obligations to repair completely and effectually; but if the reverse should happen to be the case, and the public exigency require it, we do not know that the trustees might not expend money in repairing this portion of the road.

And supposing it were otherwise, and that no part of their funds could be so laid out, it cannot be considered as unreasonable that a person who uses any part of a road, all of which is virtually repaired by the public, though in different

modes, should pay something to the public in return.

It appears to us that there is nothing unreasonable in this construction; and there is certainly nothing inconsistent with the express or implied intention of the legislature, to be collected from other parts of the act. In our opinion no distinction can be made in respect of the obligation to pay toll, between the parts of the road which are repaired by parishes, townships, or individuals, and those which are repaired by the county; whatever the liabilities to repair may be, all are alike parts of the road.

The judgment of the Court below must therefore be affirmed.

Judgment affirmed.

#### \*STORR and Another v. BOWLES. Nov. 5.

Г\*112

The act for uniformity of process, 2 W. 4, c. 39, s. 1, does not prevent the signing of a pluries bill of Middlesex in a suit commenced before the act came into operation.

S. Hughes moved that the signer of Middlesex writs might be ordered by the Court to sign a pluries bill of Middlesex in the above cause, which that officer had declined to do, considering himself precluded from it by the act for uniformity of process, 2 W. 4, c. 39. In sect. 1, of the act (which came into operation the first day of this term), after reciting that the process for the commencement of personal actions in the superior Courts is inconvenient, it is enacted, "that the process in all such actions commenced in either of the said Courts," where it is not intended to hold to bail, shall be in the form after stated, namely, by writ of summons. But the writ of summons, by its form, applies only to the original commencement of an action, which in this case would have been too late to save the statute of limitations; the object of this application therefore was, that the plaintiff might have the benefit of the former process, which was sued out within the six years, and would be continued by the pluries bill of Middlesex.

PER CURIAM. We are of opinion that the clause applies only to actions commenced since the statute came into operation. It will probably be sufficient to

give this intimation, for the guidance of the officer.

#### \*STURCH v. CLARKE and Two Others. Nov. 5.

**F\*113** 

Plaintiff declared in case, that the defendants wrongfully and maliciously took his goods of the value of 700l. as a distress for 141l. alleged and pretended to be due, for a poor rate, whereby they levied an unreasonable and excessive distress for the said 141l.; and it was proved that the defendants, overseers, having a regular distress warrant for the rate, distrained cattle, &c. of the plaintiff, to the value of more than 600l.:

Held, that the plaintiff was not bound to demand a copy of the warrant, pursuant to 24 G. 2, c. 44, s. 6, before commencing his action, as the overseers had not acted in obedience to the warrant, and no action would have lain against the justices.

Held further, that it was not a question to be left to the jury on these facts, whether or

not the defendants acted maliciously.

And, on motion in arrest of judgment, held, that the declaration, though it did not expressly admit any poor rate to have been due (on which ground it was objected that the action ought to have been trespass), was sufficient, at least after verdict.

CASE for wrongfully and maliciously taking and distraining goods of the plaintiff, as a distress for 1411. for a poor rate alleged and pretended to have been duly assessed on him, and to be in arrear, such goods being of much greater value than 1411., to wit, 7001., whereby the defendants then and there took a great, unreasonable, and excessive distress for the said 1411., &c., and wrongfully and maliciously detained the same, to wit, for three days, and until the plaintiff was obliged to redeem the same by paying 1411. and costs; whereas one fourth part of the distress would have been sufficient to satisfy the said 1411. and charges, &c. Plea, the general issue. At the trial before Gaselee, J., at the Buckinghamshire Summer assizes, 1832, it appeared that the distress (consisting of sheep and rams, and a quantity of beans,) was taken under a warrant issued by two justices to the overseers of the parish of Haddenham, Bucks, reciting that the plaintiff had been assessed to the poor rate in the sum of 1411., and had refused payment, &c., and requiring them to make distress of the plaintiff's goods and chattels; and if the sum, with costs, &c., were not paid in five days, to sell the said goods and chattels, and retain the amount, rendering the overplus to the plaintiff. The defendants, two of \*whom were the overseers, and the third an auctioneer employed by them, distrained goods which were valued by a witness for the plaintiff at 642l. The plaintiff obtained a verdict for 10l.

Biggs Andrews now moved for a rule to shew cause why the judgment should not be arrested, or a new trial had, or (by leave reserved) why a nonsuit should not be entered. The objection in arrest of judgment was, that the declaration did not (according to the precedents in such cases) admit that something If nothing was due, the action should have been in trespass. The ground for a new trial was, that the learned Judge did not leave it to the jury whether or not there was malice. Express malice need not be proved, but some evidence of it ought to appear. [PARKE, J. There was no need to shew malice if it appeared that a more than reasonable distress was taken. (See Field v. Mitchell, 6 Esp. 71.)] As to entering a nonsuit, the parties here acted in obedience to a warrant of justices, and the plaintiff never demanded a perusal and copy of the warrant, according to 24 G. 2, c. 44, s. 6.(a) No action, therefore, could be maintained. The law is the same even if the warrant was illegal. Price v. Messenger, 2 B. & P. 158.

PARKE, J. The object of the statute in making a demand of the warrant necessary is, that the justice may be joined as a defendant. But this is an \*115] action for seizing goods more than reasonably sufficient for the \*probable exigency of the distress-warrant; an excess for which the justices could not possibly have been made joint defendants. In such a case the act does not apply. Bell v. Oakley, 2 M. & S. 259, decides this, and it is apparent from the terms of the act. Milton v. Green, 5 East, 238, shews the distinction between cases in which the magistrate may be joined as a wrong-doer, and those in which the warrant is regular, but the officer has exceeded the authority given by it. Price v. Messenger, 2 B. & P. 158, and all the modern cases on the subject, shew that where demand of a copy of the warrant is held necessary, it is upon the ground that the officer acted in obedience to it. As to the first objection,

<sup>(</sup>a) Overseers distraining for poor's rate are within the statute, Harper v. Carr, 7 T. R. 270.

the effect of the declaration is, that whether 141l. were due or not, more was taken by the defendants than was in fact due. I think it is sufficient, at least in this stage of the proceedings.

TAUNTON, J. I am of the same opinion. It seems to me that the term "excessive" implies that some poor rate was due. A copy of the warrant would have been of no use, where no proceeding could be taken against the justices.

Patteson, J. I am of the same opinion. In Branscomb v. Bridges, 1 B. & C. 145, where the plaintiff's goods were distrained for rent, the whole having been tendered, and there having been no subsequent demand and refusal, it was held that, if trespass would lie, still the plaintiff might waive the trespass and doclare in case \*for an excessive distress. At all events, I think the present declaration is good on motion in arrest of judgment, whatever might have been the result on special demurrer.

Rule refused.(a)

#### WRIGHT v. BRUISTER. Nov. 5.

A toll of one penny for every pig brought into a market is not necessarily unreasonable.

ASSUMPSIT for tolls. Plea, the general issue. At the trial before Lord TENTERDEN, C. J., at the last assizes for the county of Hertford, the following appeared to be the facts of the case. The plaintiff claimed a toll of a penny for every pig brought into Bishop Stortford Market, by virtue of a lease granted by the Bishop of London, the lord of that manor. In support of the right, he gave evidence that a toll of a penny per pig, for every pig brought into the market, had been taken in Bishop Stortford for a long series of years. It was objected, that such a toll was unreasonable. Lord Tenterden reserved the point, and told the jury to find for the plaintiff, if they thought from the evidence that the toll in question had been usually paid by persons frequenting the market. The jury having found for the plaintiff,

Law now moved, according to the leave reserved, to enter a verdict for the defendant. Whether toll be reasonable or not, is a question of law, 2 Inst. 222. Here the plaintiff relied not upon a grant of toll, but \*on a pre-criptive right to toll, to be inferred from the receipt of it for a long series of years. At the time of its presumed commencement (in the reign of Richard I.), one penny would have been a very unreasonable toll. In Heddey v. Welhouse, Moore, 474, it is said that, in the argument of the case, the justices held that the king might grant a toll with a new fair, if the toll were reasonable and not excessive; but one penny per beast they held unreasonable.

PARKE, J. I think there should be no rule in this case. The jury having found that this toll had been usually taken, it is the duty of the Court to support it, unless it be unreasonable; and the onus of shewing it to be unreasonable is on the defendant. He relies on the case of Heddey v. Welhouse, as reported in Moore, where it is said that the justices held, during the argument, that a penny per beast was an unreasonable toll. The case seems to be more correctly reported in Cro. Eliz. 558, and there it does not appear that the judges so decided. Popham, J., on the contrary, seems to have thought such a toll to be reasonable. He says, "The king may grant a fair, and that toll shall be paid, although it be a charge upon the subject; because his subjects, viz. the vendees, have benefit and ease by such fairs: but the king cannot appoint a burthensome toll; but it ought to be a petit sum, as a penny or twopence, which are the smallest coins, or of lesser; but not of any greater value to charge the

<sup>(</sup>a) As to demand of a copy of the warrant, see Kay v. Grover, 7 Bing. 312, and the cases there cited.

subject." We do not know when the toll in this case commenced; and we \*118] cannot say that a toll of a penny per pig, which \*has been taken for many years, is necessarily unreasonable: and I think the defendant has failed in shewing that it is so.

TAUNTON, J. I cannot say that a toll of one penny per pig is, in point of

law, unreasonable.

PATTESON, J. The jury having found that the toll has been paid for such a considerable period by persons frequenting the market, I think it is too much for us to say that, in point of law, it is unreasonable.

Rule refused.

### HUTCHINSON v. W. LOWNDES, T. HALL, J. RADFORD, and S. BROAD. Nov. 5.

The 5 G. 4, c. 18, s. 2, reciting that, by some acts, penalties or sums of money are to be recovered before a justice, and he is authorized to issue his warrant for levying the same by distress, but no further remedy is provided in case no sufficient goods can be found, enacts, that whenever it shall appear to such justice that the party has not sufficient goods whereon to levy, it shall be lawful for such justice to issue forth his warrant for committing such offender to the common gaol for any term not exceeding three calendar months, unless the sum adjudged to be paid, and costs, shall be sooner paid: provided always, that the amount of such costs shall be specified in such warrant of commitment:

Held, that the warrant of commitment must be in writing; and that the detention of the party without such written warrant cannot be justified for any longer time than is

necessary for making it out.

This was an action for assault and false imprisonment. Plea, not guilty. At the trial before Lord Lyndhurst, C. B., at the Chester Summer assizes 1832, the following facts appeared. The two first named defendants were magistrates for the borough of Congleton, the defendant Radford was a constable, and Broad a gaoler of the same borough. On the 23d of May, 1831, one J. Cotterill, a labourer, obtained from the defendant, Hall, a summons \*119] against the plaintiff, for wages on account\* of work done by Cotterill for the plaintiff in Congleton; and in the evening of that day Cotterill and the plaintiff attended the defendants Lowndes and Hall; and Cotterill swore that the sum of 1l. 4s. 6d. was due to him from the plaintiff, for wages which he had refused to pay. The defendant Lowndes then ordered the plaintiff, verbally, to pay Cotterill the 1l. 4s. 6d., and 2s. 6d. for the costs of summons, &c.; but the plaintiff refused. He was then asked if he had any goods on which the sums might be levied, and he said he had not. And he was thereupon (without a previous warrant of distress being issued) committed verbally to the common gaol of the borough of Congleton, for one calendar month, unless the wages and costs were sooner paid, and was at once taken to the prison by the defendants, Broad and Radford, where he remained from the evening of the 23d to the morning of the 25th of May; he then paid the wages and costs, and was discharged. On the 31st of May, 1831, a copy of the warrant of commitment was demanded from the two constables, and such copy was delivered to the plaintiff's attorney on the 4th of June. The summons for payment of the wages and costs, and the warrant of commitment of the plaintiff in default of payment, were both dated the 23d of May, 1831, (the day when the complaint was heard,) but were reduced into writing, and signed by the defendant Lowndes, after the 31st of May. The warrant of commitment having been merely verbal at the time when the plaintiff was sent to gaol, an objection was taken, that the commitment was illegal; and the learned Judge, being of that opinion, directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Cottingham now moved accordingly. The justices have \*not exceeded the authority given them by the acts of parliament relating to [\*120] this subject. By the 20 G. 2, c. 19, (extended so as to include cases of this description by 31 G. 2, c. 11, s. 3,) a justice or justices are empowered, upon complaint by any servant or workman there mentioned, on oath, to make an order for the payment of wages, and to enforce the same, if not complied with by the master within twenty-one days, by warrant of distress. By 4 G. 4. c. 34. s. 5, referring to the above statutes, such order is declared to be final. And by 5 G. 4, c. 18, s. 2, it is enacted, that in case it should appear, by the confession of the party, that he has not sufficient goods whereon a distress can be levied, "such justice or justices may issue forth his or their warrant for committing such offender to the common gaol, for any term not exceeding three months, unless the sum adjudged to be paid, and all costs and charges of the proceedings, shall be sooner paid: provided always, that the amount of such costs and expenses shall be specified in such warrant of commitment." All the requisites contained in the acts of parliament were strictly complied with. It is true, there was no commitment in writing made out at the time when the plaintiff was taken to prison; but it was not necessary that the warrant should be made out at that precise moment, the doing of which, in many cases, would be impossible. It is sufficient if a commitment be made out within a reasonable time, so as to afford the party complaining, after having called for the proceedings, the means of proving any irregularity therein. The objection is one strictissimi juris, and not to be favoured. In the case of a \*conviction, Abbott, C. J., in Basten v. Carew, 3 B. & C. 652, states it to be a [\*121] general rule and principle of law, "that where justices of the peace have an authority given to them by an act of parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do, in order to originate their jurisdiction, a conviction drawn up in due form and remaining in force, is a protection in any action brought against them for the act so done." Justices may draw up convictions, not only after the penalty is levied, but even after action brought, Massey v. Johnson, 12 East, 67, Gray v. Cookson, 16 East, 13: and may even alter such a conviction, after a certiorari has issued to remove it into this Court, Rex v. Barker, 1 East, 186, Rex v. Allen, 15 East, 343.

Parke, J. The statute 5 G. 4, c. 18, s. 2, enacts, that in the case there specified "it shall be lawful for the justices to issue a warrant for committing such offender." That must mean a warrant in writing, for the amount of costs and expenses is to be specified in the commitment. In Hawkins, P. C., book 2, c. 16, s. 13, it is said that a commitment must be in writing, under the hand and scal of the person by whom it is made, and expressing his office or authority, and the time and place at which it is made, &c. It is true it need not be immediately made out; the detention of the party during the time necessarily required to make it out would be justifiable, but it should be as soon as possible. Here several days elapsed. A commitment is in no respect like a conviction. That is only the \*entering on parchment the proceedings of the Court which have already taken place: it is like recording a judgment in a [\*122 superior court. But if a justice may imprison without a commitment in writing, it may as well be said that a sheriff may seize the goods of a defendant

before the fieri facias be made out.

TAUNTON, J. I am of the same opinion. The commitment is not mere matter of form. By not having the causes of his commitment duly stated, the party imprisoned is, for the time, deprived of the benefit of a writ of habeas corpus.

PATTESON, J. The second section of 5 G. 4, c. 18, authorizes judges to issue a warrant. That manifestly means a warrant in writing. I cannot think that the warrant may be made at any time. The statute does not say in express

terms that the warrant shall be in writing, but it does so in effect, for the amount of costs and expenses is to be specified in the commitment.

Rule refused.

#### WRAY, Assignee of CATTON, v. The Earl of EGREMONT. Nov. 6th.

By the insolvent act 7 G. 4, c. 57, s. 31, no distress for rent made and levied after the arrest of any person who shall petition the court for the relief of insolvent debtors for his discharge, upon the goods or effects of such person, shall be available for more than one year's rent. A distress taken before, but not sold till after the arrest of such insolvent debtor, is available for more than a year's rent.

Assumpsit by the plaintiff, as assignee of the estate and effects of one Catton, an insolvent debtor, for money had and received. Plea, non assumpsit. \*123] At the trial before Parke, J., at the last assizes for the \*county of York, it appeared that the insolvent had for some years been tenant of a farm to the defendant, at a rent of 115l., payable half yearly, and that, the rent for two years and a half being in arrear at Lady Day, 1831, the defendant on the 29th of August in that year distrained for the same. On the 30th of August. Catton was arrested by the plaintiff for a debt of 1501.; he was committed to York gaol, and signed a petition to the court for the relief of insolvent debtors, pursuant to the statute 7 G. 4, c. 57; and, on the 3d day of September, gave notice of his having done so to the defendant's agent, and required him not to sell for more than a year's rent. The goods were sold, under the distress, on the 5th of September, and produced 2001. 19s., and there remained in the defendant's hands, after deducting thereout the expenses of sale and one year's rent, the sum of 741., to recover which the present action was brought. learned Judge was of opinion that the defendant was entitled to retain the whole sum, inasmuch as the distress had been made before the arrest; and he nonsuited the plaintiff.

Campbell now moved to set aside the nonsuit. The 7 G. 4, c. 57, s. 31,(a) enacts, that no distress for rent made and levied upon the goods of an insolvent, after his arrest, shall be available for more than one year's rent. The words "made and levied" are in the corresponding \*clause of the bankrupt act, \*124] 6 G. 4, c. 16, s. 74. Here the distress was made before, but not levied till after, the arrest of the insolvent. Now a distress is made as soon as the bailiff enters on the premises, but it is not levied until a sale takes place, and the property in the goods remains in the tenant till sale, though as soon as they are seized they are a security to the landlord for his rent, and continue so until the sale. So, a person who had issued a fi. fa., under which the sheriff had seized, but not sold, when the debtor became bankrupt, has been held to be a creditor having security for his debt within the meaning of 6 G. 4, c. 16, s. 108, and not entitled to the proceeds on a subsequent sale by the sheriff. (Notley v. Buck, 8 B. & C. 160.) Now an execution gives an immediate right to sell; a distress gives a right to sell only at the end of five days. The goods, therefore, continued the property of the insolvent, when he made the assignment to the plaintiff; and the latter is entitled to recover.

PARKE, J. But for the Insolvent act, the landlord was entitled to sell the

<sup>(</sup>a) Sect. 31 enacts, "That no distress for rent made and levied after the arrest or other commencement of the imprisonment of any person who shall petition the said court for his discharge from such imprisonment, according to this act, upon the goods or effects of any such person, shall be available for more than one year's rent accrued prior to the execution of the conveyance and assignment by such person in pursuance of this act, but that the landlord or party to whom the rent shall be due, shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors by this act."

goods of the tenant for all the rent due. That right can only be cut down by the statute. It enacts, that no distress made and levied after the arrest shall be available for more than a year's rent. Here the distress was made before the arrest of the insolvent debtor. It is not a case, then, within the words of the act. The common law right, therefore, of the landlord, is not affected by it, and he was entitled to sell the goods distrained, to a sufficient amount to satisfy the whole rent.

TAUNTON, J. I think the opinion delivered by the learned Judge at the trial was correct. The statute says, that no distress made and levied after the arrest, &c., \*shall be available for more than a year's rent. To bring a case within that provision, the distress must be made after the arrest. Here [\*125 it was made before the arrest of the insolvent: and if it was once rightfully made, this is analogous to the case of an execution issued before an act of bankruptcy, on a judgment obtained in the ordinary way; and in such case, if the goods be seized before the act of bankruptcy, the execution may be completed by the sale of goods afterwards; though in the case of a judgment by default, confession or nil dicit, it would be otherwise, but that is by reason of an express provision by statute. So, here, the distress having been made before the arrest, the landlord was entitled to sell afterwards.

Patteson, J. The statute applies to cases where the distress is made and levied after arrest of the insolvent. Here it was made before. I doubt whether the word levied has, in this statute, any meaning different from the word made. The 21 Jac. 1, c. 19, s. 9, enacts, "that all creditors having security for their debts by judgment, &c., whereof there is no execution or extent served and executed upon any of the lands, &c., of the bankrupt, before he shall become bankrupt, shall not be relieved upon any such judgment, &c., for more than a rateable part of their debts, &c., with the other creditors of the bankrupt." Now it has been held that the words served and executed have the same meaning; and that an execution commenced by seizure before, but not finished till after, the act of bankruptcy is committed, was served and executed within the meaning of the statute.(a)

# \*DOE dem. MARGARET and JANE DALTON v. JONES and Another. Nov. 6.

A private dwelling-house was demised for forty years, by lease, containing a covenant to repair and keep in repair the premises, and all such buildings, improvements, and additions as should be made thereupon by the lessee during the term, with a proviso for re-entry in case of breach of covenant. The lessee changed the lower windows into shop windows, and stopped up a doorway, making a new one in a different place, in the internal partition of the house:

Held, that no forfeiture was incurred, the lessee's covenant being only against non-repair, and it being implied, by the terms of the lease, that additions and improvements were to be made.

EJECTMENT for premises at Swansea. At the trial before ALDERSON, J., at the last Summer assizes for Glamorganshire, it appeared that this action was grounded on a forfeiture, said to be incurred by breach of covenant in a lease. The premises, a dwelling-house, garden, &c., were demised to the defendant, Jones, for forty years from Lady Day, 1819, at a rent of 30*l.*, which the lessee covenanted to pay, and also to repair and keep repaired, &c. the messuage, garden, and premises, by the indenture of lease demised, "together with such buildings, improvements, and additions whatsoever, as at any time during the said term should be erected, set up, or made by him, the said Thomas Jones, his

<sup>(</sup>a) See Phillips v. Thomson, 3 Lev. 192, and Giles v. Grover, 6 Bingh. 140.

executors, &c. thereupon;" that it should be lawful for the lessor (under whom the lessors of the plaintiff claimed) to enter and view the premises; and that in case any defects or want of reparation of the said premises or any part thereof should be there found, the defendant, his executors, &c. should, on notice thereof in writing, cause the said premises to be forthwith well and substantially repaired or amended in all things. The only other covenants on the lessee's part were, not to assign without license, and to deliver up the premises at the expiration of the term, in good, substantial, and tenantable repair and condition. Proviso for immediate re-entry, if the rent should be unpaid for twenty-one days, or if the lessee should not observe and perform all his covenants. \*January, 1832, the house was private, and occupied as a lodging-house. The defendant, Jones, then took down part of the house-front, next the street, and converted the lower portion of the premises on that side into a shop, and exhibition room for pictures. The old windows, which were of the form usual in private houses of that description, and about four feet six inches wide, and five feet high, were taken away, and shop windows put in, measuring about eight feet in width by six in height. On the inside, a partition on the groundfloor was broken through, a new door made in it, and an old one stopped up. The work was done well, and with good materials. Notice in writing was given to the plaintiff, during these proceedings (but not attended to by him), to repair, and not to alter the premises. Alderson, J. was of opinion, that no breach of covenant was proved, and directed a nonsuit, but gave leave to move that a verdict might be entered for the plaintiff.

Whitcombe now moved accordingly. The alterations made by the defendant were a breach of the covenant to repair, Doe dem. Vickery v. Jackson, 2 Stark. N. P. 293. [PATTESON, J. In that case the door was made, not in an internal partition, but in a wall between two houses. PARKE, J. The covenant relied upon here, contemplates the making of improvements.] But not altering the whole character of the premises. The improvements must be considered with reference to the nature of that which is the subject-matter. It cannot have been the meaning of the parties, that a private house should be turned into a \*128] shop. [PARKE, J. If the defendant had sold goods on the \*premises, that would not have been a breach of any covenant; the only question therefore is, whether a forfeiture be incurred, under this lease, by merely enlarging the windows and opening a new door in the house.] The parties cannot have contemplated as an improvement, the doing of acts which the law considers waste. In Vin. Abr. Waste, D. pl. 19, it is said, that "If a lessee flings down a wall between a parlour and a chamber, by which he makes the parlour more large, it is waste, because it cannot be intended for the benefit of the lessor, nor is it in the power of the lessee to transpose the house." (a)

PARKE, J. That does not apply to a lease like this, which contemplates "improvements and additions," and only provides against non-repair, which is permissive waste. Under such a lease can it be said that a valuable house was to be kept in precisely the same condition for forty years? I think the nonsuit was right.

TAUNTON, J. I am of the same opinion. This case is the same as if there had been an express contract for the liberty to make improvements, which at common law would have been waste: here the contract is implied. There is no stipulation against waste, except by the covenant to repair: and I am clearly of opinion that enlarging the windows and opening a door, as here proved, did not amount to a breach of that covenant, the effect of which was merely that the tenant should supply the ordinary wear and tear of the premises.

<sup>(</sup>a) Cited from Keilwey, 37 b., where a former decision of this point, in the same case, is referred to, Yearb. 10 H. 7, f. 2; but a distinction is there taken as to a partition.

Vol. XXIV.—5

PATTESON, J. This was nothing more than the ordinary \*covenant to repair; I think no forfeiture was incurred under the lease.

Rule refused.

### BUTCHER and another against HARRISON and Another. Nov. 6.

The assignees of an insolvent debtor are "parties grieved," within the meaning of the act 13 Eliz. c. 5, against fraudulent conveyances, and may recover the penalty thereby given, from the insolvent and others, parties to such conveyance.

On a fraudulent slienation of lands, the offending parties forfeit (by sect. 3 of the act), a

On a fraudulent alienation of lands, the offending parties forfeit (by sect. 3 of the act), a year's value of the estate, but not the consideration money named in the conveyance.

DEBT by the plaintiffs as assignees, under the insolvent act, of the defendant Harrison's estate. The declaration stated that the defendant, Anna Louisa Harrison, was entitled to and interested in certain lands, &c., of the yearly value of, &c., and was indebted to the plaintiff, Butcher, in the sum of 301., and to other persons in divers other sums: nevertheless, that the defendants well knowing the premises, of their malice, fraud, &c., were parties to a fraudu-lent conveyance of the said lands, &c., from the said A. L. H. to Edward Harrold (the other defendant) by lease and release, for a pretended consideration of 5001. in the said conveyance stated to have been paid, to the intent to hinder and defraud A. L. H.'s creditors of their just debts; which conveyance the defendants, after the said A. L. H. became an insolvent debtor, did wittingly and willingly put in ure, avow, maintain, &c., to the intent before stated, contrary to the statute; whereby an action had accrued to the plaintiffs as such assignees, (being, as such assignees as aforesaid, the parties grieved by the said fraudulent conveyance,) to demand and have, for the king and for themselves as such assignees, &c., of and from the defendants, being the parties thereto, one year's value of the lands, amounting to, &c., "and also \*the said sum of 500l., being the said sum of money contained in the said conveyance as aforesaid." Plea, nil debent. At the trial before Bosanquet, J., at the Stafford Summer assizes 1832, evidence was given in support of the averments in the declaration, and the plaintiffs had a verdict for 150l. as the annual value of the land, and 500% as the sum contained in the conveyance.

Curwood now moved for a rule to shew cause why a nonsuit should not be entered, or the judgment arrested. This is a declaration on the statute 13 Eliz. c. 5,(a) for a penalty in respect of a fraudulent conveyance; and the plaintiffs say that they claim, being, as assignees of an insolvent, by whom the conveyance was made, "the parties grieved" thereby. But assignees of an insolvent who has made such a conveyance, are not "grieved" thereby, within the meaning of the act: they cannot, as representatives of one party to such conveyance, sue the other for penalties. And further, the forfeiture given by the act is,

<sup>(</sup>a) The act is stated in sect. 1, to be for the avoiding of fraudulent conveyances, &c., as well of lands as of goods, devised and contrived to delay, hinder, or defraud creditors and others of their lawful actions, debts, &c. It is therefore enacted in sect. 2, that all and every bargain and conveyance of lands, goods, and chattels, &c., and all and every bond made to or for any intent or purpose before declared, shall be, (only as against the persons thereby hindered, delayed, and defrauded,) utterly void. And sect. 3 enacts, that the parties to such fraudulent conveyance, bonds, &c., who at any time after, &c., shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same as true or made bona fide, "shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits, of or out of the same; and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond;" one moiety to the Queen, the other "to the party or parties grieved" by such fraudulent conveyance, bond, &c.

"one year's value of the said lands," &c., "and\* the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond;" that is, where land is fraudulently conveyed, one year's value of the land shall be forfeited; where goods, the value of the goods; and where a bond is given, the sum of money named in the bond: but here the plaintiffs have claimed in their declaration, and have recovered, both a year's value of the land and also the consideration money mentioned in the deed of lease and release. They were only entitled to 150%.

PER CURIAM.(a) We have no doubt that the assignees were parties grieved within the statute, being the persons who, but for the fraudulent conveyance, would have been entitled to seize the lands by due process of law. As to the other point, the act declares that the money contained in any such covinous and feigned bond shall be forfeited, but not the consideration named in any fraudulent conveyance. There will, therefore, be a rule to shew cause why the damages should not be reduced to 150%. But,

R. V. Richards, for the plaintiffs, consenting, the rule for such reduction was forthwith made Absolute.

# \*132] \*EDWARD LYTTON BULWER, Esquire, v. HORNE, COSTAR, and Others. Nov. 7.

In assumpsit on a special contract, and for money had and received, &c.. defendant pleaded the general issue, and to the common counts a tender; and he paid into Court, upon a rule in the common form, not applying in terms to any particular count: Held, that such payment could not be referred exclusively to the counts as to which a tender was pleaded, but that it applied to the whole declaration, and admitted the special contract.

Assumpsit against the defendants, carriers, for not conveying the plaintiff to Cheltenham according to an agreement which was specially stated. Money counts. Plea, the general issue, except as to 11., part of the sums claimed in the third and subsequent counts (the common counts), and as to that a tender. Issue thereon. At the trial before Parke, J., at the sittings at Westminster during last Hilary term, it appeared that the plaintiff had paid a deposit of 11. for a place in the mail to Cheltenham, the defendants engaging, as they said conditionally, but as the plaintiff alleged absolutely, to convey him: at the time appointed the mail was full, and the plaintiff proceeded in a chaise and brought this action to recover the expenses. The jury were of opinion that the contract was conditional only, but it appeared that the defendants, on pleading a tender, had, by mistake, obtained a rule of Court in the common form, for paying 11. into Court generally, and not upon the particular counts to which the tender was pleaded; and the money was so paid in. No entry of payment was made on the margin of the paper-book. It was contended for the plaintiff that this. general payment must be considered an admission of the special contract stated in the first two counts; and Parke, J., being of that opinion, directed a verdict for the plaintiff for 5l., giving leave to move that a nonsuit might be entered. A rule nisi having been obtained for that purpose,

\*F. Pollock and Hoggins now shewed cause. The learned Judge decided rightly, and when a mistake like this is made, the party must abide by the consequences. It has been so held in a case where money was erroneously paid into Court on a declaration upon a policy of insurance. (b)

(a) Parke, Taunton, and Patteson, Js.

<sup>(</sup>b) Alluding probably to Andrews v. Palsgrave, 9 East, 325. The defendant there ob-

Sir James Scarlett and Curwood contrà. The payment into Court upon this rule was not a conclusive admission, but capable of being explained. It is true that such payment under a rule of Court in an ordinary case where the general issue is pleaded, is a conclusive admission that something is due, and that an action lies on every count. But on a plea of tender that is not so. states that the party, at a certain time, tendered a part of the sum claimed in certain counts of the declaration, and has ever since been and still is ready to pay it, and that he now brings it into Court ready for the plaintiff if he will accept it. In support of this last averment the money is paid in, and the rule of Court is the evidence of the payment. If the 11. were not paid, the defendant must fail on that plea. The general inference, therefore, does not arise, as in other cases, that the payment applies equally to the whole declaration. The plaintiff cannot understand it so, and such a construction would be contradictory to the record. There is no case in which it has been adopted. To make the payment here applicable to \*the whole declaration, 1l. ought to have been paid in upon the counts to which the tender is pleaded, and another like sum on the remaining ones.

PARKE, J. I have always understood that payment of money on a rule of Court was deemed a conclusive admission. I yield to the objection with reluctance, but I think we must decide that money paid in as this was, is paid upon the special as well as the general counts, and has the effect of an admission on both. It is said this was a mistake; but the defendant might have availed himself of it if he had failed on the plea of tender; for, in that case, if the plaintiff had only proved a loss of 1l. incurred by him through the default complained of, the defendant would have had a verdict, and his costs subsequent to the bringing of the money into Court. As, then, he would have benefited by the

error in that case, he must suffer by it in the event which has occurred.

TAUNTON, J. concurred.

PATTESON, J. I am of the same opinion, though I come to the conclusion This is clearly a blunder, but the party making it must suffer the reluctantly. Rule discharged. consequence.

#### \*The KING v. LLOYD, BURNELL, and Others. Nov. 8. Г\*135

By the act 11 G. 4, & 1 W. 4, c. 70, s. 9, upon trials for felony or misdemeanor on a King's Bench record, judgment may be pronounced at the assizes, and shall have the effect of a judgment of the court above, unless that court in the first six days of term grant a rule nisi for a new trial, or for amending the judgment. A defendant on such record, having been sentenced at the assizes, cannot apply to the Court to amend the judgment by diminishing the punishment, upon ordinary affidavits in mitigation, or without showing some specific defect in the sentence, or some matter which could not have been adduced at the assizes.

An indictment against these parties for conspiracy, being removed by certiorari, was tried at the last York assizes, on the civil side, before Parke, J. The defendants, Lloyd and Burnell, were convicted and sentenced, at the same assizes, to eighteen months' imprisonment. John Williams (with whom was Alexander) now moved for a new trial, on the ground that the verdict was against evidence. The Court having refused a rule nisi, Williams then moved for a rule to shew cause why the sentence should not be amended, pursuant to the statute 11 G. 4, and 1 W. 4, c. 70, s. 9, (a), by diminishing the punish-

tained leave to amend his rule for paying money into Court, and to go to a new trial on payment of costs; but in the present case no application of that kind could be made, the damages being below 201.

(a) Which enacts, "That upon all trials for felonies or misdemeanors upon any record of the Court of King's Bench, judgment may be pronounced during the sittings or assizes,

ment. In support of this motion affidavits, sworn by the defendants respectively, were put in and read, vindicating their conduct on the merits of the case; stating hardships to which they had been \*subjected by the prosecution, and alleging ill-health, poverty, and the condition of their families, as grounds for a mitigation of the sentence.

DENMAN, C. J. These affidavits do not shew any thing which would have been likely to induce a judge as the assizes to pass a milder sentence. is important it should be understood, that defendants are not enabled by this statute to take the chance of a light sentence at the assizes, and afterwards, if

they think proper, come to this court to amend the judgment.

PARKE, J. I am of the same opinion. The affidavits are not such as would have induced me to pass a lighter judgment. To ground a motion of this kind, the party ought to point out some essential defect in the sentence, otherwise we should lose, and not gain, by the enactment of the late statute: for after sentence had been passed at the assizes, we should still be called upon, in a number of cases, to hear the report of the trial, affidavits, and speeches of counsel, in this court, as the practice was before the act.

TAUNTON, J. concurred.

PATTESON, J. It happens here that the affidavits contain nothing which could induce a mitigation of the sentence. But if this were otherwise, I think the parties would be bound to shew why they did not suggest that matter at the Rule refused.(a) assizes.

#### ~137] \*DOE dem. THOMPSON v. LEDIARD. Nov. 9.

By a local turnpike act certain tolls were made subject to the payment of moneys borrowed thereupon. The trustees granted mortgages of such tolls, in the form given by the turnpike act, 3 G. 4, c. 126, s. 81, conveying to each creditor such proportion of the tolls, and the toll-gates and the toll-houses, as the money advanced by him bore, or should bear to the whole sum due or to become due on that security. By a subsequent act for making a new branch road, the former act was continued, and certain tolls were granted in respect of the new branch, to be applied like the former, and to be subject to the debts incurred on the credit of the former tolls; and it was enacted, that all moneys due on such credit should be entitled to "a preference and priority of charge and payment" before any moneys advanced under this act, for making the new branch.

On ejectment for the tolls and toll-houses by the holder of a mortgage, (framed like the former ones,) for moneys lent to complete the branch road: Held, that the words "priority of charge," did not prevent this mortgagee from acquiring a legal estate in the subjects mortgaged, and that he might recover the toll-houses and gates in ejectment, (pursuant to 3 G. 4, c. 126, s. 49,) only remaining accountable to the other mortgagees for such portion of the tolls as they were entitled to in respect of their advances.

EJECTMENT for toll-houses and toll-gates. At the trial before Littledale, J., at the Gloucester Spring assizes, 1832, a verdict was found for the plaintiff with liberty to move to enter a nonsuit, and on such motion the Court directed a special case to be stated. The case was in substance as follows:-

by the Judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in Court, excepting only where the prosecution shall be by information filed by leave of the Court of King's Bench, or such cases of informations filed by his Majesty's Attorney General, wherein the Attorney General shall pray that the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of Nisi Prius, and afterwards entered upon the record in Court, and shall be of the same force and effect as a judgment of the Court, unless the Court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had or the judgment amended."

(a) As to the practice with respect to affidavits in mitigation at the assizes, see Rex v.

Cox, 4 Car. & P. 540.

By statute 6 G. 4, c. cxlvii., for improving part of the road from Cheltenham to Gloucester, &c., certain tolls thereby granted were made subject to the payment of moneys borrowed on the credit of former tolls, and to be borrowed on the tolls granted by that act, without preference among the creditors in respect of priority of mortgages, &c. By statute 9 G. 4, c. ix., for making a branch road to communicate with the former, it was declared that the former act (except such parts as were then varied, altered, or repealed,) should be as valid and effectual for carrying this act into execution as if re-enacted therein; and certain tolls were granted on the branch road, to be applied like the former tolls, and were, by section 10, made liable to all the debts incurred on the credit of those tolls. By section 11, it was nevertheless provided as follows:--" That all such \*moneys as are now due and owing on the credit of the said tolls, and also all such other moneys as may hereafter be borrowed or raised for the making or completing the several branches of road authorized to be made by virtue of the said last-mentioned act (of 6 G. 4), with the interest on all such moneys respectively, shall have and be entitled to preference and priority of charge and payment, to and before any sum or sums of money to be advanced by any person or persons on the credit of the tolls granted by the said last-mentioned act or by this act, for the purpose of making or completing the new branch of road hereby authorized to be made as aforesaid, and for erecting a toll-gate and toll-house thereon, and to and before the interest on such last-mentioned sum or sums." This arrangement had been consented to before the passing of the act, by the lessor of the plaintiff, a person materially interested in the making of the branch road, and who, at the same time, agreed to advance money for the undertaking.

The branch road was made, and a toll-house and toll-gate erected thereupon, pursuant to the last-mentioned act; and the trustees under the two acts, having borrowed 2700l. of the lessor of the plaintiff, granted him, for the purpose of securing the same, twenty-seven mortgages, in the form given by the general turnpike act, 3 G. 4, c. 126, s. 81, and in each of which the mortgagors (therein named as trustees for executing the two first-mentioned acts, the titles of which were recited), in consideration of 100l. advanced by him towards defraying the expense of the branch road, granted and assigned to him, his executors, &c., such proportion of the tolls arising and to arise on the said road, and the roads \*authorized by the said acts to be made, and the toll-gates and toll-houses thereon, as 100% did or should bear to the whole sum due or to become [\*139] due on the security of the said tolls; to have, hold, and take the said proportion, &c., for and during the residue of the term for which the said tolls were granted, unless the said sum of 100l., with 5 per cent. interest, were sooner paid. At the time of making these mortgages, there was and still is due to other creditors entitled to the preference given by 9 G. 4, c. ix., s. 11, the sum of 17,000l., secured to them respectively by mortgages on the tolls, toll-houses, and toll-gates, in the same form as those held by the lessor of the plaintiff. The yearly income of the tolls is not sufficient to yield anything to the lessor of the plaintiff, after paying for necessary repairs, and the interest due to prior creditors. The defendant was at the date of the demise, and still is, in possession of the toll-gates and toll-houses. This case was now argued by

Maule, for the lessor of the plaintiff. This action is well brought under section 49,(a) of the general turnpike act, 3 G. 4, c. 126, notwithstanding the pre-

<sup>(</sup>a) By which, "If any mortgagee of tolls, toll-gates, &c., shall seek to obtain possession of the toll-gates, &c., in order to pay himself the principal money and interest, or any part thereof due to him, it shall be competent for him, as lessor of the plaintiff, and upon his demise only, and without uniting in such demise the other mortgagees of the said tolls and premises, to obtain such possession; but such person who shall obtain the possession thereof, shall not apply the tolls which may consequently be received by him, to his own exclusive use and benefit, but to and for the use and benefit of all the mortgagees of the said premises. pari passu, and in proportion to the several sums which may be due to them as such mortgagees."

ference given by 9 G. 4, c. ix., s. 11, to debts incurred on the \*credit of \*140] the former tolls, or for completing the branches of road mentioned in 6 G. 4, c. cxlvii. It is contended on the other side, that there is no legal estate in the lessor of the plaintiff, because the other creditors have a "priority of charge and payment:" but although they have a right to be first paid, that does not divest him of the legal estate conveyed to him by trustees under an act of parliament; he has a right to recover what is now claimed, and the application he may be bound to make of the tolls, after having so recovered, cannot alter his right: that is merely matter of account between him and the prior creditors. The same view was taken of a mortgage of tolls and toll-houses, upon which there were other mortgages, in Doe dem. Banks v. Booth, 2 B. & P. 219. the eleventh section of 9 G. 4, c. ix., gives the creditors there mentioned a priority of "charge" and payment; but the word "charge" is satisfied by the application of the tolls, when recovered, to the payment of their mortgages first. If that were not so, the present lessor of the plaintiff could never recover, as long as a claim to any amount could be set up by one of the prior creditors. [PARKE, J. That is only the inconvenience to which any second mortgagee is liable.] The question is, whether the act places the lessor of the plaintiff in that

W. J. Alexander, contrà. If the lessor of the plaintiff could recover, a great hardship would be thrown upon the other mortgagees. The party who first lent his money on one of these mortgages acquired a legal estate in the whole tolls, \*141] toll-houses, &c., subject to two conditions: \*first, the divesting of the estate on payment of the debt; secondly, the abstraction of a part of the security in favour of persons subsequently advancing money on similar mort-gages. The value of the interest which such lender acquired, was to be calculated with reference to these events: but according to the claim now advanced on the other side, the act of 9 G. 4, c. ix., would entirely alter the result of this The eleventh section appears framed with a view to prevent any such assumption, for it retains to the creditors, who rank first, a priority of charge as well as of payment; the word charge evidently meaning the security they are to have, in addition to the right of being first paid: and the priority of charge is as important to them, as the preference given in respect of payment. Unless they had both, they would be subject to the very inconvenience suggested by Lord Eldon in Doe dem. Banks v. Booth, 2 B. & P. 224. "The money advanced by the mortgagee would be very ill secured, if his only remedy was either an application to the vindictive power of the Court of King's Bench, or a suit in Chancery, in which all the other mortgagees must be made parties." The lessor of the plaintiff here is only mortgagee of the equity of redemption, and has no legal estate. The very form of his mortgage shews this, for it refers to the act 9 G. 4, c. ix., and thereby incorporates the eleventh clause as if it were in terms set out. Section 49, of the general turnpike act must not be understood to govern the proceedings on all mortgages which may thereafter be made; a new act, containing a specific provision like that of 9 G. 4, c. ix. s. 11, \*142] may control its operation. \*And in a mortgage made since that statute, whatever be its form, the demise (as was said in Doe dem. Banks v. Booth, 2 B. & P. 223, can only operate so as to effectuate the act. The word "charge," in this act, cannot be nullified or passed over, and must be taken to imply "legal estate."

Maule, in reply. A mere conveyance of the tolls and toll-gates, without more, would clearly have entitled the lessor of the plaintiff to the legal estate. Is that right altered because the act 9 G. 4, c. ix. adds some direction as to the purpose to which the tolls are to be applied when recovered? [PATTESON, J. At the time when the act passed, there was a legal estate outstanding in the other parties. PARKE, J. The legal estate was in them, subject to be opened by other mortgages granted to new creditors: the question is, whether, under the present act, it is so opened to the lessor of the plaintiff?] The mortgage to

him is of all the tolls arising, and the toll-gates and houses erected, under both the local acts: the effect of the latter act was to throw the whole together, and make all the mortgage creditors mortgagees alike of the old and new tolls.

make all the mortgage creditors mortgagees alike of the old and new tolls.

Denman, C. J. It appears to me very clearly, that in this case the legal estate is in the lessor of the plaintiff. Under the general turnpike act, 3 G. 4, c. 126, s. 81, and the act of 6 G. 4, c. cxlvii., the trustees were undoubtedly enabled to convey to him such proportion of the tolls, toll-gates and toll-houses, as the sum advanced by him bore to the whole amount due or to become due on that security. But, it is said, the subsequent act, 9 G. 4, c. ix., \*prevented the legal estate from passing to him under such mortgage, by the [\*143] preference and priority given in section 11, to the other mortgagees. It is indeed clear, that his claim as mortgagee of the tolls, &c., in the proportion specified, is subject to the priority of payment, given by the latter act to the other mortgagees: but I do not apprehend that that divests him of the legal estate. If the legislature intended to vest the legal estate in the other creditors and not in him, that intention has not been accomplished. The clause gives them a priority of charge, and that is satisfied if the lessor of the plaintiff recovers as mortgagee, for the purpose of taking the tolls to the extent of that proportion which is due to him, but subject to account with the other creditors in respect of their previous claims. This accords with the view which was taken of a similar case in Doe dem. Banks v. Booth, 2 B. & P. 219. Whatever inconvenience may be incurred if the other parties should be compelled to seek relief in equity, I cannot see any thing in the clause referred to, to prevent the legal estate in this property from vesting in the lessor of the plaintiff.

Parke, J. When the act 9 G. 4, c. ix. passed, 17,000l. had already been advanced on mortgage of the tolls under the act 6 G. 4, c. cxlvii., and the mortgagees had a legal estate in them, liable only to be divested on payment of what they had advanced, or, to a certain extent, by the advance of new sums on similar mortgage, for the purposes of the then existing act. Perhaps on the completion of the road to which that act related, their legal estate was indefeasible. Then the question is, \*what interest the present lessor of the plaintiff took under the tenth and eleventh sections of 9 G. 4, c. ix.? I have considerable doubt of his right to recover. The question turns on the construction of the words "preference and priority of charge and payment." Perhaps the framer of the clause did not himself know what was the effect of these words. He probably meant that the rights of those who had advanced money for the purposes of the former act should not be affected by the power given to charge the tolls under this: but they certainly are affected by another mortgage being thrust upon them in the manner now contended for. But my mind is not fully made up on the subject, and the doubt I entertain will be of no con-

sequence, as it is not felt by the rest of the Court.

Taunton, J. I take the same view of the case with my Lord Chief Justice, and agree in the reasons he has given. I think that by the last act of parliament the tolls were all consolidated into one common fund, and those of the new as well as of the old road made answerable both for the former debts and for those to be afterwards incurred. So far the creditors under the preceding act derive a benefit from the new provision. In Doe dem. Banks v. Booth, 2 B. & P. 219, the lessor of the plaintiff was mortgagee of a proportion of the tolls, and of the toll-gates and toll-houses; and Lord Eldon distinguished that case from Fairtitle dem. Myther v. Gilbert, 2 T. R. 169, which had been cited, by observing that in this latter case the whole, and not a proportion only, of the tolls was mortgaged, and a recovery of the toll-gates by the mortgagee would in effect have given him a preference over all the other creditors; but where, as in \*the case then before the Court, the party was mortgagee only of the proportion which his debt bore to all the sums advanced, no priority was gained, since the lessor of the plaintiff would become the bailiff of the other creditors as to all except his own proportion. That applies to the present case,

and agrees with the judgment which my Lord has now delivered. I think, therefore, that the claim of the lessor of the plaintiff to the legal estate in these tolls and premises is not contrary to the preference given by 9 G. 4, c. ix. to the other creditors; and that estate being duly vested in him by mortgage, which the trustees were authorized to grant, there is nothing to prevent him from seek-

ing his legal remedy by ejectment.

Patteson, J. Before the act 9 G. 4 c. ix. the whole legal estate in these tolls, &c., was outstanding in the mortgagees under the former act. The estate vested in each only bore that proportion to the whole which the money advanced by him bore to the entire sum due or to become due from the trustees; but the whole of the amount for which the mortgages were held, covered the whole legal estate. By the general highway act, and by the form of the mortgages granted under it, it was open to any person subsequently making advances, to come in for a portion of that legal estate; and the question here is, whether the lessor of the plaintiff was prevented from doing so by the eleventh section of 9 G. 4. c. ix. I am of opinion that the word "charge," in that section, relates only to the application of the tolls, and not to the legal estate in them and the premises here claimed, and therefore that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

\*146] \*MELLER and others, assignees of Sir HARRY JAMES GOOD-RICKE, Bart., Sheriff of Yorkshire, v. PALFREYMAN and another. Nov. 9.

A bail bond given by a party attached for contempt in not putting in an answer in Chancery, is not assignable under the statute 4 Ann, c. 16, s. 20.

The declaration stated that the plaintiffs on, &c., sued out of the Court of our lord the king of his Chancery, a writ of attachment, directed to the sheriff of Yorkshire, commanding him to attach certain parties, to answer our said lord the king, as well touching a certain alleged contempt of our said lord the king, as also such other matters as should be laid to their charge, and further to perform and abide, &c., which writ was indorsed "By the Court, for not answering at the suit of W. L. Meller and others, plaintiffs;" that the writ was delivered to the sheriff to be executed; that he took the parties and had them in custody by virtue thereof; that the defendants became bail for the said parties, and entered into a bail-bond to the sheriff in the penalty of 40% conditioned for the appearance of the said parties in His Majesty's Court of Chancery on the 13th day of August then next (the return day of the writ), wheresoever the said Court should then be, to answer, &c.; that the parties did not appear, whereby the bond was forfeited; and the penalty being unpaid, the sheriff, at the request and costs of the plaintiffs in this action (they being the plaintiffs in the Chancery suit), assigned the bond, by indorsement thereon, to the plaintiffs, according to the form of the statute in such case made and provided: by means whereof, and by force of the statute, &c., an action had accrued to the plaintiffs as assignees of the said sheriff, &c.

\*147] accrued to the plaintins as assignees of the same of demurrer and joinder. The demurrer was now argued by Crowder, for the defendants. This bail-bond was not assignable. At common law it could not have been assigned, being a chose in action; nor could it under the statute 4 Ann, c. 16, s. 20, which provides that if any person be arrested "by any writ, bill, or process issuing out of any of her Majesty's Courts of Record at Westminster, at the suit of any common person," and the sheriff take bail, he shall, on request, assign the bail-bond by indorsement to the plaintiff, who may sue upon the same if forfeited. For that act evidently applies only to cases within the statute 23 Hen. 6, c. 9, which requires the

sheriff to admit to bail persons arrested or in custody "by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass." The words of these statutes cannot be extended to a person taken into custody

to answer the king for a contempt. The Court here called upon

It was held by the Court of Common Pleas in White for the plaintiffs. Morris v. Hayward, 6 Taunt. 569, (2 Marsh. 280; see Posterne v. Hanson, 2 Wms. Saund. 59, note c, 5th ed.) where the point was fully discussed, that the sheriff may take a bail-bond on an attachment out of Chancery, and may recover in an action of debt against the obligors. It seems to have been admitted in Studd v. Acton, 1 H. B. 468, that such bond is legal, though the Court thought the sheriff was not compellable to take it, for that the statute 23 Hen. 6, c. 9, did not extend to bail-bonds on process out of Chancery. words of the statute of \*Anne are more extensive, and require that wherever any person has been arrested by any writ, bill, or process out [\*148] of the Courts at Westminster, and bail has been taken, the sheriff shall assign the bail-bond at the request of the plaintiff in such action or suit; evidently referring to suits in Chancery as distinguished from actions at law; and the object being to prevent the inconvenience that might arise if actions on such bail-bonds could only be brought in the name of the sheriff, who would have it in his power to release them. In Beddall v. Page, 2 Sim. 224, the defendant, being taken on an attachment for not answering, gave a bail-bond, which was assigned, and no answer being put in, the plaintiff brought actions against him and his sureties on the bond, at the same time proceeding to enforce an answer by the process of the Court. An injunction was moved for, and the Vice-Chancellor said that the giving of a bail-bond was useless if no proceedings could be taken on it; and he dismissed the motion with costs. [PARKE, J. What was the nature of that assignment? In the Exchequer the practice is to take only an equitable assignment of the bail-bond on an attachment; the sheriff, on being indemnified, gives up the bond to the plaintiff's attorney, with permission to sue in his name.] (See Dax's Exchequer Practice, 113.) DENMAN, C. J. It appears to me that this security is not assignable, unless

the statute of Anne has made it so, and that the statute has not that effect. The practice which has hitherto prevailed shews what the opinion has been as to the law. It may be that bonds of this description have been equitably assigned, with permission to put them in force in the name of the sheriff: \*and a court of equity would take care, in such a case, that no injustice was done. But the words of the statute, authorising a legal assignment, apply to bail-bonds given upon process at common law. It is true the expression "such action or suit" is used, but there is no ground for confining the term suit to proceedings in Chancery. I therefore think the judgment must

be for the defendant.

PARKE, J. I am of the same opinion. It has never yet been supposed that

the statute of Anne applied to proceedings in equity.

TAUNTON, J. The words in the statute of Anne are, "any writ, bill or process, issuing at the suit of any common person;" and on bail being taken from the person against whom such writ, bill or process, is taken out, the sheriff, at the request of the plaintiff in such action or suit, shall assign the bail-bond. But, in this case, the process under which the bail-bond is taken, was not properly at the suit of any common person, being his Majesty's writ of attachment for a contempt of court. It is also to be observed, that an action on a bail-bond is to be brought in the same court where the suit was commenced. (a) And the practice affords strong evidence of the construction which has been put on the statute of Anne: for in the course of more than 125 years, no instance is found of an action by the assignee of such a bail-bond as this.

Patteson, J. concurred. Judgment for the defendant.

<sup>(</sup>a) See the authorities in note 3, to Posterne v. Hanson, 2 Wms. Saund. 61.

\*The KING v. The Inhabitants of LYDLINCH. Nov. 10.

A surrender of an old lease by a grandfather and great uncle, and the taking of a new lease by the grandson and great nephew, at a nominal fine to the lord of a manor, is not a purchase of an estate within the statute 9 G. 1, c. 7, s. 5.

On appeal against an order of two justices, whereby John Tucker, his wife and children, were removed from the parish of Hilton, in the county of Dorset, to the parish of Lydlinch, in the same county, the sessions confirmed the order,

subject to the opinion of this Court on the following case:-

By lease dated the 22d of December, 1754, G. Pitt, lord of the manor of Hilton, demised a dwelling-house and garden, situate within the manor, to John Tucker of Lydlinch (who was the grandfather of the pauper), in consideration of a surrender made by Arthur Corfe and E. his wife, of the said dwelling-house and garden, which they claimed to hold for their lives successively (the lease having, as was recited, been consumed in a then recent fire, together with the dwelling-house, which Tucker was re-building), and also in consideration of the surrender of another lease of the same premises, granted to William Corfe, determinable on the decease of the said John Tucker, and in consideration of the re-building of the premises by Tucker, and of 1s. paid by him to Pitt: Habendum to Tucker, his executors, &c., from the day of the date thereof for the term of fourscore and nineteen years, if Tucker and his wife, and Meliar their daughter, or either of them should so long live, at the yearly rent of 1s. lessee covenanted to pay the rent, to attend the lord's court and do suit and service there, to finish the re-building of the dwelling-house within two years, and to repair during the term.

\*John Tucker (the grandfather of the pauper) was the grandson of William Corfe, and the great nephew of Arthur Corfe, the surrenderors of the leases, who were brothers. It did not appear that any pecuniary consideration passed from Tucker to either of them. He continued to inhabit the premises until his death in 1818. It was found by the sessions that the premises were not of the value of 30l. when Tucker rebuilt the house. The question for the opinion of this Court was, whether John Tucker, the grandfather of the pauper, gained a settlement by estate in the parish of Hilton. If so,

the pauper was derivately settled therein.

Barstow and Watson in support of the order of session. This is a purchase of an estate within the meaning of the statute 9 G. 1, c. 7, s. 5, and must be governed by Rex v. Warblinton, 1 T. R. 241, and Rex v. Hornchurch, 2 B. & A. 189. In Rex v. Warblinton, there was a grant of the waste by the lord of a manor for a nominal fine of 1s.; heriot 1s., and quit-rent 1s.; and it was held that the purchase was for a pecuniary consideration, though small, and that it was within the statute. It may be said, that this was a mere family arrangement; and that it is to be inferred from the relationship of the parties, that the conveyance was not for a pecuniary consideration, but induced by natural love and affection, and therefore that the case must be governed by the cases of Rex v. Ufton, 3 T. R. 251, and Rex v. Hatfield Broadoak, 3 B. & Ad. 566; but in those cases the relationship was that of parent and child. Here it may be pre\*152] sumed from the covenant to \*rebuild and keep in repair that pecuniary value was the consideration.

Jeremy, Bond and Lucena, contrà. This is not a case within the statute, which is confined to purchases for pecuniary consideration, under 30l. Rex v. Marwood, Burr. S. C. 386, Rex v. Charlton, Cald. 416, Rex v. Ufton, 3 T. R. 251. Rex v. Tarrant Launceston, Cald. 209, is in point. There by an arrangement among the members of the family, a lease held of the lady of the manor was surrendered, and a new lease taken, the new lease having been granted in consideration of the surrender of the old and a fine of 30s. Lord Mansfield

there said, "this was not a purchase within the meaning of the 9 G. 1, c. 7, s. 5, but only a surrender of the old lease, and getting a new one on paying the fine." In Rex v. Warblinton, 1 T. R. 241, and Rex v. Hornchurch, 2 B. & A. 189, it did not appear that there was any other than a pecuniary consideration.

DENMAN, C. J. Rex v. Tarrant Launceston, Cald. 209, is decisive to shew

that this is not a purchase within the 9 G. 1, c. 7, s. 5.

PARKE, J. The statute applies to purchases for money consideration only. Here it may be inferred, from the relationship of the parties, that natural love and affection formed an ingredient in the consideration. The lord was only the medium of the arrangement in the family.

\*TAUNTON, J. In order to bring a case within the statute, the consideration must consist wholly of money. Here there were several con-

siderations, and it does not even appear that there was a pecuniary one.

Patteson, J., concurred. Order of sessions quashed.

#### The KING v. The Inhabitants of CLIXBY. Nov. 10.

In 1825 three occupiers of land in a parish, ordered A. to go and be sworn in pinder, and he was sworn in before a justice of the peace, and served as pinder during that year. He was again sworn in in 1826, and served several years, residing in the parish all the time. Before 1825 there was no such officer as a pinder remembered in the parish: Held, that he gained no settlement by serving the office.

On appeal against an order of two justices, whereby W. Clayton, his wife and family, were removed from the parish of Caistor to the parish of Clixby, both in the parts of Lindsey and county of Lincoln, the sessions confirmed the order, subject to the opinion of this Court on the following case:—Clixby belongs, with the exception of about twenty acres of land, to one proprietor, Mr. Harman. There are nine occupiers of land in Clixby, including Harman, who retains some portion of his estate in his own hands; he holds no courts. The pauper (the only witness examined) stated that he had known the place thirtythree years, and had never known or heard of any pinder there before 1825. In 1825, Harman and two other occupiers of land in Clixby, of whom Mr. Lawrence, constable of Clixby, was one, ordered the pauper to go and be sworn in It did not appear in evidence that there was any public meeting of the parish, or any other meeting to appoint him. The pauper went with Lawrence to a justice of peace, and was sworn in. He impounded cattle in Clixby in that year, and continued to do so \*for several years, till he was removed. In 1826, he was again sworn in before two justices of the peace. During all this time he resided in Clixby. The sessions found that this was a public annual office. The question for the opinion of this Court was, whether, by such service and swearing in, the pauper gained a settlement in Clixby.

Fynes Clinton and Hildyard in support of the order of sessions. The sessions have found the office of pinder to be a public annual office, and that finding is conclusive, Rex v. Ilminster, 1 East, 83. Rex v. Corfe Mullen, 1 B. & Ad. 211, shews that to confer a settlement, it is sufficient if the party execute a public annual office, though he be not legally placed therein. Assuming that the pauper was not duly appointed to the office, he still gained a settlement. [PARKE, J. In Rex v. Stogursey, 1 B. & Ad. 795, the mere service of the office of parish clerk, to which the party was not colourably appointed, was held not to be sufficient.] There the party was a mere intruder into it. Here the sessions must have inferred from the direction given to the pauper to go and be sworn in, that he was appointed with the consent of the parish. And he was sworn in two successive years; not, indeed, by the court leet, but by a justice, upon whom that duty would devolve in default of a court leet being held.

Whitehurst, contrà. The office of pinder is in no instance a public annual office. There is no authority for saying that there was ever a legal office of pinder in parishes, though there is in manors. The duty of the pinder is to \*155] the lord of the manor, not of the parishioners. It is an employment rather than an office. To constitute an office there must be some public duties to perform, for the breach of which an indictment will lie. The ale-taster and heg-ringer are appointed at the court leet. The duty of the former was to inspect weights and measures, and to warn the jury to serve at the court leet. The hog-ringer is an office of public benefit to the parishioners, with certain stated fees in respect of such service. [Parke, J. It is to prevent a public nuisance.] (See Rex v. Whittlesea, 4 T. R. 807.) Here, too, the pauper was appointed by three individuals only, and not by any competent authority, and that appears on the face of the case.

Denman, C. J. The court of quarter sessions have found this to be a public annual office, subject to the opinion of this Court on the evidence. We think their finding is not warranted by the facts which they have stated. The office of pinder in this parish is not proved to be ancient, for it is not known that there was any such officer before 1825. Nor was the pauper appointed by any authority known to the law. The hog-ringer is an annual officer of great public utility, appointed at the court leet. It is not necessary to decide generally whether a pinder, properly appointed, be a public annual officer within the act; it is sufficient to say, that under the circumstances of this case, the office was

not in this parish a public annual office.

PARKE, TAUNTON, and PATTESON, Js. concurred.

Order of sessions quashed.

### \*156] \*The KING v. The Inhabitants of CONINGSBY. Nov. 10.

A female pauper hired for a year, was, during the year, apprehended and fined for having committed a malicious trespass, contrary to the statute 7 & 8 G. 4, c. 30. She went to prison instead of paying the fine, by the advice of her mistress, who told her to return when her time was out; and after her imprisonment, which lasted a month, she did return to her service, and continued in it till the end of the year, and was paid her whole year's wages: Held, that there was a dispensation with the service during the month of her imprisonment, and that she gained a settlement.

On appeal against an order of two justices, whereby E. Flintham, single woman, was removed from the parish of Coningsby, in the parts of Lindsey, in the county of Lincoln, to the parish of Stickney in the said parts and county; the sessions discharged the order, subject to the opinion of this Court on the

following case :---

A few days before May-day 1829, the pauper was hired by Mr. Gosling, from the same May-day, at the wages of 3l. 10s., and went into his service, in the parish of Stickney, on that day. About harvest time, in the same year, she was apprehended upon the complaint of W. Foster, her master's neighbour, on a charge of having wilfully and maliciously damaged property belonging to him. The magistrates before whom the complaint was heard, fined her, and she, not paying the fine, was committed to prison for one month. It was by the advice of the mistress (who was present at the hearing of the complaint) that the pauper went to prison instead of paying the fine. When she was taken to prison, her mistress told her she was to return when her time was out, and she also sent her provisions occasionally during her imprisonment. She was discharged at the end of the month, returned immediately to her master's, and went about her work as usual. She staid in the service till May-day 1830, and

on going away received her whole wages. The question \*for the opinion of this Court was, whether, under these circumstances, she gained a set-

tlement in the parish of Stickney.

Hildward in support of the order of sessions. There was not, in this case, a service for a year, or any dispensation with service during the period of the im-There are two classes of cases applicable to this subject; one, where the servant has been committed to prison for bastardy, as in Rex v. Westmeon, Cald. 129, and Rex v. North Cray, Cald. 495, and the other where he has been committed for misconduct in his service, as in Rex v. Hallow, 2 B. & C. 739, and Rex v. Barton-upon-Irwell, 2 M. & S. 329. In the first class of cases, it has been held that no settlement was gained, by reason of the interruption of service during the time the party was in custody. In Rex v. Hallow and Rex v. Barton-upon-Irwell, which will be relied upon by the other side, the servants were committed at the instance of the master, and the contract of service was held to continue; but those cases are distinguishable from this, because there the imprisonment was for the purpose of enforcing the contract of service. There is no case which establishes that there may be a constructive service under circumstances where actual service is impossible. The insertion of the provision in the militia acts, that service in the militia shall not be deemed absence from service, shows that an absence by legal compulsion would otherwise prevent the time lost by such absence from being reckoned for the purpose of settlement. It may be said here that the going to \*prison was voluntary; but the fallacy [\*158] of that argument consists in representing the alternative (of not going) as clogged with no condition, whereas the condition was "to pay a fine," might be less eligible; if so, it was the duty of the mistress to dissuade the pauper from paying it; and it is to be presumed the sessions have thought so by their deciding as they have. Besides, the imprisonment was not voluntary; for suppose the justices to have acted without authority, and the pauper to have brought an action, the defendant could not have alleged that the pauper had imprisoned herself, because she might have paid the fine. But assuming it to be voluntary, there cannot have been a dispensation, because the master could not dispense with services which he could not command. It is of the essence of constructive service that actual service shall have been possible. In Rex v. St. Peters, 8 T. R. 478, Lord Kenyon stated the distinction to be, "that where the servant continued liable to serve during the whole year, though the master dispensed with the actual service for any part of it, the servant gained a settlement, because the relation of master and servant subsisted all the year, and the master might resume the right to the service if he chose; but that where the parties absolutely put an end to the contract before the expiration of the year, the servant did not gain a settlement." Here the master could not during the term of imprisonment command the services of the pauper. It is like the case of the militia-man, who, not being sui juris, cannot contract to serve for a year, Rex v. Taunton St. James, 9 B. & C. 831.

\*Fynes Clinton, contrà. This is an ordinary case of dispensation with service. In Rex v. Westmeon, Cald. 129, and Rex v. North Cray, Cald. 495, the servants, after the imprisonment, never returned to their masters. Here the pauper did return, and received her whole year's wages. In Rex v. Kenilworth, 2 T. R. 600, Buller, J. says "the circumstance of the pauper having been apprehended on a charge of bastardy, I lay out of the question, for it was competent to the master to receive him back again after he was discharged out of custody, if he pleased." Here the absence from the service was permissive, for her mistress advised the pauper to go to prison instead of paying the fine, and told her when her time was out to return to her service. In Rex v. Barton-upon-Irwell, 2 M. & S. 329, the pauper was, on the complaint of his master, committed to prison for a month. At the end of nine days, he was discharged at his master's instance, returned immediately to his service, and served seven months over his year; and though he received no wages for the time he

was in custody, it was held that there was no dissolution of the contract, and that the pauper gained a settlement. As to the impossibility of service during the absence, that argument might be used in many cases where, however, there is no doubt of the dispensation. The clause in the militia acts was intended to prevent a dissolution of the contract of service; but, independently of such clause, if a master received a pauper into his service after an absence occasioned by his being a militia-man, that would have been a dispensation. [PARKE, J. The clause prevents the master from refusing to take the servant back, as he otherwise might.]

\*Denman, C. J. This head of settlement is made to depend upon two \*160] things: first, there must be a hiring for a year; and, secondly, an abiding and continuance in the same service for a whole year. strictly construed, would perhaps import actual service. It has been decided, however, that there may be a dispensation by the master with the performance of the servant's duties for a time, and that during such period there is a constructive service, sufficient to satisfy the words of the statute. The consent of the master to dispense with such service may be either express or implied: and it is implied, where the servant, having absented himself for a time, has returned to the service, and been received by the master, and had his full wages paid. I think, in this case, the absence of the pauper during the imprisonment must be taken to have been with the consent of the mistress. It may be collected from the statement that the pauper could have paid the fine, and that the mistress interfered to prevent her. After the term of imprisonment expired, she received her back, and paid her her full wages. It has been ingeniously argued, that the absence here was not permissive, because the law compelled the pauper to be imprisoned unless she paid a fine. But she had her election, either to pay the fine or go to prison; and she did the latter by the advice of her mistress, who supplied her with provisions during her confinement. It seems to me, therefore, that the service was dispensed with by the mistress. Rex v. Westmeon, Cald. 129, and Rex v. North Cray, Cald. 495, are distinguishable, for there the masters did not consent to the absence, and showed their dissent in the most effectual way by deducting from the wages.

\*161] \*Parke, J. To constitute a settlement by hiring and service, there must be a hiring for a year and a service for a year, but the service need not be actual; of necessity it may be constructive, because no servant serves his master every hour of every day; and a dispensation from service may be implied. Even in the case of a wilful absence, it has been held that if a master receive back his servant afterwards, and pay him his wages, that is a dispensation with the service during the period of absence. In Rex v. North Cray, and Rex v. Westmeon, the absence of the servant was wilful, for the imprisonment was occasent, because the pauper never returned to the service after the imprisonment. Absence during imprisonment, like absence from other causes, may be purged by consent. It has been said that the master during the term of imprisonment could not recall the pauper to his service. But, as Mr. Clinton has observed, the same may be said where the absence is occasioned by illness, proceeding from the misconduct of the servant; or where the servant during such absence is at a

great distance from the master.

TAUNTON, J. I am of the same opinion. Rex v. North Cray and Rex v. Westmean are distinguishable, because it did not appear that the master again received the servant into his service; but I cannot help thinking the good sense to be in what is stated by Lord Mansfield and Buller, J., in Rex v. North Cray. The pauper, eight or nine days before the expiration of the service, had been committed for not giving security to indemnify the parish, as the father of a \*1621 child likely to be born a \*bastard, and Lord Mansfield says, "The single question is, whether the pauper served his year; in fact he did not; did he then constructively? There is not a pretence that the master con-

sented to dispense with the time he did not serve; his absence and imprisonment were the consequences of his own criminality. His imprisonment was not illegal." Those observations apply to the present case; and I think this doctrine of dispensation has been carried too far. The current of authorities, however, compels me to say there may be a constructive service even during the time for which the servant is committed in execution for misconduct; and I yield to authorities, not to reason.

PATTESON, J. I think that we are bound by the authorities to hold that there was a dispensation with the service during the time the pauper was imprisoned.

Order of sessions quashed.

#### The KING v. JOHN HEARLE TREMAYNE, Esquire.

An owner of the soil, who has granted to adventurers liberty to dig, mine, work and search for manganese for twenty-one years, and the same to take and convert to their own use, and to make adits, shafts, &c., rendering to him 1l. 15s. for every ton weight of manganese raised during the term, is not an occupier of any portion of the soil, and consequently not rateable to the relief of the poor.

In a rate made for the relief of the poor of the parish of Maristow, in the county of Devon, on the 15th of September, 1831, J. H. Tremayne, Esq., was assessed "for manganese dues," in the sum of 7l. 10s. He appealed against the rate, on the ground that he was not the occupier of any manganese dues in the parish; and also that he was not liable by law to be assessed in the said rate, \*for or in respect of any manganese dues. The sessions confirmed the rate, subject to the opinion of this Court on the following case:—

H. H. Tremayne, clerk, the deceased father of the said J. H. Tremayne, being tenant for life, with a power of granting leases and settlements of the lands hereinafter mentioned, did, by indenture, bearing date the 23d of October, 1815, and made between the said H. H. Tremayne of the one part, and John Williams, Esquire, of the other part, grant unto Williams, his partners, fellowadventurers, &c., liberty, license, and authority to dig, work, mine, and search for manganese, in and throughout all those messuages, farms, tenements, and premises, called Allerford, Lea Down, and Holster yard, situate in the parish of Maristow: and the same manganese there found, to raise and bring to grass, and there to pick, dress, and make merchantable and fit for sale; and the same to take and carry away, convert, and dispose of at his and their will and pleasure. The said indenture also gave them liberty, within the before-mentioned limits, to make and work such adits, shafts, pits, watercourses, &c., and to erect such engines and other buildings, as they should think necessary or convenient; and it gave them also the use of waters and watercourses within the said limits, with liberty to divert the same, &c., for the more effectually and beneficially exercising and enjoying of the liberties, powers, and authorities by the said indenture granted; excepting unto H. H. Tremayne, his heirs and assigns, all other ores, minerals, and metals, and all quarries of stone and slate within or under the said premises, or any part thereof, with full power and authority to them, their workmen and agents, into and upon any part of the \*same premises to enter, and in any manner to search for, break, land, stamp, and dress the said lastmentioned ores, minerals, metals, stone and slate, and to take and carry away the same. The grant was for twenty-one years from the 15th of March then last past; yielding and paying unto the said H. H. Tremayne, his heirs or assigns, the sum of 1l. 15s. for every ton weight of the said manganese raised or gotten during the term within the limits of the said settlement: free and clear of and from all charges and expenses of raising, dressing, and returning the same, or otherwise incident to the adventure.

H. H. Tremayne died on the 10th of February, 1829, and the appellant succeeded him, and is now seised as tenant for life of the lands above described. subject to the said grant or settlement, and (as to some of the lands) to leases at nck-rent hereinafter mentioned. By virtue of the grant, and within the limits thereby described, the said J. Williams, with his partners and co-adventurers, have dug and sunk shafts, driven adits and levels, and opened pits for the purpose of searching for and raising manganese. They have also erected crushing-machines, worked by water wheels, for pulverizing the ore when raised, and built houses and sheds for dressing and cleaning the same. The whole of these works have been undertaken and performed at their sole risk and expense, by their own labourers, and under the entire direction and superintendence of their own agents, and without any expense, risk, or interference whatsoever of, or on the part of, either H. H. Tremayne, or J. H. Tremayne; and the whole have continually been, and still are, in the sole and exclusive possession and occupation of the said J. Williams, his partners \*and co-adventurers. Considerable quantities of manganese have from \*165] time to time been raised by them, the whole of which, after undergoing several processes of pulverizing, dressing, and cleansing at a great expense, have been sold and disposed of by them as and to whom they thought fit.

J. Williams and his co-adventurers have regularly accounted with H. H. Tremayne, in his lifetime, and since his death with J. H. Tremayne, for the 11. 15s. per ton reserved by the said indenture, and the assessment now appealed against is laid in respect of the said money payments. The tenements and farms of Allerford and Lea Down, part of the lands comprised within the limits of the above settlement, are let to and occupied by tenants at rack rent, subject to a reservation of mines, ores, metals and minerals, with the usual powers of digging and searching for the same; those tenants are respectively assessed to the poor rates of the parish in respect of such occupations, proportionably with the other farmers and occupiers of lands in the parish; and the tenement and farm of Holster Yard, the residue of the lands within the same limits, are in the occupation of the said J. H. Tremayne, who is also rated in the rate appealed

against in respect of such occupation.

The question for the opinion of the Court is, whether, under these circumstances, Mr. Tremayne can be considered such an occupier in the parish of

Maristow, as to make him liable for the above rate for manganese dues.

Kelly and Escott in support of the rate. Mr. Tremayne was liable to be rated for these manganese dues, as an occupier of land in the parish of Maristow; because, by the conveyance, no interest in the land \*passed out of him. but a mere easement; and he was a beneficial occupier, by receiving 11.

15s. per ton on all ore raised. There are two classes of cases applicable to this subject. In the first are Rowls v. Gells, Cowp. 451, Rex v. The Baptist Mill Company, 1 M. & S. 612, and Rex v. St. Austell, 5 B. & A. 693. In Rowls v. Gells, Cowp. 451, the lessor under the crown of lead mines, being entitled to a certain portion of the ore raised from the mines, was held to be rateable in respect of the profit arising from such portion as an occupier of land, because they who had a right to raise it had but a qualified occupation, or rather a mere right of working the mines of the lord or owner, and of taking a portion as their remuneration for raising the lord's or owner's proportion. And Rex v. The Baptist Mill Company, 1 M. & S. 612, shews, that if this portion be granted to a lessee the lessee is rateable; for it is a lease of such an interest in the land itself, as renders him the occupier. In Rex v. St. Austell, 5 B. & A. 693, which very much resembles the present case, the owner of the soil, by indenture, granted to certain adventurers full and free liberty to enter on the land and work mines, and to erect buildings on the land for that purpose, &c.: and it was agreed that the adventurers should raise the ores, and prepare them for smelting, and when in that state, taking the remainder for their own use, leave a certain proportion for the use of the lessor, or pay him

Vol. XXIV.—6

a certain portion of the amount arising from the sale of all the ores, at the option of the lessor. It was held, that the lessor was rateable in respect of the profits arising from the mine in the value of his portion of the ores, as the profits of land; \*for he still continued to be the occupier of the mine, and the adventurers had not the unqualified occupation, but were merely [\*167] entitled to take a certain part of the produce of the land as a remuneration for their expenditure, risk, and labour, in raising the rest for the owner. It was not material that the lessor had always elected to be paid in money, for in taking his portion and so paying him, the adventurers were simply in the situation of purchasers.

On the other hand, in Rex v. The Earl of Pomfret, 5 M. & S. 139, the proprietor of the soil, having made a demise of the land in which there were mines, with a power to work them, reserving a certain pecuniary rent, was held not to be rateable in respect of the rent, because the lessee under such demise was the exclusive occupier of the mines, and the profits of land were rateable only in the hands of the occupier, the rent reserved being merely a criterion of the amount of the profits, and not itself rateable. In Rex v. The Bishop of Rochester, 12 East, 353, nothing was left in the grantors; the mines were let, and wholly out of their power; and there was a money rent reserved. The grantors there were held not rateable, there being no occupation of any thing by them within the 43 Eliz. c. 2.

The question is, to which class of cases the present belongs, and if the two conflict, which is to prevail? Here, there is no demise of the land or of the mine, but of a mere liberty to dig, as there was in Rex v. St. Austell, 5 B. & A. 693: now, whatever did not pass out of the grantor by the deed, remained in him; a mere easement passed and not the soil; that therefore remained in Mr. \*Between this case and Rex v. St. Austell, 5 B. & A. 693, the difference is, that in the latter, the adventurers were to leave a certain proportion of the ore for the use of the grantor; and here, the adventurers are to pay 1l. 15s. for every ton raised; and Lord Tenterden distinguishes Rex v. St. Austell from Rex v. The Eart of Pomfret, 5 M. & S. 139, on the ground that in the latter there was an absolute demise of all the mines, under which both the possession of that part which was worked, and that which was not worked, passed to the lessees, whereas, in Rex v. St. Austell, there was an express reservation of part; the relation of the parties was not that of landlord and tenant. So here Tremayne has reserved to himself all but a mere liberty to dig on part of the lands. [PARKE, J. What portion of the soil does Tremayne occupy?] Whatever portion yields the ore in respect of which he receives the money payment. The same question might have been put in Rex v. St. Austell. Tremayne occupies the land producing the ore till it is separated. [PARKE, J. He has no right to any portion of the rude ore.] He does not cease to be an occupier of the soil because another person may take ore from it. So long as the ore is not severed from the land, it is parcel of the freehold, and is his property; when severed, it becomes personal property, and belongs to another. [PARKE, J. The decisions on which you rely, proceeded on the ground that a certain portion of the rude ore was reserved to the lord. If Mr. Tremayne, as you contend, is the occupier of the mine, then, as such, he is not rateable. In Rowls v. Gells, Cowp. 451, there was in part a pecuniary rent, the cope being sixpence for \*every load or nine dishes of lead ore raised at the mines. [PARKE, J. [\*169] That distinction was not pressed on the attention of the Court, and the principles on which such property is rateable were not so well understood as they are now.] The result of all the authorities is, that where by lease the interest in the land has passed out of the grantor, the grantee is rateable, but where such interest has not passed, the grantor is. Then, if Mr. Tremayne was the occupier of the land, he was clearly a beneficial occupier in respect of the 1l. 15s. per ton, which he receives on all the ore raised.

Crowder, with whom were Praced and Follet contra, was stopped by the

Court.

DENMAN, C. J. The rate cannot be supported. Here the landlord receives a rent, and is not the occupier of the soil as in Rowls v. Gells Cowp. 451. In Rex v. St. Austell, 5 B. & A. 693, the landlord, by the express terms of the grant, was to be paid, not by money, but by the produce of a part of the mine, unless he elected to be paid in money. Here he is paid by a sum of money, in proportion to the weight of manganese raised; but he has no right to any portion of the ore. If we had any doubt, we would permit the rate to stand, that the party rated might bring an action; but we have no doubt whatever. The order of sessions must therefore be quashed.

PARKE, J. A party can only be rateable as the occupier of land. Mr. Tremayne is not the occupier of the soil; he receives a money rent. The \*170] case falls within \*Rex v. The Earl of Pomfret, 5 M. & S. 139. It is said that no interest in the land passed, but a mere authority to the grantee to dig. That may be so, and, in that respect, the case resembles Rex r. St. Austell; but then it would follow that Tremayne is himself the occupier by his agents; and if so, as the owner of mines, he is exempt from rateability by the statute of Elizabeth, and the nature of the property, and he could not be rated unless for dues. This case is distinguished from Rowls v. Gells, Cowp. 451; Rex v. The Baptist Mill Company, I M. & S. 612, and Rex v. St. Austell, 5 B. & A. 693, because, here, the owner is not entitled to any portion of what may be called the soil. The ground of the decisions in those cases was, that the reserved ore was a portion of the soil, and that the party entitled to it was therefore the occupier; but here, if he was not entitled to that portion of the soil, he is not the occupier, and then this is like the case of Rex v. The Earl of Pomfret, (where the reservation was not of a part of the soil, but of something different,) and is distinguishable on that ground from Rex v. St. Austell and the other cases, where a portion of the mineral itself was received.

TAUNTON, J. I entirely concur. The distinction is very subtle; but the

TAUNTON, J. I entirely concur. The distinction is very subtle; but the cases may, perhaps, be reconciled by distinguishing between a reservation of a rent, and a reservation of part of the soil itself. In the latter case, the lessor has been considered as occupying that part of the soil which he has so reserved.

\*171] there there is a pecuniary rent reserved, and no reservation of any \*part of the soil. If we were to hold that Mr. Tremayne was rateable here, we should be shaking a well established principle, that a landlord is not rateable for his rent. And again, if Mr. Tremayne is to be considered as the occupier of the soil of the mine, and the lessees as his agents, he is not liable to be rated; because coal mines are the only mines mentioned in the statute of Elizabeth,

which has therefore been construed to exclude all others.

PATTESON, J. I am of the same opinion. The rule is very clearly laid down by Le Blanc, J. in Rex v. The Baptist Mill Company, 1 M. & S. 612: "Where a person receives without risk part of the produce extracted from the bowels of the earth, he is an occupier of land; but where he merely receives a rent or money payment, there he is not an occupier." Here Mr. Tremayne is not the receiver of what is extracted from the bowels of the earth, but of money. He is not liable, therefore, to be rated as an occupier of land.

Order of sessions quashed.

#### \*172] \*HEATH v. SANSOM and EVANS. Nov. 12th.

S. and E. were partners in alum works, for an indefinite period. E. was a dormant partner. In January, 1829, it was agreed that the settlement of the partnership accounts, and all questions concerning the respective liabilities, and the mode of winding up the affairs, and the manner and time of dissolving the partnership, should be referred to an arbitrator; and it was afterwards agreed that S. and E. should respectively bid for the plant, utensils, and fixtures, and the referree was to declare the highest bidder to be the

purchaser. In April, 1829, S. having been declared the highest bidder, became the purchaser, and the works were entirely given up to him: Held, that the partnership was then determined, although the referee had made no order as to the dissolution; and that S. had no authority, after that time, to bind E. by a promissory note.

Assumpsir by the plaintiff, as indorsee, against the defendants, as makers, of a promissory note for 300/., dated July 1st, 1829. Plea, by the defendant Sansom suffered judgment by default. Evans, the general issue. this case, for a new trial, having been made absolute, in Easter term, 1831, (see 2 B. & Ad. 291,) the cause came on to be tried before Lord Tenderden, C. J., at the sittings in Middlesex after Hilary term, 1832, and the following facts were proved:-Before January, 1829, Sansom and Evans were partners in some alum works at Bristol; Evans was not held out to the world as a partner; the trade was carried on under the style and firm of Philip Sansom & Co. 26th of January, 1829, Sansom and Evans agreed that the settlement of the accounts of the partnership subsisting between them as manufacturers of alum, and all questions between them concerning their respective liabilities in the partnership transactions, the mode of winding up the affairs of the partnershipship, and the manner and time of dissolving it, should be referred to the decision of H. O. Price; and that they would abide by his decision. In April, 1829, it was agreed between Sansom and Evans, as to the disposal of the plant, utensils, and fixtures on \*the alum works, that each should separately offer a price, which was to be communicated to the referee, and he was then to declare the highest bidder to be the purchaser; such purchaser to give a bill for the purchase money, and to be entitled to the possession of the goods In the same month of April, Sansom having, by letter to the referee, made a tender of 1301. for the said plant, utensils, and fixtures, they were declared by the referee to be his property; and the works were entirely given up to him. In July, 1829, Sansom, being called upon by the Droitwich Salt Company to pay a sum of 300l., which he owed them, gave the promissory note in question for 300l., and the note was indorsed by the company to the plaintiff. Upon this evidence, Lord Tenterden was of opinion that there had been, in July, 1829, no actual dissolution of the partnership; and a verdict was found for the plaintiff, for the amount of the note. A rule nisi having been obtained for a new trial, on the ground that the partnership must be taken to have been actually dissolved in April, 1829, when Sansom became the purchaser of the plant, utensils, and fixtures on the alum works,

Sir James Scarlett and Hoggins now shewed cause. Sansom had prima facie an authority to bind his partner by bills of exchange and promissory notes, and that authority continued in July 1829, unless the partnership was previously put an end to. The submission to Price cannot operate as a dissolution. It was a proceeding preparatory to it, but it clearly was not intended that the relation of partnership should then cease, for Price was to determine concerning the time and mode of dissolving it. He never did so determine before July \*1829, and this partnership then continued, notwithstanding any trans-

action as to the plant and fixtures.

Bompas, Serj. and Ball, contra. The authority of one partner to bind another by his promissory note, is implied from the relation of partnership, and ceases as soon as the partnership is determined, unless such party has held himself out as a partner to the world, or to a third person, and thereby induced others to give credit on the faith of such partnership. Here, Evans never so held himself out, but was a mere dormant partner. The only question, therefore, is whether the partnership, as between Evans and Sansom, was dissolved? No formal agreement is necessary to effect a dissolution; any writing, words, or conduct, from which a clear intention to dissolve the relation can be collected, is sufficient. Conceding that the agreement of reference did not amount to an actual dissolution, but was preparatory to it; in April, 1829 it was agreed that

the referee should declare which of the two was to be the purchaser of the plant, fixtures, &c., and that this person should be entitled to the possession of the goods purchased. Price declared Sansom to be the purchaser, and he took to the stock in trade, and became the sole proprietor. After that time the partnership was at an end, and Sansom could have no authority to bind Evans by his

promissory note.

I am of opinion that the rule for a new trial must be made DENMAN, C. J. absolute in this case, because Evans, at the time when the note was given, had ceased to be a partner with Sansom in the alum business. In January, 1829, it was agreed that all matters concerning the mode of winding up the affairs of the \*partnership, and the manner and time of dissolving it, should be submitted to a referee. It was afterwards agreed that the plant, utensils, and fixtures on the alum works, were to be declared by the referee to belong to him who should be the highest bidder, and in April, 1829, Sansom was declared to be the highest bidder, and became the purchaser, and the plant, utensils, and fixtures, were delivered up to him. Evans having, then, parted with all his interest in the works from which the profits of the business (if any) were to arise, ceased to have any right to participate in such profits; and since a partnership, as between parties, results from the agreement to share in profits, it ceases as soon as such right is determined. This note, then, being given after Sansom had become the sole proprietor, and after the implied authority, resulting from the relation of partnership, was at an end, could not bind Evans.

PARKE, J. The rule for a new trial must be made absolute. The objection to the plaintiff's recovering against Evans is, that in July, 1829, Sansom was incompetent to bind Evans. It must be taken upon the evidence(a) that the partnership was to continue for an indefinite period (there being no proof to the contrary), and then either party might, at any time, have put an end to the partnership by a simple notice to his copartner, Peacock v. Peacock, 16 Ves. 49, Featherstonhaugh v. Fenwick, 17 Ves. 298, Nerot v. Burnand, 4 Russ. 260; a fortiori by a mutual agreement. Then the question is, was the authority of Sansom to bind Evans (which is implied by law from the relation of partnership) \$\frac{1}{2} \frac{1}{2} \frac{1

was agreed between them, that the settlement of the accounts of the partnership, and all questions concerning their respective liabilities in the partnership transactions, and concerning the mode of winding up the affairs, and the mode and time of dissolving the partnership, should be referred to an arbitrator. The expression dissolving the partnership is ambiguous. It may either import the dissolution of the joint tenancy in the goods belonging to the firm. and the division of the partnership effects, or a putting an end to their future dealings, and the mutual authority of one party to bind the other by future contracts, or both. If the first be the true import of the words, and the intention was by them to provide that the arbitrator was to decide when and how the partnership effects were to be divided, it may be inferred from the other terms of the agreement, which are those generally used on a complete dissolution of partnership, that the power of entering into future contracts had already been put an end to. But, assuming that not to be so, and that the arbitrator was to determine not merely when and how the effects were to be divided, but when that mutual authority was to be put an end to, we must then look to the subsequent conduct of Evans and Sansom, to see whether they intended that the one should have a right to bind the other by future contracts so late as July, 1829. In April, 1829, it had been arranged between them, that the one who made the highest offer for the plant, utensils, and fixtures, was to have them, and be put into possession. Sansom, having been the highest bidder, took possession of them in the same month. Now, after that, it never could have been in the contemplation of the parties that the one should bind the other by future

<sup>(</sup>a) The only proof of partnership was by declarations of Evans to that effect.

contracts. When that had been done, \*there can be no question but that, as between Sansom and Evans, the right to participate in the profits arising from the plant, utensils, and fixtures (if any had been made), ceased, and consequently the mutual power to bind each other by contracts within the scope of their former partnership dealings, ceased also, and that Sansom had no authority afterwards to bind Evans by any future contract. It is to be borne in mind that Evans, who never held himself out to the plaintiff as a partner, could be liable only by reason of the authority which Sansom really possessed, and unless that authority continued to July, 1829, he was not liable at all. But if it was not determined in January, it certainly had ceased in April of that year.

TAUNTON, J. I am of the same opinion; and for the same reasons. Evans was a dormant partner with Sansom. The authority of the latter, therefore, to bind the former, ceased as soon as the partnership was at an end; which, at the latest, was in April. Price, to whom it was referred to settle the time and mode of dissolving the partnership, at that time declared Sansom to be the purchaser of the partnership effects, in consequence of the tender made by him. Evans then sold his interest in the partnership concern to Sansom, and the latter assented to such sale; and he afterwards conducted the business exclusively for his own benefit. After the sale, there was only one person concerned in the

business, and the authority of Sansom to bind Evans ceased.

PATTESON, J. I am of the same opinion. A dormant partner may retire from a firm, without giving notice to the world. The question is, whether Evans did retire from the partnership before July, 1829? It is quite \*clear on the facts of the case, that he retired from it in April, 1829; [\*178 for, from that time, Sansom only was entitled to the works, and to all the profits to be derived from them. The authority, therefore, which Sansom previously had to bind Evans, was countermanded in April. Rule absolute.

### The Dock Company of KINGSTON-UPON-HULL v. PRIESTLEY. Nov. 13.

By statute 14 G. 3, c. 56, s. 42, the following tonnage duties were imposed on every ship or vessel (except those in the king's service,) coming into or going out of the harbour, basin, or docks of the port of Kingston-upon-Hull, or loading or unloading there.

1. For every ship coming to or going between the said port and any port to the northward of Yarmouth or southward of Holy Island, 2d. per ton. 2. For every ship coming to or going between the said port and any port or place between the North Foreland and Shetland, on the east side of England, except as above, 3d. 3. For every ship trading between the said port and any other port or place in Great Britain not before described, 6d. The duties to be paid on the ship's entry inwards, or clearance or discharge outwards; or, if there were no entry, then to be paid at the custom-house at

any time before the vessel proceeded:

Held, that the first clause related only to ports on the east side of England, between the places there named; that it extended to the port of Goole, though situate twenty-five miles inland from Hull, on the river Ouse; and, therefore, that vessels taking all, or part of their cargoes at Goole and going to Hull, or vice versa, were liable to the duty of 2d.; and this, though they did not enter or clear at the custom-house: Held also, that the first clause did not apply to vessels loading at Leeds or other places, not ports, situated above Hull, and going directly thither; that the third clause (if those places were contemplated by it) did not refer to them with the precision necessary for imposing a duty: and, (Parke, J., dubitante,) that the vessels so loading at Leeds did not become liable to duty by merely passing through the entrance basin of the Goole docks, without taking in goods or making any stay there.

DEBT for tonnage dues. At the trial before Vaughan, B., at the Yorkshire Summer assizes, 1831, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following special case.

The defendant is clerk to the Aire and Calder Navigation Company, who are

properly sued in his name. The action is founded on the statute 14 G. 3, c. 56, s. 42, which enacts that in consideration of the charges incurred and to be incurred by the Hull dock company, in making and keeping in repair the dock, \*179] quay, &c., therein mentioned, there shall be paid from and after, &c., and other ships and vessels employed in his majesty's service only excepted) coming into or going out of the said harbour, basin or docks, within the port of Kingston-upon-Hull, or unlading or putting on shore, or lading or taking on board any of their cargo, or any goods, wares, or merchandize within the said port, by the master or commander, owner or owners of every such ship or vessel, the several rates or duties of tonnage (according to the full of the reach and burthen) hereafter particularly rated and described; (that is to say)

For every ship or vessel coming to or going between the port of Kingston-upon-Hull and any port to the northward of Yarmouth in Norfolk, or any port to the southward of the Holy Island, for every ton, twopence. For every ship or vessel coming to or going between the port of Kingston-upon-Hull and any port or place between the North Foreland and Shetland, on the east side of England, except as above, for every ton, the sum of three pence. For every ship or vessel trading between the said port of Kingston-upon-Hull and any other port or place in Great Britain, not before described, for every ton, the sum of six pence." The clause then fixed other dues for vessels trading to foreign places, which were enumerated; and "For every ship or vessels sailing coastwise or otherways, and coming into the said haven in ballast to be laid up, for every ton (coasting duty included), the sum of six pence." Which rates and duties were vested in the Dock Company, and were to be paid at the time of the ship's "entry inwards, or clearance or discharge outwards," or, "in case any ships or \*180] vessels should not enter as aforesaid, then, at any time before such ships or vessels \*should proceed from the said port, at the custom-house in the said port."

Section 44 provides that the act shall not extend to charge with the said

duties any vessel "which shall come or go coastwise from or to any port or place in Great Britain, to or from any place up the rivers Trent or Ouse, within the limits of the port of Hull as now used, or to or from any other place up the said rivers Trent or Ouse, or any other river which falls into the said rivers or either of them, or which shall trade between any such port or place in Great Britain and any such place as aforesaid, within or up the said rivers or either of them, unless such ship or vessel shall come into or go out of the said basin or dock, or any part of the said harbour or haven called Hull Haven; or shall use the said basin, or dock, or quays, within the said harbour;" or shall unlade or lade goods in any part of the Humber: or to charge any such coasting vessel, going or being called by the officers of the customs into the said harbour for the sole purpose of being entered or cleared at the custom-house there. Section 45 declares that all goods landed or discharged at the company's quays or wharfs shall pay the same wharfage, and in like manner, as goods discharged in the port of London. Section 49 enacts, that no officer of the customs of the port of Kingston-upon-Hull shall hereafter give or make out any coquet, or other discharge, or take any report outwards, for any ship or vessel trading or coming to the said port, until the rates, duties, and payments hereby granted or payable

testifying the receipt thereof; which receipt such officer is required to give, under a penalty.

By acts of 42 G. 3, and 45 G. 3, the Dock Company were empowered to make additional docks, and the rights and privileges of the then present port of

by the master or other person taking charge of such ship or vessel, according to the tenor and true meaning of this act, shall be paid unto the respective col\*181] lectors or officers appointed to received the same as aforesaid; and that such \*master or masters, or other persons taking charge of such ship or vessel, shall produce an acquittance, under the hand of such collector or officer,

Kingston-upon-Hull were extended to the company's docks and basins, and the same were to all intents and purposes to be deemed part of the said port; and vessels entering into, or loading or unloading in the said docks and basins, were declared subject to the same regulations and duties as they would have been liable to in the said port.

The case then stated the situation of Goole, (on the river Ouse, twenty-five, miles west of Hull,) the establishment of docks and quays there by the Airs and Calder Navigation Company, and the commission in 1827, appointing Goole to be a port in the United Kingdom for the import and export of goods; on which points a fuller detail will be found in The Hull Dock Company v. Browne, 2 B. & Ad. 43. It was further stated that Grimsby is an ancient port on the Humber, to the southeast of Hull, and about thirty years ago was constituted a port for foreign trade. The case then stated the decision of this Court in The Hull Dock Company v. Browne, 2 B. & Ad. 43, where it was held that a vessel sailing with goods from Goole to Hamburgh, was not liable to the duties given by 14 G. 3, c. 56, s. 42, as a vessel lading or unlading within the port of Kingston-upon-Hull. After that decision the Dock Company ceased to demand duty for vessels trading between Goole and foreign ports, but \*they claimed those now in question. The cases to which this action related were four:

A transport of the stated the cases to which this action related were four:

A steam-vessel belonging to the Aire and Calder Navigation Company, called the Eagle, took on board a cargo of goods at Goole, and proceeded therewith to the port of Kingston-upon-Hull, came into the basin of the Humber dock, within the said port, and there unladed her cargo on the Dock Company's quay.—A sloop, also belonging to the Navigation Company, and called the Stanhope, took in part of her cargo at Leeds, and proceeded therewith to Goole, where she took on board the remaining part of her cargo, and proceeded therewith to the port of Kingston-upon-Hull, and into the said Humber dock; she there unladed part of the cargo into other vessels alongside, and she afterwards proceeded through the docks into the harbour, and there, within the port, delivered and landed the remainder of her cargo upon a quay belonging to Messrs. Tomlinson and Newbald.—Another sloop belonging to the Navigation Company, and called the Blucher, took her cargo at Leeds, and proceeded therewith to the port of Kingston-upon-Hull, came into the harbour, and there, within the said port, unladed her said cargo upon the last-mentioned quay, having, in the course of her voyage, passed through the entrance basin of the docks at Goole, without taking in any goods there.—In the fourth case the vessel took in her cargo at Tomlinson and Newbald's quay, in the port of Kingston-upon-Hull, and proceeded on her voyage to Leeds with such cargo, passing through the entrance basin of the docks at Goole. The plaintiffs demanded, in each case, a tonnage duty of 2d. per ton, which was refused.

None of the vessels were registered at Goole or elsewhere, \*but the name painted on the steamboat was "The Eagle, of Goole." Before the [\*183 above-mentioned decision no tonnage or dock duties were charged on vessels going up or down the Ouse or Trent, to or from Hull, though all vessels paid wharfage when they came into the basin or docks and landed goods upon the quays there; and it was paid in the four cases above mentioned; it is a charge on the goods, and paid by the owner of them. Foreign-bound vessels, or vessels passing between Grimsby and Hull, have paid tonnage whenever they entered the harbour, basins, or docks, as well as any wharfage that might become due. The tonnage on Grimsby vessels is 2d. per ton. The dock dues are a charge on the register tonnage of the vessel, and are payable by the ship-owner. Vessels that only pass between Hull and Grimsby, or up or down the Trent and Ouse, to or from Hull, require no coasting or other custom-house papers, nor do they pay coasting duties. The tax on sea-borne coals, while in force, was levied by the custom-house officers at Hull upon coals brought coastwise

from Newcastle; but none was levied on coals brought down the Ouse or Trent.

The case was argued on this and a former day of the term.

Alexander, for the plaintiffs. It having been decided in the Hull Dock Company v. Browne, 2 B. & Ad. 43, that Goole is not, for the present purpose, within the port of Hull, and Goole being itself a port, the vessels in question fall within the clause of 14 G. 3, c. 56, s. 42, which imposes a duty of 2d. per ton upon "every vessel coming to or going between the port of Kingston-upon-Hull and any port to the northward of Yarmouth in Norfolk, or any port to the southward \*184] of the Holy Island." \*If it be said that the situation of Goole is inland; so is that of London; or if it be urged that there is another port between it and the sea, the same argument applies to Hull itself, which has Grimsby to the scaward. It is true Goole has been made a port since the passing of the dock acts; but they may extend to ports subsequently established, according to the doctrine in Harrison v. Bulcock, 1 H. B. 68, and Downing College v. Purchas, 3 B. It may be said that, as vessels from Goole to Hull do not require & Ad. 162. custom-house papers, they are not contemplated in the forty-second section of 14 G. 3, c. 56, which requires payment of these duties to be made at the time of entry inwards or clearance outwards, or, if the ship should not enter, then at any time before she proceeds from the said port, at the custom-house there; and the same argument may be founded on section 49, which forbids officers of the customs to give any coquet or discharge, &c., to any vessel, until payment of the duties to the collectors or officers appointed to receive the same, and who are to give a re-But although particular methods of securing payment are pointed out in the case of vessels which take custom-house papers, it does not follow that other vessels are not liable to tonnage duty: and the words of section 42, "every ship or vessel coming into or going out of the said harbour," apply to all. remedy in cases where the custom-house has jurisdiction may be cumulative, Chapman v. Pickersgill, 2 Wils. 145; and in these very cases, under the present act, a further remedy is provided, by distress, in section 47. Grimsby vessels do not take custom-house papers, yet they have always paid tonnage. the same argument would exempt the vessels now in question from wharfage dues, which, by sect. 49, are put \*under the protection of the custom-\*185] dues, which, by sect. 40, at par and the reserves else have always house officers equally with tonnage duties; yet these vessels have always paid wharfage. It cannot be said that wharfage alone, in the case of the vessels, was intended to be the compensation for using the docks. Wharfage, by this act, is payable on the goods; it depends upon the rates of wharfage charged in London, and is paid to the respective proprietors of the quays or wharfs: tonnage is charged on the vessel; its amount is fixed, and it is payable to the Dock The wharfage paid to the owners of private quays for landing goods can be no recompense to the company for the use of the docks. No argument arises from the non-payment of duty on coals brought down the rivers, for the act 6 G. 4, c. 107, s. 111, extended only to coals brought coastwise; and the plaintiffs do not contend that the vessels in question are coasting vessels. difficulty arises from the non-registration of these vessels. The act does not require that the liability to tonnage should be estimated through that medium. Section 46, gives another mode of ascertaining it. The Dock Company have no control over the registration: and ships employed only in river navigation are not registered at all; nor are coasting vessels, if under fifteen tons burden: yet a vessel of that description coming, for instance, from Lynn to the Hull docks, would undoubtedly be liable to tonnage duty. The terms "entry inwards or clearance or discharge outwards," cannot be confined to the technical sense of entry or clearance at the custom-house. Vessels in ballast, or with passengers, would not clear at the custom-house, though they would certainly be liable to tonnage dues. In such cases the words "entry," and "clearance or discharge," must be taken in the more extended sense of entrance and departure.

\*186] Secondly, if these vessels, or any of them, are not within the \*clause imposing 2d. per ton, they must then fall under the subsequent one,

which imposes a duty of 6d. per ton on every vessel trading between the port of Kingston-upon-Hull, and any other port or place in Great Britain, not before described. The intention is clear to tax all vessels, except those in the king's service. If all or any of the vessels in question are of the number "before described," they come under the first clause, and are properly charged with the

duty of 2d.; if not, they are chargeable with 6d. under the third.

Wightman, contrà. There are three classes of vessels which the plaintiffs undertake to bring within the 14 G. 3, c. 56, s. 42. First, those which load at Goole and discharge their cargoes in the Dock Company's basin at Hull. Secondly, those which load at Leeds, take in goods at Goole, and discharge at Thirdly, those which load at Leeds, and proceed to Hull, where they discharge, passing in the way through the entrance basin of the docks at Goole, but not taking in goods there. (a) None of these are liable to the duty. As to the clauses relied upon in the forty-second section, it is true that Goole is, geographically, in a latitude north of Yarmouth and south of Holy Island, according to the strict sense of the first clause; but that clause evidently means only ports to the seaward of Hull. Conformably to this interpretation, the section goes on increasing the duty as the vessels go further outward: those which proceed to ports within the limits just referred to pay 2d.; those which go still further out along the east \*coast are charged 3d.; and those which proceed to the west, or any other part of Great Britian, 6d. If it could be [\*187] said that the first duty extended to places westward of Hull, vessels going to Liverpool, Whitehaven, or Preston, should be charged only 2d. And the argument that the vessels in question, if not within the first, are within the third clause, would lead to this absurdity, that a ship going to London would pay 3d, to Scarborough 2d, to Goole 6d. The direction, that payment shall be made at the time of the vessel's "entry inwards or clearance or discharge outwards." and the provisions of sect. 49, shew, that the duties were only considered applicable to vessels which come under the jurisdiction of the king's customer, not to those employed in inland navigation. It may be asked, why these should be wholly exempted. The legislature may not have taken them into consideration; or, it may have been thought that, as feeders of the trade of Hull, they ought to go free from these duties. The forty-fourth section is an exempting one, and does not extend the operation of the forty-second as against the parties to be charged. The provisions of sect. 44, apply to vessels coming or going to or from any place up the Trent or Ouse, from or to any port or place in Great Britain to the seaward of Hull; not vessels passing merely from Leeds to Hull. This appears from the word "coastwise," which always implies a voyage by sea between different parts of the kingdom, as described in 13 & 14 Car. 2, c. 11, s. 7, (which prescribed regulations for the coasting trade, with reference to the customs,) where mention is made of goods which "shall be shipped or put on board, to be carried forth to the open sea from any one port, creek, or member in the kingdom of \*England, &c. to be landed at any other place of this realm." It would be unreasonable to say that vessels coming from Leeds [\*188] are subject to these duties, because they merely pass through the entrance basin of the Goole docks, when it is clear that vessels coming down the Trent, and which enter the Ouse at a lower point, are not chargeable with them.

Alexander in reply. Section 42, unequivocally imposes the duties on "every ship or vessel, the king's ships of war, and other ships and vessels employed in his majesty's service only excepted;" thus negativing any other exception. Section 44, therefore, is not needed for that purpose: but it assists in explaining section 42; and was relied on by Lord Tenterden for that purpose in The Hull Dock Company v. Brown, 2 B. & Ad. 61. It shews that vessels employed in the river navigation are exempt from duty only so long as they do not use the docks, or incur liability in the other ways there specified. There is nothing

<sup>(</sup>a) The fourth case, (page 182, ante) was merely the third reversed.

in section 42, to confine the duty of 2d. to ports lying eastward of Hull. The Aire and Calder Navigation Company, in resisting payment of these dues, are in effect setting up a claim to use the plaintiff's docks without making any com-

pensation.

Denman C. J. I am of opinion that Goole comes within the description of a port on the east coast of England to the northward of Yarmouth and southward of Holy Island; and that vessels loading there, and coming into the harbour, basin, or docks of Kingston-upon-Hull, are liable to the duty of 2d. per ton. to the vessels not loaded at Goole, I have considerable \*doubt: nor am I satisfied with the dilemma suggested, that they must either pay 2d., as proceeding from a port north of Yarmouth and south of Holy Island, or 6d., as proceeding from a "port or place not before described." It appears to me, that there are no words in the act to make them liable to either duty. If, before Goole was made a port, there was nothing to render them chargeable with the duty of 2d., I think their merely passing through the entrance basin there, after loading at another place, cannot have that effect now. It is said, that if the duty of 2d. does not attach, that of 6d. must. But that would be so startling an anomaly, that I cannot bring myself to believe that it was intended. Some qualification must be imposed on the word "place," in the clause exacting this duty; giving it a signification anlogous to that of "port," in the proper sense of the word, or considering it to mean a "place" on the coast. It is sufficient at all events, to rely on the general proposition, that a tax must be imposed in distinct and unequivocal words. Here the vessels not loaded at Goole do not proceed from a port within the meaning of the clause giving a duty of 2d.; and the other clause is not distinct enough to enable us to say that the vessels come within

PARKE, J. The questions in this case relate to two classes of vessels: the first, those which take in goods at Goole, and proceed from thence to Hull, and use the harbour or docks there; the second, those which begin or end the voyage at Leeds, merely passing through the entrance basin at Goole, in their way Unquestionably, no duty can be claimed on any of these, but such as 190\*] is distinctly given by the forty-second section\* of the statute. I think it is clear, that the vessels carrying goods to and from Goole are liable to the duty of 2d.: but I differ from my Lord Chief Justice on the other point; for I cannot distinguish between the two classes of vessels, and it seems to me that the Dock Company are entitled to the duties on both. As to the first class, construing the first and second rating clauses of section 42, together, it is clear that the duty of 2d. is imposed on every vessel trading between Hull and any port on the east side of England, north of Yarmouth and south of Holy Island: for the words in the second clause are, any port, &c. on the east side of England, except There is an uncertainty in the words "port or place," in the third clause and, before Goole was made a port, I think they would not have included it; nor would they now include Selby or Leeds; for "place" must be something ejusdem generis with "port." But since Goole has been made a port, the case, as to that falls precisely within the first clause. Undoubtedly the enactment applies to newly made ports as well as to others; and the application is reasonable, because those who use the docks ought to pay for doing so. As to the second class, if vessels sailing from the port of Goole are liable to duty, I think it attaches also, though they take their cargo at a place more inland. It is the same as where a vessel takes in goods at Norwich to go from Lowestoff. not see why they should not be liable, at whichever place the goods are loaded. One reason for such a construction is, that under this act, a greater tonnage is imposed in proportion as the ports are more distant, because vessels do not arrive so often at Hull from those ports: coming frequently from Goole, they yield a \*191] sufficient compensation though the duty is \*less. Then it does not seem reasonable that the duty levied on vessels from Goole should not equally be paid by those coming, in the first instance, from Leeds, a more distant place;

and from which the trips are of course less frequent. On the first class therefore, I think the duty is clearly given by the express words of the act: with respect to the second, I am less confident, because I have the misfortune to differ from the rest of the Court.

TAUNTON, J. Of the first two vessels mentioned in the case, one took in the whole, the other part of her cargo at Goole. I think that on those the duty attaches, for the reasons already given. They come within the forty-second-section, but that I think is owing merely to the accident of Goole having been made a port, otherwise they would be in the same situation as vessels trading from Leeds. The other two vessels, I think were not liable. The one having taken her cargo at Leeds, passed into the harbour of Hull and unloaded there; she had, in the course of her voyage, gone through the entrance basin of the Goole docks, but had not taken any goods, nor is it said that she made any stay there. The other loaded at Hull, and went to Leeds, also passing through the entrance basin of the docks at Goole, but she, too, does not appear even to have made a rest there. Then the question is, whether a ship so taking or discharging her cargo at Leeds, can be considered as coming to or going between the port of Kingston-upon-Hull, and a port to the northward of Yarmouth and southward of Holy Island, it being agreed that Goole is such a port? I think not, because the port so described ought to be a terminus to the voyage: and a mere passage through the entrance basin of a dock is not a coming to such port, \*or going between it and Hull, within the meaning of the first clause. [\*192] Nor is the voyage to Leeds a trading between Hull and any "other port or place," within the meaning of the third clause; for "place" must be something ejusdem generis with "port;" that is, lying on the coast, and not situated internally as Leeds is. I am therefore of opinion, that the duty attaches on the first two classes of vessels, but not on the last.

Patteson, J. Where a duty is claimed, those who seek to enforce it must shew some clear words by which the legislature has imposed it. With respect to the last two cases, I find no words in the 42nd section of this act, applying to the inland navigation between Hull and places up the river. I think it was clearly not intended to lay the duty on vessels going to and from such places, before Goole was a made a port; and I cannot see why it should be demandable now because Goole is port, and a vessel merely passes through the mouth of that port. If the vessel came from Goole, or took in her cargo or part of it there, there are distinct words in the first clause applicable to that case, for Goole is a port, and is to the northward of Yarmouth, and southward of Holy Island. The argument for the plaintiffs went the length of contending that the words of that clause might include a port on the west side of England, as Liverpool; but that is going too far: the words can only apply to a port which has

its sea-mouth (if I may so express it) on the east coast.

Judgment for the plaintiffs as to the first two vessels; for the defendants as to the last two.

## \*FRIEDLANDER v. The LONDON Assurance Company. Nov. 14. [\*193

If a witness on a trial gives evidence against the interest of the party calling him, such party may bring other witnesses, not to discredit him generally, but to contradict him on the fact to which he has deposed, if it be material to the issue; not if it be merely collateral.

In an action upon a policy of insurance against fire, one issue was, whether or not goods of the plaintiff had been destroyed by fire as alleged in the declaration. A witness was called for the plaintiff, to prove that part of the goods were supplied to the plaintiff by him before the fire; but on being shewn an invoice and letter relating to such goods, he stated that they were written by him, but that he never delivered such goods to the plaintiff; and he deposed that the letter (supposed to have been sent from Edinburgh)

was written by him in London, at the desire of the plaintiff; that the invoice was drawn up by him (the witness) after the fire, in the presence of the plaintiff's son and shopman; and that the son and shopman persuaded him to state that the goods had been sent according to the invoice and letter:

Held, that the son and shopman, who had already been examined for the plaintiff, might

have been called back to contradict all these statements.

COVENANT on a policy of insurance against fire. The declaration, after setting out the policy, stated that the plaintiff was interested in the goods thereby insured, to the amount mentioned therein, and that after the policy was effected, and while he was so interested, the said goods were destroyed by fire, &c. The defendants pleaded, among other things, that the plaintiff was not interested in the said goods to the said or any amount, and that the said goods were not destroyed by fire; and on these averments the parties went to issue. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary term 1832, the plaintiff called witnesses to shew that goods of considerable value had been sent in to him, on the premises in question, by various persons, before the fire happened. Among others one Lewin Samuel Friedlander was examined, for the purpose of proving that he (L. S. Friedlander) had sold and delivered certain goods to the plaintiff before the fire, and had, on that occasion, sent him an invoice and letter from Edinburgh, relating to such goods. The witness, on his examination in chief, when the invoice and letter were shewn to him, admitted that he wrote the invoice, but denied that he had ever sent the goods, and said that the invoice was made out by him after the fire, in the presence of the plaintiff's son, and Nathan his shopman; that the letter was, in fact, written in London, at the plaintiff's house and by his desire; and that the plaintiff's son and shopman had persuaded him to say that he had sent the goods. It was then proposed, on the part of the plaintiff, to call the son and the shopman (both of whom had been examined before) to prove that the invoice was not made, nor the letter written, under the circumstances alleged, and that they had not acted in the manner stated by the witness. Lord Tenterden rejected the evidence, being of opinion that the plaintiff was not entitled to offer it, in contradiction to his own witness; and the jury found a verdict for the defend-A rule having been afterwards obtained for a new trial.

Sir James Scarlett, Campbell, and Kelly, now shewed cause. The evidence was rightly rejected. The witness was called to prove that certain goods were sold and delivered to the plaintiff before the fire. To that extent, if his evidence was adverse, the plaintiff was at liberty to put in other testimony. But the questions which were put to him respecting an invoice and letter were clearly collateral to the matter in issue; to contradict the witness on those points could only have the effect of proving that he was unworthy of credit; and it is an established rule, that a party cannot take this course against his own witness. Ewer v. Ambrose, 3 B. & C. 746, Bradley v. Ricardo, 8 Bingh. 57, shew that a witness may be contradicted as to material facts by the party calling him, but not generally discredited. The evidence here offered could have no other ten-

deney.

\*195] \*Holt and Follett contrà. It is true that evidence cannot be given to discredit a witness generally, by the party calling him. But if he has given evidence on a particular point contrary to expectation, and operating as a surprise on that party, other witnesses may be called to give different testimony as to the individual transaction, if it be, as in this case, not merely collateral, but important to the issue. [Parke, J. The witness may be contradicted as to matters that are not purely collateral: the question is, whether that was the object here. To contradict the witness on a collateral fact would be only to discredit him in the same manner as if you proved that he had been guilty of a felony.] It is settled law, that although a party cannot bring evidence to discredit his own witness, he may to contradict him, if the fact be material to the issue. Here it was so. The plaintiff claimed damages for goods which he

alleged to have been on his premises, and to have been destroyed by fire. defendant denies that they were there at the time of the fire: the plaintiff asserts the contrary, and that they were, bona fide, purchased at a time previous to The plaintiff might clearly have called another witness to prove that fact before he called L. S. Friedlander. But Friedlander is first called for this purpose, and a letter and invoice are put into his hands, which tend materially to shew that the goods were, bona fide, purchased. He denies that the drawing up of these was a genuine transaction. Then may not the plaintiff set up another witness named in his brief, and who might have been called before. to shew the real character of this letter and invoice? It may be said that the question as to the invoice is collateral only,\* because no act appears done by the plaintiff himself with respect to it. But the essential point was [\*196] to shew that the document was fabricated; no matter by whom. Friedlander asserted that it was fabricated by the plaintiff's son: it was material to establish on the other hand, that the invoice was not fabricated with his concurrence, because, if it was his fraud or Nathan's, proof of that fact was as conclusive against the plaintiff as if it had been his own. The point of contradiction was one on which the whole issue turned; and the evidence given was not to affect a prior witness, but to prove a substantial and leading fact in the cause. son or shopman might have been examined as to this fact before Friedlander. why not after? It cannot be maintained, that because a witness has, by his statement out of court, deceived the party preposing to call him, he shall be enabled to preclude that party from giving the other evidence with which he was prepared, to the same facts. It was once supposed that a party could only give this contradiction where the witness was forced upon him by law, as the subscribing witness to a deed or will. But the more comprehensive rule is now clearly established. Alexander v. Gibson, 2 Camb. 556, Ewer v. Ambrose, 3 B. & C. 746, Bradley v. Ricardo, 8 Bingh. 57. In Richardson v. Allan, 2 Stark. N. P. C. 334, a witness called by the plaintiff to prove an indorsement denied the genuineness of the hand-writing, and Lord Ellenborough, though he thought the plaintiff could not prove the contrary by other witnesses, allowed the indorser to be called, because his testimony went to charge himself. But it is clear now, that if the indorser in \*such a case had been first called and denied the writing to be his, the plaintiff might still have brought forward his other witnesses to prove the contrary.

Parke, J. There is no dispute in this case as to the law; the application of it only is in question. It is clear that a party may contradict his own witness if he speaks to a material fact in the case, against the interest of those who called him. On a collateral fact he cannot be contradicted, not only because such evidence goes to the credit of the witness, but because a multiplicity of issues ought not to be introduced. Now here the conduct of the plaintiff himself in directing the letter to be written was clearly a material fact, on which the witness might be contradicted. On the point as to the invoice, I thought at first that the acts of the plaintiff's son and shopman were not so pertinent to the case as to admit the contradictory testimony. But I am now of opinion that those acts were not collateral, because it was material to the issue to shew that the invoice existed before the time of the fire, and was a genuine document. The evidence, therefore, ought to have been received.

TAUNTON, J., concurred.

PATTESON, J. The whole question is, for what purpose it was proposed to call back the witnesses, who had already been examined. The law is clear, but there is a good deal of difficulty in the application. I had a doubt at first, whether the plaintiff's son and shopman could be called to contradict a witness who stated that the invoice had been fabricated by him in their presence, and that they had persuaded him to say that the \*goods were sent conformably to the letter and invoice. It struck me that this would have been offering contradiction on a collateral point. But I am satisfied that the evidence

on these facts was admissible, on the ground that they were not collateral, but material to the issue; and the genuineness of the letter was clearly a material question in the case. The rule will therefore be absolute.

DENMAN, C. J., having been counsel in the cause, gave no judgment.
Rule absolute.

#### Ex parte CORDING. Nov. 15.

The pawnbroker's act, 40 G. 3, c. 99, s. 24, enables justices in case it shall be proved before them that any goods pawned have been sold contrary to the act, or have been embezzled or lost, or are become or have been rendered of less value than at the time of pawning, through the default, neglect, or wilful misbehaviour of the person with whom the same were pawned, to award satisfaction to the owner, as there specified: Held, that justices have no power, in the above cases, to commit in default of such satisfaction being made.

Quare, Whether a pawnbroker is answerable for pledges destroyed by accidental fire, as goods "lost" within the above clause.

Semble, that the words "through the default," &c., apply to all the cases previously mentioned, and not only to that of the goods pawned having become of less value.

In obedience to a writ of habeas corpus, the governor of the House of Correction in Cold Bath Fields brought the above party before the Court, and returned, as the cause of his being taken and detained, the following warrant of commitment:—

"To all constables and other peace officers of the county of Middlesex, and to the governor of the House of Correction at Cold Bath Fields in the said county.

"Whereas, on the 2d day of October, 1832, George Courtney, of, &c., gen-\*199] tleman, informed me, William Ballantine, Esq., one of his Majesty's justices of the \*peace for the said county of Middlesex, that on the 11th day of January in the year aforesaid he pawned one gun, of which he was the real owner, for securing the sum of 21s. lent thereon by John Masheder Cording, of the parish of St. George in the said county, pawnbroker, and the profit thereof; and that the said G. Courtney had, within the space of one year after the pleaging of the said gun, to wit, on the 28th day of September in the year aforesaid, duly tendered unto the said J. M. C. the said sum of 21s., the principal money borrowed upon the said gun, and the profit due to the said J. M. C., according to the table of rates established by the act of parliament in such case made and provided, and thereupon demanded and required the said J. M. (' to deliver back the said gun to the said G. Courtney; but that the said J. M. C. did, on the said 28th day of September in the year aforesaid, at, &c., unlawfully, and without shewing reasonable cause for so doing, neglect and refuse to deliver back the said gun to the said G. Courtney; and whereas the said J. M. C. appeared before me, the said justice, on the 2d day of October in the year aforesaid, at the Thames Police Office, in the parish, &c.: and I, the said justice, proceeded to examine on oath, in the presence and hearing of the said J. M. C., the said G. Courtney, and also one Charles Young, a credible witness, touching the premises, and he produced before me the note or memorandum which had been given by the said J. M. C. upon the pledging of the said gun, according to the direction of the act of parliament in such case, &c., and proved a tender of the principal money due, and all profit thereon, to have been made 33 aforesaid to the said J. M. C., within the said space of one year after the pledging of \*the said gun, whereupon the said J. M. C. stated that the said gun had been destroyed by fire on his premises: and whereas, upon due consideration had thereof, it appeared to me, the said justice, that the said gun had been lost by the said J. M. C., and I did thereupon, by a certain order

under my hand and seal, bearing date the 2d day of October, &c., allow and award the sum of 31. and 9s., to be a reasonable satisfaction to the said G. Courtney, for or in respect of the said gun, and did order the said J. M. C. forthwith to pay the said sum of 3l. and 9s. to the said G. Courtney, according to the form of the statute, &c.: and whereas it appeareth to me, the said justice, on the oath of the said G. Courtney, that the said J. M. C. having had due notice of my said order, hath unlawfully neglected and refused to pay the said sum of 3l. and 9s. to the said G. Courtney as a satisfaction for and in respect of the said gun: these are therefore to will and require you, the said constables and peace officers, forthwith to apprehend and convey the said J. M. C. to the said House of correction; and you, the said governor of the said House of Correction, are hereby authorized and required to receive the said J. M. C. into your custody in the said House of Correction, and him therein safely to keep without bail or mainprize, until he shall pay the said sum of 31. and 9s., the amount of satisfaction which I, the said justice, have adjudged to be reasonable for the value of the said gun so lost as aforesaid to the said G. Courtney, or be otherwise discharged by due course of law. Given," &c.

Sir James Scarlett, and Follett, now moved that the party should be discharged. This is a commitment under the pawnbrokers' act, 39 & 40 G. 3, c. 99. The \*sections relied upon on the other side will be the fourteenth(a) and twenty-fourth. By the fourteenth, the justice is authorized, in a particular event, to commit the party who took the pawn. But it is a general rule, \*that a commitment in execution, to be valid, must be preceded by a conviction; Rex v. Rhodes, 4 T. R. 220; it should appear that both sides were heard, and that there was a regular adjudication. This clause expressly speaks of the county or "place wherein the offender shall reside or be convicted;" and in section 35, an appeal is given to persons convicted of any offence punishable by this act: but if a party may be committed in execution by an order, the appeal in that case is taken away. Now, upon the present

(a) By sect. 14. If goods be pawned as there mentioned, and if, within one year after such pawning (proof being made by one or more witnesses, and by producing the note or memorandum directed by the act, before any justice, to his satisfaction, of the pawning of such goods within one year, &c.) any such pawner who, at the time of pledging, was the real owner of such goods, his executors, &c., shall tender to the person who lent thereon, his executors, &c., the principal money borrowed thereon, and profit according to the act, and the person who took such goods, &c., in pawn, his executors, &c., shall thereupon, without showing reasonable cause for so doing to his satisfaction of such justice, neglect or refuse to deliver back the goods or chattels so pawned, &c., to the person who borrowed the money thereon, his executors, &c., then on oath made thereof by the pawner, his, &c., or other credible person, any justice for the county, &c., where the person who took the pawn, his, &c., shall dwell, on the application of the borrower, his, &c., is required to cause the person who took, &c., to come before such justice, who is authorized and required to examine on oath the parties themselves, and such other credible person or persons as shall appear before him touching the premises, and if tender of the principal money and profit shall be proved by oath to have been made to the lender. his, &c., within one year, &c., after the pawning, then on payment by the borrower, his, &c., of such principal and profit to the lender, his, &c., and if he or they refuse to accept thereof, on tender thereof made by the borrower, &c., to the lender, &c., before any such justice, such justice shall thereupon, by order under his hand, direct the goods forthwith to be delivered up to the pawner, &c.; and if the lender, his, &c., "shall neglect or refuse to deliver up or make satisfaction for the goods or chattels which shall be so proved to the satisfaction of such justice as aforesaid to have been so pawned, as any such justice as aforesaid shall order and direct, then any such justice shall, and is hereby authorized and required to commit the party so refusing to deliver up or make satisfaction for the same, to the house of correction for the county, &c., wherein the offender shall reside or be convicted, there to remain without bail or mainprize, until he, she, or they shall deliver up the goods or chattels so pawned, and continuing redeemable as aforesaid, according to the order of such justice as aforesaid, or make such satisfaction or compensation as such justice shall adjudge reasonable for the value thereof, to the party or parties entitled to the redemption of such goods or chattels so pawned, and continuing redeemable as aforesaid."

return, it only appears that certain facts are sworn to by two parties before the justice, and he makes an order; and then it appearing to the justice on the oath of one of the original complainants that the party has not obeyed the order, for that offence the justice orders him to be imprisoned. There is no hearing of both parties; no adjudication or conviction. Secondly, it is clear from the whole of the fourteenth section, that it was meant to apply to cases where the pawnbroker wilfully and perversely withheld, and refused to account for that which it was in his power to deliver up: but here, it appears by the order that the pawnbroker states the gun to have been destroyed by fire; and upon that the justice finds, on consideration, that the gun is lost, and orders satisfaction to be made. Besides, according to this clause, before the order is made, there should be a tender of the principal money and profit by the borrower to the lender before the justice; and this does not appear by the present order to have taken place. Nor is the return supported by the twenty-fourth section.(a) \*That enables the justice to award a reasonable satisfaction, if the goods \*203] That enables the justice we award a comparable or lost, or are become have been improperly sold, or have been embezzled or lost, or are become or have been rendered of less value than they were at the time of pawning, by the default, neglect, or wilful misbehaviour of the person with whom they were pawned. It is clear, that these last words extend to all the cases put in the preceding part of the sentence; confining them to the single case of deteriora-tion in value, would be giving a forced construction in order to impose a liability not known at common law. And the satisfaction to be awarded, for which one \*204] general rule is prescribed, is to \*be in respect thereof or of such damage; thus applying to every case before mentioned. In the present order no default is charged. And the twenty-fourth section, though particular in its provisions, gives no power to commit. Nor can it be coupled with the fourteenth, in order to give that power. If they could be so construed together, a party might proceed, under section 14, to recover satisfaction for goods expressly alleged by him to be lost; which is contrary to the whole tenor of that section. Besides, under section 24, the loss should be proved on oath, and the order does not allege that to have been done.

Campbell, contrà. The act is certainly obscure, but sections 14 and 24, taken together, support this order. The question is, whether a pawnbroker, in consideration of the high interest he receives, is not liable to the parties who deposit goods with him, if they are lost, though by accidental fire. [TAUNTON,

Vol. XXIV.—7

<sup>(</sup>a) Sect. 24. "And be it further enacted, That if, in the course of any proceedings before any justice or justices of the peace, in pursuance of or under this act, it shall appear, or be proved to the satisfaction of the justice or justices upon oath or solemn affirmation, that any of the goods and chattels pawned as aforesaid have been sold before the time allowed by this act, or otherwise than according to the directions of this act, or have been embezzled or lost, or are become or have been rendered of less value than the same were at the time of pawning or pledging thereof, by or through the default, neglect, or wilful misbehaviour of the person or persons with whom the same were so pledged or pawned, his, her, or their executors, administrators, or assigns, agents or servants, then and in any such case it shall be lawful for every such justices and justices, and he and they is and are hereby required to allow and award a reasonable satisfaction to the owner or owners of such goods or chattels in respect thereof, or of such damage." sum awarded fall short of the principal and profit due to the pawnbroker, it shall be deducted therefrom: and where the goods pawned shall have been damaged, "it shall be sufficient for the pawner, his executors, &c., to pay or tender the money due upon the balance, after deducting, out of the principal and profit as aforesaid, for the goods or chattels pawned, such reasonable satisfaction in respect to such damage as any such justice or justices shall order or award; and upon so doing the justice or justices shall proceed as if the pawner or pawners, his, her, or their executors, administrators, or assigns, had paid or tendered the whole money due for the principal and profit aforesaid." And if the satisfaction awarded equal or exceed the principal and profit aforesaid, the pawnbroker shall deliver the goods to the owner without being paid anything for such principal or profit, and shall pay the excess, if any, to the person entitled thereto, under the penalty of 101., to be recovered as after-mentioned; that is, (under sect. 26,) by distress and sale.

The contrary appears from Coggs v. Bernard, 2 Ld. Raym. 916.] That is at common law. But here a statutable liability may be imposed, on account of the high premium received, the necessity of protection to the pawner, and the power which a pawnee now has of securing himself by insurance. The order in this case was not bad for want of a conviction. Rex v. Rhodes, 4 T. R. 220, was a case on the vagrant act, and a conviction was necessary there; but an order for payment of money may be made without a conviction. The fourteenth section requires a summons and examination of the parties on oath only in the first stage of the proceeding; if the order then made is not \*complied with, nothing further is necessary, but the justice is authorized and required to commit. This is in the nature of a ca. sa. It is objected that the order does not show any tender of principal and profit before the justice. That is necessary where the proceeding is on section 14; it may, however, be admitted that the present order cannot be grounded on that clause alone, but proceeds on section 24, coupled with it. The first empowers the justice to order that the goods shall be delivered up; the second directs what shall be done if they are not forthcoming, or have been lessoned in value. [PARKE, J. If it appear on oath that they have been embezzled, lost, or damaged.] The words are, "if it shall appear, or be proved on oath." The justice may state it at his own peril, without oath made, otherwise the alternative, "if it appear," would be superfluous. The words "by or through the default," &c., apply only to the immediately preceding clause, if the goods "are become, or have been rendered, of less value." In the case of pledges improperly sold, or embezzled, such words would be an unnecessary addition. [PATTESON, J. The words "satisfaction in respect thereof, or of such damage," must extend to all the cases; otherwise what compensation is provided, in case of loss for instance?] The fourteenth and twenty-fourth sections must be taken together: there is otherwise no effectual remedy where the goods are lost, embezzled, or sold. The pawnee, under the two sections, may be ordered to deliver up the goods, or, if lost, &c., make satisfaction for them; and in every case he may be committed in default. [Patteson, J. Sect. 14 speaks of the article "continuing redeemable."] That only means, if the time for redemption has not expired.

\*Denman, C. J. No subject of the king is to be restrained of his [\*206] liberty without a good legal warrant for his imprisonment. Here no such warrant is shown. Many objections have been taken to the commitment, and I am not inclined to say that any one of them is bad. But it is sufficient to select one which is clearly good, namely, that by the twenty-fourth section no power of commitment is given, assuming that the loss here in question was of the kind contemplated in that clause. It would require strong proof to convince me that the same power was meant to be given in the cases there mentioned as in that of the contumacious detention contemplated by section 14. The objects of the two clauses are very different; and, at any rate, we are not to imply a right to take away liberty. I have the greatest doubt whether the magistrate, in this case, formed a right conclusion, when he held that the goods were lost within the meaning of the twenty-fourth section; but it is unnecessary to decide that, because, if his finding was right, still the power of commitment is not given

in such a case. The party must, therefore, be discharged.

PARKE, J. I am of the same opinion. It is unnecessary to enter into any other objection than that which my Lord has adverted to, namely, that, under the twenty-fourth section, we cannot see clearly that any power is given to justices to commit in default of payment for goods that have been lost. We are not at liberty to import the power of commitment from the fourteenth section into the twenty-fourth. In the case provided for by the former section, the party has it in his power to deliver up the goods; it may be reasonable there \*that the justice should have authority to commit, and perhaps without [\*207 first convicting. But it is very different to say that, where goods have been lost, the party failing to make satisfaction shall be immediately committed.

We ought, at least, to see by very clear words, that such a power is given before we enforce it. I desire not to be considered as assenting to the doctrine stated in argument, that a pawnbroker is liable under the statute for the loss of a pledge by accidental fire.

Taunton J. I am also of opinion, that this warrant cannot be supported; and that the power of imprisonment, given by the fourteenth section of this act is not to be carried on to the twenty-fourth. I have also a strong opinion, that the words in the latter section, "by or through the default, neglect, or wilful misbehaviour of the person with whom the same were so pledged or pawned," must refer to the word "lost;" that a loss, therefore, is not within the meaning of the section, unless it happen by the default of the pawnbroker; and, consequently, that a loss by accidental fire is not contemplated. The language of Holt, C. J., in Coggs v. Bernard, 2 Ld. Raym. 916, shews what the common law would be on the subject, and affords a key to the intention of the legislature in this statute. I do not think it was intended by the act to extend the liability of pawnbrokers, in this respect, beyond what it was at common law. But I only throw out this as my present opinion; not meaning to lay it down judicially, or to be bound by it hereafter.

Patteson, J. I am perfectly satisfied that the twenty-fourth section does \*208] not authorize the justice to commit; \*and I think there is great weight in the other objections. We cannot incorporate the two sections, and take it by implication that a power of imprisonment is given by the latter as well as by the first. It seems to me clear, that section 24, was not intended to give the powers of section 14, in cases of loss; because the former section provides, that where the goods are damaged, it shall be sufficient for the pawner to pay the amount of principal and profit, deducting such reasonable satisfaction in respect of damage as the justice shall award; and upon so doing the justice shall proceed as if the pawner had paid or tendered the whole money due for principal and profit: but in the other cases under that clause the provisions are different. Section 14, contemplates an alternative in the party's power, to make satisfaction or to deliver the goods; and the power of committal seems confined to the case of a wilful refusal to do either one or the other. I am consequently of opinion, that this warrant is bad.

The party was therefore discharged out of custody.

#### The KING v. The Inhabitants of PADSTOW. Nov. 17.

On the trial of an appeal against an order of removal, the respondents having proved, by parol, the renting of two fields in the appellant parish, at 15*l*. a year, and an occupation and payment of the rent for a whole year, the appellants then gave evidence, that the contract for taking the two fields was reduced into writing: Held, that it lay upon the latter to produce the written contract.

On appeal against an order of two justices, whereby Mary Ann Old and her children were removed from the parish of Little Petherick, in the county of \*209] Cornwall, to the parish of Padstow in the same \*county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

In support of the order of removal the respondent parish (Little Petherick) proved by parol evidence that, in the year 1828, the pauper's husband, Martin Old, who is now living in America, rented two fields in the parish of Padstow, of J. A. Corkhill, at 151. a year; that he occupied and paid the rent agreed on for the same for two years, viz., from Michaelmas 1828 to Miehaelmas 1830; and that, during the first year of such tenancy and occupation, he resided in Padstow forty days and upwards. For the appellant parish a witness was called,

who stated that he had been a clerk of Corkhill (who has since become a bankrupt); that he was present in 1828 when Martin Old took the fields in question of his master, and that the conditions of taking were reduced into writing, and signed by the parties on unstamped paper. Upon this evidence, the court of quarter sessions confirmed the order, subject to the opinion of this court, whether they were justified in so doing, or whether, erasing the evidence previously given on the part of the respondents, and rescinding the conclusion which arose from that evidence, they ought to have quashed the order of removal.

Coleridge in support of the order of sessions. The respondents having proved, by parol, a taking of the premises in 1828, and it then appearing, from the appellant's witnesses, that there had been an agreement in writing, it lay upon the latter to produce that agreement, Stevens v. Pinney, 8 Taunt. 327, Rex v. Rawden, 8 B. & C. 708. The rule upon the subject is thus laid down by [\*210 Tindal, C. J., in Fielder v. Ray,\* 6 Bingh. 335: "If it appear by the testimony of the plaintiff's witness, (that there is a contract in writing,) the absence of the writing is an inherent defect in his case, which it is incumbent on him to get over; whereas, if it appears from the defendant's witnesses, it is an objection which the defendant must substantiate by the production of the instrument in the regular way: otherwise, this inconvenience might follow,that the plaintiff might, on a mere assertion of the defendant, be nonsuited for the non-production of a written instrument, which, if it had been produced, might turn out not to apply to the contract in question." [DENMAN, C. J. The rule undoubtedly is, that where a party has made out a prima facie case, and the opposite party attempts to cut it down by a written instrument, he must prove it.]

Follett contrà. In order to gain a settlement by renting a tenement, the 6 G. 4, c. 57, requires that it should be hired for a year, at a rent of 10%. This statute, therefore, renders it necessary to prove the contract itself; and if that be so, and it appear in the course of the case that there is a contract in writing, the party who seeks to establish the settlement must prove that contract. [PARKE, J. The rule is very clearly settled, that if it comes out on the crossexamination of the plaintiff's witnesses that there is a written instrument, he must produce it; but if he makes out a prima facie case without shewing that there was any written contract, the other party, if he relies on that written con-

tract, must produce it.]

PER CURIAM. The order of sessions must be confirmed.

Order of sessions confirmed.

## \*The KING v. The Inhabitants of MATTERSEY. Nov. 17. [\*211

If a woman pregnant of a bastard be fraudulently removed by parish officers, for the purpose of preventing the bastard from becoming chargeable to their parish, the child is settled in the parish from which the mother was so removed; but not if the mother be so fraudulently removed by a parishioner liable to pay rates, not being a parish officer.

On appeal against an order of two justices, whereby William Green Otter was removed from the parish of Kettering, in the county of Northampton, to the parish of Mattersey, in the county of Nottingham, the sessions confirmed the order, subject to the opinion of this Court on the following case:

Elizabeth Otter, the mother of the pauper, lived with one William Green, in the parish of Mattersey, for eight years, in the course of which time she was delivered of two children, both illegitimate, of whom the said William Green was the putative father. The pauper W. G. Otter was one of them, and was born at a place known by the name of the Lodge-on-the-Wolds, an extra-parochial place, not maintaining its own poor. The mother of the pauper was sent there by the said William Green, her master, when she was far advanced in her pregnancy, in order to prevent the said W. G. Otter from being born in the appellant parish. The said W. Green was proprietor and occupier of a considerable quantity of land in the said parish. He had never, in the presence or to the knowledge of the said Elizabeth Otter, spoken to the parish officers on the subject of removing her to the Lodge-on-the-Wolds for the purpose aforesaid. She returned to the house and service of the said William Green as soon as she was sufficiently recovered, namely, in six weeks after her confinement, the \*212] expenses of which, and also of her maintenance \*during her stay at the Lodge-on-the-Wolds, were paid by the said William Green.

Miller in support of the order of sessions. If the child had been born in a parish under the circumstances stated in this case, the settlement would be in the parish from which the woman was sent; and, secondly, if that be so, the place of birth being extra-parochial makes no difference. The general rule is, that a bastard is settled in the place of its birth. There are some exceptions to that rule, and one is where a woman with child of a bastard is removed out of one parish to another by fraud or collusion; and then the child, wherever it is born, is settled in the parish from which the mother has been collusively re-[DENMAN, C. J. That is where the fraud or collusion is by the parish officers; here it was the fraud of a private individual.] In Tewksbury v. Twyning, Bulst. 349, it is stated only that the woman being with child, by practice was conveyed out of the parish of Twyning; it does not appear that it was by the practice of the officers of that parish. It is sufficient if the practice be by any of the parties who would be burdened by the child becoming chargeable to the parish from which the mother is removed. In Rex v. St. Nicholas, Leicester, 2 B. & C. 891, Bayley, J. states it as an exception to the general rule that an illegitimate child is settled in the parish where it is born, if the mother of the child is removed out of one parish into another through the fraud or collusion of the But that was not the point there decided; and there is no authority to shew that the fraud must be by the parish officers. [PARKE, J. Mr. Nolan, vol. i. p. 324, states, that the removal\* must be by the fraud or collusion of the parish officers; and for that cites Tewksbury v. Twyning, 2 Bulst. 349, and Masters v. Child, 3 Salk. 66. Masters v. Child does not support that position.

Waddington (and Park was with him), contrà, was stopped by the Court. Denman, C. J. The general rule is, that an illegitimate child is settled in the parish in which it is born. Unless this case, therefore, comes within some of the exceptions to that rule, W. J. Otter would be settled in the place of his birth, if it were not extra-parochial, and certainly not in Mattersey. It is said, that he is settled in Mattersey, because the mother, when pregnant, was fraudulently removed from that parish by a parishioner liable to pay rates there. But I think it may be collected from Tewksbury v. Twyning, 2 Bulst. 349, and Masters v. Child, 3 Salk. 66, that in order to fix the settlement of an illegitimate child in the parish from which the mother has been fraudulently removed, the fraudulent removal must have been by the parish officers. Here that was not so. No case has gone so far as to show that if the fraud be by an individual, not a parish officer, the child shall be settled in the parish where the fraud was committed.

PARKE, J., concurred.

TAUNTON, J. It does not appear by the statement in the case, that the mother of the pauper was settled in the parish of Mattersey. It is merely said that she lived there. In Masters v. Child, 3 Salk. 66, it is stated that if a \*214] woman being with child of a bastard, and settled in one \*parish, is persuaded by the parish officers to go into another, and there to be delivered, this fraud will make the parish chargeable where the mother was settled, though the child was not born there. But if the woman accidentally come into a parish, and is persuaded by some of the parishioners to go into another, which she doth,

and there is delivered, this shall not charge that parish which persuaded her. That is precisely in point. Here the mother of the pauper was persuaded by one of the parishioners to go to an extra-parochial place. Independently of that decision, I should have been bold enough to come to the same conclusion. The general rule is, that an illegitimate child shall be settled in the place where it is born; and the fewer exceptions there are to that rule, the better.

Patteson, J., concurred.

Order of sessions quashed.

#### The KING v. The Inhabitants of ORMESBY. Nov. 17.

In 1827 a cottage and land were hired for a year, at the rent of 111.10s., and it was agreed that the land should be entered on at Lady-day, 1827, and held till Lady-day, 1828, and the cottage entered on at May-day, 1827, and held till May-day, 1828. The land and cottage were occupied for a year respectively, commencing and ending at the days agreed on, and the rent paid: Held, that this was an occupation of a tenement for one whole year, sufficient to give a settlement under the 6 G. 4, c. 57.

Upon appeal against an order of two justices, whereby William Milestone, his wife and children, were removed from the township of Stokesley to the township of Ormesby, both in the North Riding of Yorkshire, the sessions confirmed the

order, subject to the opinion of the Court on the following case:-

About Candlemas, 1827, the pauper, being legally settled in Ormesby, took of one Emerson a cottage and \*some land, both in the parish of Kirby. E\*215 Both the cottage and land were bargained for at the same time, and the rent agreed upon, namely 112. 10s., was for both conjointly, and each was to be held for the term of one year, but the times of entering upon and quitting the land and the cottage were different; the agreement being, that the land should be entered upon at Lady-Day, 1827, and the cottage at May-day, 1827; the same to be held till Lady-day, 1828, and May-day, 1828, respectively. The pauper entered on the land at Lady-day, and the cottage at May-day; he quitted the former on the ensuing Lady-day, having occupied the same for a year; and at May-day quitted the latter, having occupied that a year; paying the full rent of both cottage and land at two separate payments; namely, the first half-yearly rent after Martinmas, 1827, and the second half-yearly rent about a week before May-day, 1828. No evidence was offered by the appellants as to the value of the land alone, or of the house alone.

Alexander, in support of the order of sessions. There has not been an occupation of the house and land for the term of one whole year, as required by the statute 6 G. 4, c. 57; because the house and land were never occupied together for the space of one whole year. Between Lady-day and May-day, 1827, the pauper did not occupy a building or land of the annual value of 10l. During that period he was in possession of land only; but he had a mere interesse termini in the cottage. So, after Lady-day, 1828, he occupied the cottage only

and not the land.

Starkie, contrà, was stopped by the Court.

\*Denman, C. J. This question depends on the statute 6 G. 4, c. [\*216 57; which enacts "that no person shall acquire a settlement by reason of settling upon, renting, or paying parochial rates for any tenement, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bona fide rented by such person, at and for the sum of 10l. a year at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10l., actually paid for the term of one whole year at the least." Now here the tenement did consist of separate and distinct building and land; they were bona fide rented for 10l. The question is, whether it was occupied for one whole year? the house and land were occupied under

the yearly hiring, and each of them was for the term of one whole year. The words of the statute are therefore satisfied.

PARKE, TAUNTON, and PATTESON, Js., concurred.

Order of sessions quashed.

# The KING v. The Inhabitants of OSSETT-CUM-GAWTHORPE. Nov. 17.

A. agreed to become the hired servant of B. for five years, to do such work as belonged to the finishing of cloth, and B. promised to pay to A. 10s. a week for the first two years, 11s. for the third, 12s. for the fourth, and 13s. for the fifth, the hours of working to be from six in the morning till seven in the evening, to be paid for all over-time, and a deduction to be made for all short: Held, by Denman, C. J., Parke, and Patteson, Js., Taunton, J., dissentiente, that this was not an exceptive hiring, but a hiring for five years absolutely.

On appeal against an order of two justices for the borough of Leeds in the West Riding of the County of York, whereby George Clarke, his wife and child, \*217] were \*removed from the township of Leeds to the township of Ossettcum-Gawthorpe, in the said Riding, the court of quarter-sessions confirmed the order, subject to the opinion of this Court on the following case. The pauper was born in Ossett-cum-Gawthorpe, and a hiring under the following agreement, and service for the time therein mentioned, in the respondent township, were admitted:--" Memorandum of an agreement made and concluded this 25th day of the fourth month, 1826, between J. and T. Walker, of Leeds, cloth merchants, on the one part, and G. Clarke, with the consent of his father, on the other part; the said G. Clarke doth agree to become the hired servant of J. and T. Walker, for the term of five years, to do such work as belongeth to the finishing of cloth, and to take any part of work the said J. and T. Walker shall think proper, and do the same to the best of his knowledge justly and faithfully; this being done, the said J. and T. Walker promise to pay unto G. Clarke ten shillings per week for the first two years, and eleven for the third, and twelve for the fourth year, and thirteen for the fifth and last year; the hours of working to be from six o'clock in the morning until seven o'clock in the evening, and to be paid for all over-time, and a deduction to be made for all short, either in sickness or in health. The question for the opinion of this Court was, whether G. Clarke gained a settlement in Leeds by such hiring and service.

Milner and Baines in support of the order of sessions. To gain a settlement by hiring and service, the servant must be under the control of the master for the whole year. Here the pauper was not under the control of his master from seven o'clock in the evening to six \*o'clock in the morning; and, if that be so, this was an exceptive hiring. This case must be governed by Rex v. Birmingham, 9 B. & C. 925, and Rex v. Frome Selwood, 1 B. & Ad. 207. In the first of these cases the pauper was hired for a year, at the wages of 4s. 6d. a week, to work from six in the morning till seven in the evening, with liberty to make as much over-work as he chose; and it was held to be an exceptive hiring, although Rex v. Byker, 2 B. & C. 114, was pressed upon the attention of the Court. In Rex v. Frome Selwood, 1 B. & Ad. 207, the pauper was hired for three years to work as bedstead maker; in summer from six in the morning till seven in the evening, and in winter from seven in the morning to eight in the evening; and he was not to work for or serve any other person; and that was held to be an exceptive hiring. The present is a stronger case; for there it was agreed that the servant should not work for any other person; here there is no such stipulation; and the pauper could not be compelled to work more than thirteen hours a day. In Rex v. North Nibley, 5 T. R. 21, a service under a hiring for five years, to work as a colt shearer for twelve hours each day, was held to be an exceptive hiring. [PARKE, J. sole question in this case is, whether, by the terms of the contract, the servant was compellable to work for his master during the over-hours, on receiving compensation? In Rex v. Birmingham, 9 B. & C. 925, it was optional in the pauper to do over-work or not.] So here, the stipulation that the pauper was to be paid for all over-time; shews that it was optional in him to work or not, during the over-hours, for his master.

\*Blackburne and Sir G. Lewin contrà. The legal effect of the contract is, that the pauper undertakes to give the whole of his services for five years to his master. This case is distinguishable from Rex v. Birmingham, because there it was optional in the pauper to work over-hours or not; and from Rex v. Frome Selwood, because there the pauper was not entitled to compensation if he worked over-hours, and consequently the contract might be considered as one for the specified hours only. This case must be governed by Rex r. Byker, 2 B. & C. 114. There the pauper was hired for a year as a driver in a colliery, at the wages of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a day more when that time was exceeded; and it was contended that the pauper was entitled to absent himself at the expiration of fourteen hours, and that the master could not compel him to work any longer. Bayley, J., in delivering the judgment of the Court, said, that the time was only mentioned as the measure of the wages; that the contract did not impose any limit upon what might reasonably be required by the master; and that the relation of master and servant continued during the whole twenty-four hours. That applies precisely to the present case. Here, in the early part of the agreement, the pauper contracts to serve absolutely for five years. Then follows a stipulation by the master to pay weekly wages, varying in amount from year to year, and then, lastly, the clause specifying the number of working hours. That is manifestly introduced only to explain the number of hours the pauper was to work fer those specified weekly wages; he was bound by the first \*clause in the contract to give his whole services to his master during the five years; by the last clause the master was to pay him increased wages if he worked beyond the specified number of hours. At all events, the first clause in the agreement, whereby the pauper contracts absolutely to serve for five years, is free from all ambiguity; if it be said that the meaning of the subsequent clause, specifying the number of working hours, is doubtful, and may or may not refer to the early part of the agreement, so as to limit the time during which the pauper was to be bound to work for his master; then according to Hopkins v. Thorogood, 2 B. & Ad. 916, the first clause being clear, ought not to be controlled by the second, which is ambiguous.

DENMAN, C. J. It is impossible to decide this case without interfering with some former decisions, but, upon the whole, I think that this was not an exceptive hiring. The pauper agreed to become the hired servant of J. and T. Walker for five years, to do such work as belonged to the finishing of cloth. the agreement had stopped here, there would clearly have been a contract to serve for five years, and the masters would have the right to command all the services of the pauper during that period. The question is, if there be any clause in the subsequent part of the agreement which clearly takes away that right? The master's promise to pay the pauper weekly wages, varying in amount yearly during the whole five years. Then comes a clause in these words; "the hours of working to be from six o'clock in the morning until seven o'clock in the evening, \*and to be paid for all over-time, and a deduction to be made for all short, either in sickness or in health." There is nothing here to shew that it was in the option of the pauper to work or not for the master in over-hours; and if not, then the right given to the master in the carly part of the agreement, to all the services of the pauper, is not taken away. I think this was a complete bargain for all his time, and that there was not any part of that time during which the pauper could lawfully refuse to work for his master.

PARKE, J. I am of the same opinion. I think there was no period of the day when the master could not lawfully command the services of the pauper.

The true way to ascertain whether this be an exceptive contract or not, is, to consider what would have been the situation of the parties, if there had been an extraordinary demand for work, and the master had called on the pauper to work during over-hours. Could he have refused? The words of the contract are, "that G. Clarke agrees to be a hired servant for the term of five years, to do work," &c. That is the stipulation as to working, or to the service to be performed. Then the contract goes on to fix the weekly wages to be paid from year to year by the masters. Then come the words on which the difficulty arises;—"the hours of working to be from six o'clock in the morning until seven o'clock in the evening, and to be paid for all over-time." Those words seem to me to be a qualification of the sentence which immediately precedes them, and which fixes the amount of weekly wages; if that be so, then the \*9997 case is like Rex v. Byker, 2 B. & C. 114. It is distinguishable from Rex v. Birmingham, \* 9 B. & C. 925, because, there, the pauper might, at his election, have worked or not for his master at over-hours. In Rex v. Frome Selwood, 1 B. & Ad. 207, the limitation as to the working hours immediately followed the stipulation for service. Here, between that clause and the one specifying the number of hours the pauper was to work, the clause intervenes, fixing the amount of weekly wages. It appears to me that the pauper could not lawfully refuse to work for his master during the over-hours (if required so to do), but that the latter was entitled to the whole services of the pauper during the five years, and consequently this was not an exceptive contract.

TAUNTON, J. The cases undoubtedly run very near to each other. Certainty in sessions law is very important, and I am sorry therefore I cannot come to the same conclusion as my Lord Chief Justice and my brother Parke. This case appears to me not distinguishable from Rex v. Birmingham, 9 B. & C. 925, and Rex v. Frome Selwood, 1 B. & Ad. 207, and they being the latest cases on this subject, ought to govern this. It is said that in Rex v. Birmingham, 9 B. & C. 925, the pauper was to do over-work only if he chose. ing at the terms of the present contract, I think it was optional in the pauper here also to work over-hours or not. The hours of working are defined to be from six o'clock in the morning till seven in the evening. I cannot see why this limitation of the hours of working was introduced, unless it were as an exception in the contract. It is said that it refers only to the amount of wages: I think it refers to the time of working as well, and that the pauper might have \*223] refused to extend \*his time of service beyond those hours; and then it is not distinguishable from Rex v. Birmingham, 9 B. & C. 925, nor can I distinguish it from Rex v. Frome Selwood, 1 B. & Ad. 207. It does not signify much in what part of an instrument a particular stipulation occurs, unless it be so placed as necessarily to qualify only the words immediately preceding. Now I cannot consider this clause a mere regulation of wages, but I think it also limits the time of work. Without wishing to multiply distinctions in a branch of the law in which they are already too abundant, I must add that the present is the case of a servant hired to perform manufacturing work, and it is well known that exceptive contracts are extremely frequent on such occasions. This may in some degree furnish a key to the meaning of the parties, and assist in explaining their intention; and in affirming the order of sessions, I think we should not only fall in with the last two cases, but also with the general current of authorities.

PATTESON, J. I am of opinion that a settlement was gained. Rex v. Byker, 2 B. & C. 114, and Rex v. Frome Selwood, 1 B. & Ad. 207, turn on very nice distinctions. The question in this case is, whether the pauper was bound to serve more than the number of hours mentioned in the agreement? I thought, for a considerable time, that the case fell within Rex v. Frome Selwood, 1 B. & Ad. 207; but, looking at the terms of the contract, and the place in which the stipulation as to the number of hours occurs, I think that it was introduced

merely to regulate the wages; and that the pauper could not refuse to work for his master beyond those hours. I feel great difficulty in \*distinguishing one case from the other; but, upon the whole, it seems to me that the present falls within Rex v. Byker, 2 B. & C. 114.

Order of sessions quashed.

### The KING v. The Inhabitants of PENRYN. Nov. 17.

Between the passing of 35 G. 3, c. 101, and that of 6 G. 4, c. 57, a settlement might be gathed by reason of a party being charged with and paying his share towards the public taxes or levies of the parish, in respect of a tenement above the value of 10*l*.

On appeal against an order of two justices, whereby Honour Gill, widow, and her three children, were removed from the parish of Budock to the borough of Penryn, both in Cornwall, the sessions confirmed the order, subject to the

opinion of this Court on the following case:-

In 1815, Henry Gill, the deceased husband of the pauper, took of Mr. Edgcome a tenement, consisting of three rooms, in the borough of Penryn, at the rent of 6l. a year. These rooms originally formed part of a dwelling-house, which, before 1815, had been subdivided into five distinct dwelling-houses, of which the three rooms occupied by the pauper formed one. The other houses were occupied by other tenants. It was agreed between Gill and the landlord that Gill should pay all the rates upon the whole property, the amount to be deducted from his rent. Gill was accordingly rated to, charged with, and paid the church, poor, and highway rates for the borough of Penryn, between 1815 and 1830, for the whole premises, in one entire sum or charge. The aggregate annual value of these premises amounted to 16l., being the rent which the landlord received for the same, but the value of the tenement \*occupied by [\*225 Gill was under 10l. a year. In pursuance of the agreement with his landlord, Gill, when he settled his rent, was allowed the amount of the rates which he had from time to time paid. Gill was not answerable for the rent of any of the other tenants, nor had he any connection with or control over them.

Follett in support of the order of sessions. The pauper having, before the statute of 6 G. 4, c. 57, been charged with and paid parochial rates in respect of a tenement above the value of 10*l*., thereby gained a settlement. Rex v. St. Pancras, 2 B. & C. 122, has decided, that settlement by rating was not abolished by the 35 G. 3, c. 101, s. 4, in cases where the rating has been in respect of a tenement of the annual value of 10*l*.; and Rex v. Lower Heyford 1 B. & Ad. 75, shews also, that it makes no difference if the rate be repaid to

the occupier by the landlord.

Kelly contrå. There are conflicting authorities on the question, whether or not the settlement by rating was abolished by the 35 G. 3, c. 101. Rex v. Islington, 1 East, 283, and Rex v. Penryn, 5 M. & S. 443, are at variance with Rex v. St. Pancras, 2 B. & C. 122, which was decided by three judges only, but which was undoubtedly recognized in Rex v. Lower Heyford. The question therefore is, which of these decisions is right? and, in considering that point, it is important to look to the state of the law, before the settlement by rating was given by the 3 & 4 W. & M. c. 11, s. 6. The statute 13 & 14 C. 2, c. 12, s. 1, enables two justices, upon complaint made by parish officers within forty days after any person coming to settle in \*any tenement under the yearly [\*226 value of 101., that such person is likely to become chargeable, to remove such person to the place where he was legally settled. If a party, after this statute, resided forty days in a tenement under the yearly value of 101., he was irremovable, and gained a settlement. If he occupied a tenement of greater annual value, he could not be removed at any time; and, by residing forty days,

he gained a settlement. The 1 Jac. 2, c. 17, s. 3, after reciting that poor persons at their first coming to a parish do commonly conceal themselves, enacts that the forty days' continuance of a person in a parish, intended to make a settlement, shall be accounted from the time of delivery of notice in writing of the house of his abode, &c. to one of the churchwardens or overseers of the poor of the parish to which he shall so remove. That enactment manifestly applies to cases where the tenement was under the value of 10%, and the occupier was removable within the forty days. At that time, there was no settlement by rating; but as the object of the notice in writing was publicity, and as that object would be equally well attained when a party was rated to and paid parish rates, the statute 3 & 4 W. & M. c. 11, s. 6, enacts, "that if any person who shall come to inhabit in any parish, shall be charged with and pay his share toward the public taxes or levies of the parish, then he shall be deemed to have a legal settlement in the same, though no such notice in writing be delivered, as was thereby before required." The manifest object of the legislature was to substitute for the notice in writing to the parish officers (which was required in cases only where a tenement was under the value of 101.) the rating by the par-\*227] ish officers; which rating was considered by the legislature\* to imply notice had by them of the party's coming. Then (the settlement under this act, by payment of parochial taxes, being given in cases only where the tenement, in respect of which they were paid, was under the value of 10l.,) followed the statute 35 G. 3, c. 101, which, in s. 4, enacts, "that no person shall gain a settlement by being charged with and paying his share towards the public taxes or levies of the parish, for and on account of any tenement not being of the yearly value of 10l." Now it may be conceded, that if the statute 3 & 4 W. & M. c. 11, s. 6, had given a settlement by rating generally, the statute 35 G. 3, c. 101, s. 4, would only repeal that settlement in respect of tenements under the yearly value of 101.: but the former statute gave the settlement by rating, only where the tenement was under the value of 10l. whole of that head of settlement is therefore abolished by the last-mentioned act. [PARKE, J. According to your argument, a party might have gained a settlement if rated for a tenement of 51. per annum, but not if rated for one of 5001.] The notice in writing, for which payment of rates was afterwards substituted, was required in cases only where the tenement was of less value than 101.; a settlement by payment of rates, was given, therefore, where the tenement was under that value, and in no other case. Since the statute 6 G. 4, c. 57, no question can arise as to settlement by rating, because, even if that head of settlement still subsisted at the passing of the act, all the same circumstances are now required to make a good settlement by rating, as by renting a tenement.

Denman, C. J. The statute 3 & 4 W. & M. c. 11, s. 6, enacts, "that if any person who shall come to inhabit \*in any parish shall be charged with and pay his share towards the public taxes or levies of the parish, then he shall be deemed to have a legal settlement in the same, though no such notice in writing be delivered, as is thereby before required." It makes no distinction as to the value of the property in respect of which he is to be charged. It would be too much to say that the intention of the legislature was to give a settlement by rating in those cases only where notice was before required to be given to the parish officers. The judgments which have been relied upon, in Rex v. Islington, 1 East, 283, and Rex v. Penryn, 5 M. & S. 443, were considered with due respect and attention, and overruled, in the case of Rex v. St. Pancras, 2 B. & C. 122. The order of sessions must be confirmed.

PARKE, J. I am of the same opinion. There is a time when a point, even

of sessions-law, ought be considered as settled.

TAUNTON and PATTESON, Js., concurred. Order of sessions confirmed.

# \*The KING v. The Inhabitants of THRELKELD. Nov. 17.

Under the statute 56 G. 3, c. 139, s. 2, when an apprentice is bound from one parish into another, notice must be given to the overseers of the latter, though both be in the same county and jurisdiction of the peace.

On appeal against an order of two justices, whereby William Thompson was removed from the township of Keswick, in the county of Cumberland, to the township of Threlkeld in the same county, the sessions confirmed the order of removal, subject to the opinion of this Court on the following case:—

The pauper, a poor boy of, and then legally settled in, the township of Threlkeld, in the county of Cumberland, was, in February, 1819, pursuant to an order of two justices of that county, bound apprentice by the churchwardens and overseers of the poor of Threlkeld, to E. Foster of, and residing within, the township of Keswick in the same county, by indenture for a term therein men-The township of Keswick is within the parish of Crosthwaite, and is about four miles distant from the township of Threlkeld, which is in the parish Each township maintains its own poor separately, and both parishes are in the same county, and within the jurisdiction of the peace of the two justices who made the order for the binding, and who afterwards signed their allowance of the indenture. No notice was given to the overseers of the poor of Keswick, or to any of them, of the intention to bind out such apprentice, nor did any of the overseers of that township attend the justices who signed their allowance of the indenture, or either of them, and admit such notice, but the binding, as well as the service and residence under \*it, was in all [\*230 other respects such as would confer a settlement upon the pauper in Keswick. The question for the opinion of this Court was, whether such notice was necessary under the circumstances above stated.

Sir James Scarlett and Armstrong in support of the order of sessions. Notice to the overseers of Keswick, in the township into which the pauper was to be bound, was necessary in this case by the statute 56 G. 3, c. 139, s. 2;(a) and

(a) By section 1, it is enacted, "that before any child shall be bound apprentice by the overseers of the poor of any parish, township, &c., such child shall be carried before two justices of the county, &c., wherein such parish, &c., shall be situate, who shall inquire into the propriety of binding such child apprentice to the person to whom it shall be proposed by such overseers to bind such child, and such justices shall particularly inquire and consider whether such person reside, or have his place of business within a reasonable distance from the place to which such child shall belong," &c., and shall, if they see fit, examine the father and mother, and shall make such other inquiries as are there directed; and if they, upon such inquiry, think it proper that such child should be bound apprentice to such person, such justices "shall thereupon order that the overseer of the place to which such child shall belong shall be at liberty to bind such child apprentice accordingly, which order shall be delivered to such overseer as the warrant for binding such child apprentice, and such order shall be referred to by the date thereof, and the names of the said justices in the indenture of apprenticeship of such child; and after such order shall have been made, such justices shall sign their allowance of such indenture of apprenticeship before the same shall be executed by any of the other parties thereto. Provided always, that no such child shall be bound apprentice to any person residing, or having any establishment in trade at which it is intended that such child shall be employed out of the same county, at a greater distance than forty miles," &c.

Sec. 2. "And be it further enacted, that in all cases where the residence or establishment of business of the person to whom any child shall be bound shall be within a different county or jurisdiction of the peace from that within which the place by the officers whereof such child shall be bound shall be situate, and in all other cases where the justices of the peace for the district or place within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound shall be allowed as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district

the directions of the act as to the \*allowance of the indenture not having been followed, then, by s. 5, no settlement is gained. In Rex v. Newarkupon-Trent, 3 B. & C. 59, it was decided that such notice was necessary to be given by the overseers, where the parish into which the apprentice was to be bound was within a different jurisdiction from the binding parish, though in the same county; and the question in this case is, whether the statute applies equally where the two parishes are within the same county, and neither of them within any separate jurisdiction. The argument of Holroyd, J., in Rex v. Newark-upon-Trent, applies here; his opinion was, that the intent of the act \*232] was that notice \*should be given to the overseers of the parish in which the apprentice is intended to serve, whether the binding were in the same or a different county. And Lord Tenterden, who differed from the other Judges, admitted that there was no reason for expressly requiring notice to the parish officers where the binding is into another county, which might not be urged with almost equal force to a binding in the same county. The overseers of a parish at one extremity of a county, are not likely to be better acquainted with the circumstances of a parish at the other extremity than with those of an adjoining parish though situate in a different county. Then, if it be consistent with the general policy of the act that notice should be given in cases where the binding is in the same county, the language of that part of the proviso in sect. 2, which requires notice to be given, is sufficiently large to comprehend cases where the two parishes are in the same county. The circumstance of that proviso being, in the printed statute, part of the second section, ought not to confine it, in point of construction, to cases mentioned in that and not in the preceding section; for, in the parliamentary rolls, the clauses are not so distin-

F. Pollock and Aglionby contra. If it be held that notice is necessary to be given in all cases to the overseers of the parish into which the apprentice is to be bound, a party will, in this case, be deprived of a settlement without any express words in the act of parliament for that purpose. In Rex v. Newark
\*233] upon-Trent, 3 B. & C. 80, Lord Tenterden says, "As to some of the

\*233] \*directions, the statute is introductive of a new law; and as a non-compliance with its directions will prevent the gaining of a settlement, I apprehend that, according to general principles, the construction of the statute must not be carried beyond the plain and obvious meaning of the language of the directions, upon any supposition that a case not within such meaning may be within the mischief intended to be remedied, or within the reason upon which the direction may be supposed to have been enacted." Section 1, which applies to every case of the binding of a parish apprentice, says nothing of notice. Section 2, is confined to certain particular bindings with reference to the local authorities of the

within which the place shall be situated wherein such child shall be intended to serve: Provided always, that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound, who shall be engaged in the same business, employment, or manufacture in which the person to whom such child shall be bound is engaged; and notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice."

Sec. 3. "Provided always, that the allowance of two justices of the peace for the county in which such child shall be intended to serve an apprenticeship shall be situated, shall be valid and effectual, although such place may be situated in a town or liberty within which any other justices of the peace may, in other respects, have an exclusive jurisdiction."

Sect. 5. "That no settlement shall be gained by any child who shall be bound by the officers of any parish, township, or place, by reason of such apprenticeship, unless such order shall be made, and such allowance of such indenture of apprenticeship shall be signed as hereinbefore directed."

#### \*The KING v. The Inhabitants of THRELKELD. Nov. 17.

Under the statute 56 G. 3, c. 139, s. 2, when an apprentice is bound from one parish into another, notice must be given to the overseers of the latter, though both be in the same county and jurisdiction of the peace.

On appeal against an order of two justices, whereby William Thompson was removed from the township of Keswick, in the county of Cumberland, to the township of Threlkeld in the same county, the sessions confirmed the order of

removal, subject to the opinion of this Court on the following case:-

The pauper, a poor boy of, and then legally settled in, the township of Threlkeld, in the county of Cumberland, was, in February, 1819, pursuant to an order of two justices of that county, bound apprentice by the churchwardens and overseers of the poor of Threlkeld, to E. Foster of, and residing within, the township of Keswick in the same county, by indenture for a term therein men-The township of Keswick is within the parish of Crosthwaite, and is about four miles distant from the township of Threlkeld, which is in the parish Each township maintains its own poor separately, and both parishes are in the same county, and within the jurisdiction of the peace of the two justices who made the order for the binding, and who afterwards signed their allowance of the indenture. No notice was given to the overseers of the poor of Keswick, or to any of them, of the intention to bind out such apprentice, nor did any of the overseers of that township attend the justices who signed their allowance of the indenture, or either of them, and admit such notice, but the binding, as well as the service and residence under \*it, was in all other respects such as would confer a settlement upon the pauper in Keswick. The question for the opinion of this Court was, whether such notice was necessary under the circumstances above stated.

Sir James Scarlett and Armstrong in support of the order of sessions. Notice to the overseers of Keswick, in the township into which the pauper was to be bound, was necessary in this case by the statute 56 G. 3, c. 139, s. 2;(a) and

(a) By section 1, it is enacted, "that before any child shall be bound apprentice by the overseers of the poor of any parish, township, &c., such child shall be carried before two justices of the county, &c., wherein such parish, &c., shall be situate, who shall inquire into the propriety of binding such child apprentice to the person to whom it shall be proposed by such overseers to bind such child, and such justices shall particularly inquire and consider whether such person reside, or have his place of business within a reasonable distance from the place to which such child shall belong," &c., and shall, if they see fit, examine the father and mother, and shall make such other inquiries as are there directed; and if they, upon such inquiry, think it proper that such child should be bound apprentice to such person, such justices "shall thereupon order that the overseer of the place to which such child shall belong shall be at liberty to bind such child apprentice accordingly, which order shall be delivered to such overseer as the warrant for binding such child apprentice, and such order shall be referred to by the date thereof, and the names of the said justices in the indenture of apprenticeship of such child; and after such order shall have been made, such justices shall sign their allowance of such indenture of apprenticeship before the same shall be executed by any of the other parties thereto. Provided always, that no such child shall be bound apprentice to any person residing, or having any establishment in trade at which it is intended that such child shall be employed out of the same county, at a greater distance than forty miles," &c.

Sec. 2. "And be it further enacted, that in all cases where the residence or establishment of business of the person to whom any child shall be bound shall be within a different county or jurisdiction of the peace from that within which the place by the officers whereof such child shall be bound shall be situate, and in all other cases where the justices of the peace for the district or place within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indeuture by which such child shall be bound shall be allowed as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district

the directions of the act as to the \*allowance of the indenture not having \*231] the directions of the average been followed, then, by s. 5, no settlement is gained. In Rex v. Newarkupon-Trent, 3 B. & C. 59, it was decided that such notice was necessary to be given by the overseers, where the parish into which the apprentice was to be bound was within a different jurisdiction from the binding parish, though in the same county; and the question in this case is, whether the statute applies equally where the two parishes are within the same county, and neither of them within any separate jurisdiction. The argument of Holroyd, J., in Rex v. Newark-upon-Trent, applies here; his opinion was, that the intent of the act \*232] was that notice \*should be given to the overseers of the parish in which the apprentice is intended to serve, whether the binding were in the same or a different county. And Lord Tenterden, who differed from the other Judges, admitted that there was no reason for expressly requiring notice to the parish officers where the binding is into another county, which might not be urged with almost equal force to a binding in the same county. The overseers of a parish at one extremity of a county, are not likely to be better acquainted with the circumstances of a parish at the other extremity than with those of an adjoining parish though situate in a different county. Then, if it be consistent with the general policy of the act that notice should be given in cases where the binding is in the same county, the language of that part of the proviso in sect. 2, which requires notice to be given, is sufficiently large to comprehend cases where the two parishes are in the same county. The circumstance of that proviso being, in the printed statute, part of the second section, ought not to confine it, in point of construction, to cases mentioned in that and not in the preceding section; for, in the parliamentary rolls, the clauses are not so distinguished.

F. Pollock and Aglionby contrà. If it be held that notice is necessary to be given in all cases to the overseers of the parish into which the apprentice is to be bound, a party will, in this case, be deprived of a settlement without any express words in the act of parliament for that purpose. In Rex v. Newark
233] upon-Trent, 3 B. & C. 80, Lord Tenterden says, "As to some of the directions, the statute is introductive of a new law; and as a non-compliance with its directions will prevent the gaining of a settlement, I apprehend that, according to general principles, the construction of the statute must not be carried beyond the plain and obvious meaning of the language of the directions, upon any supposition that a case not within such meaning may be within the mischief intended to be remedied, or within the reason upon which the direction may be supposed to have been enacted." Section 1, which applies to every case of the binding of a parish apprentice, says nothing of notice. Section 2, is confined to certain particular bindings with reference to the local authorities of the

within which the place shall be situated wherein such child shall be intended to serve: Provided always, that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound, who shall be engaged in the same business, employment, or manufacture in which the person to whom such child shall be bound is engaged; and notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice."

Sec. 3. "Provided always, that the allowance of two justices of the peace for the county in which such child shall be intended to serve an apprenticeship shall be situated, shall be valid and effectual, although such place may be situated in a town or liberty within which any other justices of the peace may, in other respects, have an exclusive jurisdiction."

Sect. 5. "That no settlement shall be gained by any child who shall be bound by the officers of any parish, township, or place, by reason of such apprenticeship, unless such order shall be made, and such allowance of such indenture of apprenticeship shall be signed as hereinbefore directed."

M. T. 1832. justices of peace. It is said that the sentence beginning with the words "provided always," must apply to the whole former part of the act; but the words "that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound," plainly shew that it must be confined to cases where the binding is from one county into another, which are the cases included in the enactment immediately preceding. Then, the sentence beginning with the words "and notice shall be given to the overseers," &c., forms a second part of the same proviso. It does not begin with the words "provided also," but is connected with the preceding sentence by the conjunction and. It is therefore confined to the cases mentioned in the preceding sentence, viz., to those in which an allowance of an indenture by justices of two different juris-

dictions is required. The pauper gained a settlement in Keswick, unless he was DENMAN, C. J. prevented from so doing by the 56 G. 3, c. 139, s. 5, which enacts, "that no settlement \*shall be gained by any child who shall be bound by the officers of any parish, &c., by reason of such apprenticeship, unless such [\*234] order shall be made, and such allowances of such indenture of apprenticeship shall be signed as hereinbefore directed." It is said here that there have not been such an order, and such allowances of the indenture signed as by the act directed, and I am of that opinion. The act of parliament contains a proviso (s. 2), that "notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice." Now here the sessions have found that no notice was given to the overseers of Keswick, nor did the overseers of that parish attend before the justices and admit such notice. But it is contended that notice is not necessary in a case where the binding parish, and that in which the apprentice is to be bound, are within the same county, and consequently within the jurisdiction of the same magistrates. But the object of the legislature being, as may be collected from the preamble, that every possible precaution should be taken in the binding out of the poor apprentice, it is manifest that the same necessity for notice may exist in either case. It seems to me absurd to say that merely passing the boundary of the county should render that necessary in one case which was not so in another. The provision that "no settlement shall be gained unless such order shall be made," &c., is for the advantage of the apprentice, because it \*then becomes the interest of the officers of the binding period to the land of binding parish to take care that the apprentice shall be well bound. With all deference to the opinion of Lord Tenterden in Rex v. Newark-upon-Trent, 3 B. & C. 59, and admitting that the different clauses of this act of parliament are not easily reconcileable with each other, I think that the proviso as to notice in the second section is not confined to cases where the two parishes are situate in different counties, but that it extends to all the cases mentioned in the first section as well as the second. There are no words to control or limit that construction; it is beneficial to the apprentice, and by adopting it we do not violate the grammatical sense of the language used by the legislature.

PARKE, J. I am of the same opinion. The doctrine that an act of parliament is to be construed so as to favour settlements, has been long and justly exploded. There is no rule of law which calls on us to put a strict construction on this act of parliament. We must endeavour, therefore, to discover the intention of the legislature and carry it into effect, if the language used will warrant us in so doing; and the question is, whether, putting a proper grammatical construction on the proviso, it is confined to cases where the two parishes are situate in different counties, and consequently within the jurisdiction of different magistrates, or extends to those where the parishes are in the same county and jurisdiction. The circumstance of its being printed as part of the second section

can make no difference in the construction, because, on the parliament rolls, the acts \*are not divided into sections. Now, the terms of the proviso arc, "and \*236] \*are not divided into sections. Tron, via the parish in which notice shall be given to the overseers of the poor of the parish in which had not appropriate of the such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture." The language would be more accurate if it had been said "before he shall allow, and before he shall make the order for the binding;" but the word allow is used in the statute as common to both. The language, therefore, of the proviso is sufficiently large to include cases where the parishes are in the same, as well as where they are in different counties, and the sense and reason of the thing seem to require, also, that it should extend to each class of cases. I thought also reason required that the first part of the provise should be general, but as a different opinion was expressed by some of the judges on that point in Rex v. Newark-upon-Trent, 3 B. & C. 71, 84, I do not wish to give any decisive opinion upon it; if, however, the first part of the proviso extends to all cases, the second undoubtedly does, and if the first does not so apply, no reason can be given why the second should not. Upon the whole, I think that the opinion delivered by Holroyd, J., in Rex v. Newark-upon-Trent, is perfectly correct, that notice was necessary to be given in this case, and that, for want of such notice, no settlement was gained in Keswick.

Taunton, J. I frankly acknowledge there are some expressions in the \*237] second section which I do not \*perfectly understand, but they are not material to the question before the Court. I see enough to convince me that the order of sessions is right. That part of section 2, which begins with the words "and notice shall be given," is a general enactment, applicable to all the cases embraced in the first section. As to the part which begins with "provided always that no indenture shall be allowed," &c. I am by no means satisfied that those are not words of general enactment; but, however that may be, the words respecting notice are undoubtedly general; and the sense and reason of the thing require that they should be so. There may be as much reason for requiring notice in a case where the two parishes are in the same county, as where they are in different counties. Two parishes in the same county may be at a great distance from each other, and two parishes in different counties may be adjoining each other; and it is manifest that notice may be as necessary in the one case as the other. Where, indeed, the two parishes are in different counties, notice need not be given to the overseers of the master's parish until the parties go before the magistrate having jurisdiction over that parish: but where the two parishes are in the same county, the notice must be given before the indentwo parishes are in the same county, the notice must be given before the indentwo parishes are in the same county.

ture be allowed. The order of sessions must be confirmed.

PATTESON, J. I am of the same opinion. I think that, by sect. 2, notice is required to be given to the overseers in all cases. The early part of sect. 2, requires that the indenture shall be allowed by the magistrates having jurisdiction over the place from which the apprentice is to be bound, as well as by the

magistrate of the place into which the apprentice is to be \*bound. If the parishes are within different jurisdictions, two sets of justices are required; if within the same, only one: but in the latter case, they are magistrates for each parish. Where there are to be two allowances, notice need not be given to the overseers of the master's parish till the parties go to the second set of justices, because they are the persons who are to make the order; but where there is only one set of justices, notice must be given to the overseers of the master's parish before the indenture be allowed by the justices making the order. I am, therefore, of opinion that the order of sessions was right.

Order of sessions confirmed.

# The KING v. The Justices of NORFOLK. Nov. 19.

By the statute 17 G. 2, c. 38, it is discretionary in magistrates to commit an outgoing churchwarden or overseer who neglects or refuses to account.

The appeal against the accounts of the overseers of the poor of the parish of Brancaster, having been heard at the January sessions, 1831, was dismissed, 2 B. &. Ad. 944. An information was afterwards laid against L. Sims, who had been one of the churchwardens, for not having rendered an account pursuant to the 17 G. 2, c. 38. A summons having been granted against him, he appeared by attorney, and it was proved that he was eighty years of age, very infirm, and although he had been elected churchwarden, he had never been swom in, and that, although he signed the poor rates, he had never interfered in their collection or received any of the parish moneys. The justices, under these circumstances, having \*refused to commit him, a rule was obtained calling the directed to the justices to issue their warrant of commitment pursuant to the statute.

F. Pollock and Kelly now shewed cause. The commitment to gaol, unthorized by this statute, is a judicial act. Section 1 requires the outgoing churchwardens and overseers, yearly, to "deliver to the succeeding overseers a just, true, and perfect account in writing of all sums of money by them received, or rated and assessed and not received, and also of all moneys paid by such churchwardens and overseers so accounting, and of all other things concerning their said office." Here, Sims had no account to render; but assuming that he was bound to account, section 2 is not imperative on the magistrates to commit, but gives them a discretionary power to do so or not; the words of that section being, that in case such churchwardens and overseers shall refuse or neglect to account, "it shall and may be lawful" for the justices to commit.

Palmer contrà. Sims acted as overseer by signing the rate; and, by the statute, he is bound to deliver in an account, not only of all sums of money received, but of moneys rated and assessed and not received, and of all other

things concerning the office.

DENMAN, C. J. The justices were satisfied that, under the circumstances of this case, there was no ground for commitment; and the statute *authorizes*, but does not *compel*, them to commit. There is no ground, \*therefore, for issuing a mandamus to the magistrates; and the rule, as to them, must be discharged with costs, but, as to Sims, without costs.

PARKE, J. Sims ought to have rendered some account. The magistrates, however, having exercised their discretion and refused to commit him, I think the rule should be discharged, as to them, with costs, and without costs as to Sims.

TAUNTON, J. concurred.

PATTESON, J. I am of the same opinion. Sims ought certainly to have delivered some account; because the statute requires that he shall render an account of the moneys rated and assessed and not received, and of all other things concerning his office.

Rule discharged.

#### \*RUBERY v. STEVENS and Another.

f \*241

Where the residue of a term of years becomes vested in executors, and the yearly value is less than the reserved rent, the executors are still liable in the debet and detinet as assignees, for so much of the rent as the premises are worth.

The plaintiff having declared in covenant for rent at 26l. a year, the defendants pleaded that they were only chargeable as executors; that the term came to them as such, that

the premises were of less yearly value than the said rent of 26L, viz. of no value, and that they had fully administered, &c. Replication, that the premises were of the yearly value of 26L; issue thereon. At the trial the yearly value was found by the jury to be 26L:

Held, that the replication was, in substance, that the premises were of some value; that the issue was merely informal, and cured by verdict; and that the plaintiff might recover the arrears of rent at the rate fixed by the jury.

COVENANT by reversioner, against the defendants as assignees of a term in certain premises demised by indenture at the yearly rent of 264: breach, nonpayment of the rent for two years. Plea, that the defendants ought not to be charged with rent otherwise than as executors, in the detinet only: they then stated that the term came to them as executors of one Peter Walker, and continued as follows:—"And the defendants further say, that the said demised premises, &c., at the time of the death of the said P. W. were, and from thence hitherto have been, and still are, of much less yearly value than the value of the said rent of 26% a year so by the said indenture reserved as aforesaid, that is to say, the same premises during all the time aforesaid were and still are of no value whatever." The plea concluded with a plene administravit. Replication, that the premises at the time of Walker's death were, and from thence hitherto have been, and still are, of the yearly value of 261.: upon which averment issue was joined. At the trial before Lord Tenterden, C. J., at the sittings in Middlesex after Hilary term 1832, his Lordship left it to the jury to say what had been the annual value of the premises during the time in question; they found it to have been 201., and gave a verdict for the plaintiff for \*242] \*enter a nonsuit, on the grounds, that the issue between the parties was, in substance, whether or not the premises were of the value stated in the declaration; that they had been proved not to be of that value; and, therefore, that the defendants were not liable to any amount, otherwise than as executors. rule nisi having been obtained,

Sir James Scarlett and Cottingham shewed cause in the present term. If the premises were of any value, the defendants are liable as assignees. Their defence is, in substance, that they have derived no profit whatever from the premises, and consequently are not chargeable as assignees, but as executors only; and that as executors they have fully administered all the effects that came to their hands. But it being found that the premises were of some value, they are liable to assignees to that extent: 1 Wms. Saund. 112, note (c) 5th edit.(a). It is true the plea states the premises to have been of less value than \*243 1 26l. a year, that is to say, of no value, \*and the plaintiff replies to this, that they were of the yearly value of 26l.; upon which averment issue has been joined. But the actual sum stated in the replication is not important; the material averment in the plea is, that the premises were of no value; and that being so, the mention of a particular amount in the replication does not render such amount an essential part of the issue. The question is, were the premises of some value or none? "When a material allegation is traversed in

Vol. XXIV.—8

<sup>(</sup>a) The result of the cases is there stated as follows:—"If an executor be sued in his representative capacity for rent accruing in his own time, either in debt or covenant, where the lease is by deed, or in debt or assumpsit for use and occupation, where the lease is not by deed, he may plead plene administravit, and under that plea may shew that the land yields no profit, and that he has no assets aliunde; but if the land yields a profit equal to the rent, he will fail on a plea of plene administravit, for he is bound to apply the profits of the land towards payment of the rent in the first instance, and his not doing so will be a devastavit; if, therefore, the land yields some profit, but less than the rent, it should seem that his plea should be plene administravit preser the profit. If, on the other hand, the executor be sued, as he may be when he enters and is in the actual occupation, in his individual capacity as assignee of the term, in debt on a lease by deed, he must plead specially that he holds only as executor, that the lands yield no profit, or less than the rent, and pray whether he shall be charged otherwise than in the detinet; in covenant, he must plead the same matters specially."

an improper or inartificial manner, the issue taken upon it is merely an informal one, which is held to be aided after verdict by the statute 32 H. 8, c. 30." 2

Wms. Saund. 319, note (6). Cobb v. Bryan, 3 B. & P. 348.

Campbell and Joseph Addison, contrà. The gist of the plea is, that the defendants are not liable as assignees, but as executors only; and the question on which that depends is, whether or not the premises were equal in value to the rent reserved. It is laid down in the note cited from 1 Wms. Saund. 112, that if the executor be sued as assignee of the term, "he must plead specially that he holds only as executer, that the land yields no profit, or less than the rent, and pray whether he shall be charged otherwise than in the detinet." If the plaintiff meant to insist that the premises, though of less value than the rent reserved, had still yielded something, that should have been averred as an answer to the plene administravit: the misapplication of such profit, whatever it might be, would have been a devastavit by the executors. In Bolton v. Canham, Pollexf. 125, (S. C. 1 Ventr. 271), an executor sued in the debet and definet for 240l. rent, pleaded \*that the premises were of less value than the rent, to wit, of the value of 100l. only, and that he had fully administered; and the Court was of opinion, that if this had been the only matter pleaded, it might have been a good bar. Billinghurst v. Speerman, 1 Salk. 297, is to the same effect. If the premises are worth less than the rent, it is damnosa hæreditas, and, with reference to the question of liability as assignee or as executor, it is the same as if they were worth nothing. The value specified in these pleadings was therefore material; and the plaintiff, having proved a less value cannot recover. Besides, if it was competent to him to tender issue on the question whether or not the premises were of any value, he has not used words which have that effect. Cur. adv. vult.

DENMAN, C. J., in the course of this term delivered the judgment of the

Court.

There are two questions in this case. The first, whether the substance of this plea is, that the tenements demised were not of the value of the rent; or that they were of no value whatever.

The second, whether, if the latter be the substance of the plea, the plaintiff

is entitled to judgment on this issue upon the facts found by the jury.

Upon referring to the authorities, and considering the case, we are of

opinion that the plaintiff upon these pleadings is entitled to a verdict.

It is clearly settled that the executor of a termor eannot waive the term, but that he must either renounce or accept the executorship in toto: and if he accept the \*executorship, and enter on the demised premises, he is chargeable as assignee in an action of debt or covenant for the arrears of rent due after his entry, de bonis propriis. But as the rent may be of greater value than the land, it would be a greater hardship on the executor in that case to charge him personally in his own right with the full amount of the rent. And it is quite clear from the authorities that he is not so chargeable. But then arises the question, whether he be personally liable, in that event, as assignee, for no part of the rent, considering it as an entire thing, for the whole of which he must be so liable or not at all; or whether the rent can be apportioned, and he is liable in the character of assignee for so much of the reat as the premises are worth. Upon reference to the authorities it seems that the rent is in this case to be apportioned, and the executor is chargeable personally for so much of the rent as the premises are worth.

In one of the earliest cases, Hargrave's case, 5 Coke, 31 b., it was adjudged that in an action against the executor for rent due in his own time, the writ should be in the debet and detinet, "for when an executor takes the profits nothing shall be assets but the profits above the rent: as, if the land be worth 10th. per annum, and 5th is reserved, in that case nothing shall be assets but the

51. above the rent."

The next material case is that of Helier v. Casebert, reported in several books.

In 1 Lev. 127, Kelyng says, "The executor cannot waive the term, but shall be charged in the detinet, on which the assets shall come in question; and if he east continues the possession, he shall \*be charged in the debet and detinet in respect of the perception of the profits, whether he has assets or not; to

which Twysden agreed."

In the same case, 1 Sid. 266, it is stated that it was resolved by all that an executor cannot waive, if he does not waive the executorship; and this although the testator took a demise of land which is worth only 10*l*. a year, rendering 20*l*. a year, this contract binds the executor as long as he has assets; but, per Windham, J., semble, "that if an action in this case is brought in the debet and detinet, and the executor pleads nil debet, and on the evidence it appears that the land is worth only 10*l*. a year, he shall have a verdict for 10*l*. a year, and for the other 10*l*. the lessor shall have an action on the detinet tantum, because he is solely liable in respect of the contract." The reporter adds a query.

There is an argument of Pollexfen when at the bar, in his reports, p. 132, which places this question in a clear point of view. He says, "If it should be admitted that in such case where the rent is more than the value of the land, in an action in the debet and detinet the defendant shall not be charged for the whole rent, yet he ought to be charged for so much as the land is worth. This I ground upon what has been said, that if an action in the debet and detinet lie where the land is of as much value as the rent, it ought then to lie for as much of the rent as the value of the land amounts unto in the debet and detinet: then, if so, their plea is pleaded as a bar to the whole rent, whereas it is only a bar to part, vis., to the 60% over and besides the value; and as for the 100%, by his own showing, we ought to recover, for by his own showing, he is chargeable in the debet and detinet for that."

\*247] \*"In debt for rent, the defendant pleads an eviction of part of the land, and sets out the value: this is only a bar to a part of the rent, and if he pleads nothing to the rest, judgment must be against him for the whole."

if he pleads nothing to the rest, judgment must be against him for the whole."

In the case of Buckley v. Pirk, 1 Salk. 317, Chief Justice Parker (Lord Macclessield) says, "If the rent be of less value than the land, as the law prima facie supposes, so much of the profits as suffices to make up the rent, is appropriated to the lessor, and cannot be applied to any thing else. On the other hand, if the rent be worth more than the land, the defendant may disclose that by special pleading, and pray judgment whether he shall be charged otherwise

than in the detinet only."

It appears to us, that the dictum of Windham and the argument of Pollexfen are well founded in law: for if the profits are appropriated to the lessor, and become a personal debt due from the executor to him, where they are equal to or greater than the rent, why should they not be equally appropriated to the lessor, and equally a personal debt due from the executor where they are less? If so, it follows that the plea in this case, which is pleaded to the whole rent in the declaration, cannot be a good bar, unless it shews that there were no profits at all. If they had been less than the rent, and therefore covered a part only, that part should have been confessed, and the plea pleaded to the remainder. The substance of the plea, therefore, must be taken to be, that the demised tenements were of no value whatever.

The second question is, as to the form of the issue: and whether the plaintiff

be entitled to judgment?

The jury have found the demised tenements to be worth 20*l*. a year only.

\*The substance of the plea being, as above mentioned, that the premises were of no value, we think that the substance of the replication is, that they were of some value, and that the issue is merely informal, and cured by verdict.

Looking on the allegations on both sides, there is an averment by the plaintiff, that the demised premises are of the yearly value of 26l.; and on the part of the defendant, that they are of much less value than 26l., that is to say, of no

value whatever, which is equivalent in substance to an allegation that they are

not of the value of 26l., or any part thereof.

We therefore think that the substance of the issue is, whether the demised tenements were worth any thing, and that issue ought, on the facts, to be found for the plaintiff. If they are of any value whatever, the plea is falsified, for it constitutes no defence to the action for the whole rent unless they are of no value.

Rule discharged.

# The KING v. The Inhabitants of LEEDS.

Under the statute 33 G. 3, c. 54, s. 24, (which is in substance the same as 12 Ann. st. 1, c. 18, s. 2,) an apprentice bound to a person residing in a parish under a certificate, cannot gain a settlement by such apprenticeship, though the certificate be subsequently discharged, and he afterwards continue to serve his master in the parish for forty days. The binding, to confer a settlement, must be such as would, at the time, be effectual for that purpose.

On appeal against an order of two justices, whereby Nathaniel Bowles, his wife and children, were removed from the township of Horton, in the West Riding of Yorkshire, to the parish of Leeds, in the same Riding, the sessions confirmed the order subject to the opinion of this Court on the following case:—

The pauper's father was settled in Leeds. In 1809 \*the pauper, being 249\* about thirteen years of age, was bound apprentice by his father for seven years to Joseph Fox, shoemaker, who was then residing in Horton, under a certificate from a Friendly Society. Four years after the indenture was made, Fox took a farm for a year in Horton at 401., which he occupied for the year. The pauper continued to serve his master for seven years from the date of the indenture. The sessions, being of opinion that the pauper had not gained a settlement by such apprenticeship, confirmed the order. The case was argued in the course of this term.

Blackburne and Milner in support of the order of sessions. Under the statute 33 G. 3, c. 54, s. 24,(a) no settlement was gained by this apprenticeship. For that purpose, the binding ought to be to a master who is at the time capable of communicating a settlement. By 3 W. & M. c. 11, s. 8, binding and inhabitation confer the settlement: if the master is not settled at the time of the binding, his becoming so afterwards will not enure to render it valid. This is clearly to be inferred from Rex v. Hinckley, 4 T. R. 371. Lord Kenyon there, referring to 12 Ann. stat. 1, c. 18, s. 2, (which is similar to the clause in question of 38 G. 3,) says, it is necessary that the binding should be such as would confer a settlement by service under the master, "for the legislature intended that no act whatever of this sort done by a certificated man should help to bind the parish." In Rex v. Manningtree, 6 M. & S. 214, the son of a certificated person was bound apprentice, before he came of age, to a master \*living out of the parish; and after coming of age, he slept more than forty nights [250\*] in the certificated parish, while serving under the apprenticeship. a sufficient inhabitation in the parish after he was emancipated, to have conferred a settlement, but the binding was before: and the Court held, on that account, that no settlement was gained. In Rex v. Great Driffield, 8 B. & C. 684, the present question was raised, but not decided. Rex v. Nacton, 3 B. & Ad. 543, decided last term, is no authority in favour of this settlement, for there the master had taken a tenement in the certificated parish at the time of the binding, and was then irremoveable.

<sup>(</sup>a) The material part of the clause is given in the judgment. The act is now repealed. See 10 G. 4, c. 56.

Sir G. A. Lewin and Baines, contrà. A settlement was gained by this service. In St. Maurice v. St. Mary Calendars, Winchester, Burr. S. C. 27, which was a case under 12 Ann. stat. 1, c. 18, s. 2. Lord Hardwicke stated the question to be, "whether the apprentice of this man (a certificated person) gained a settlement in St. Mary's by serving an apprenticeship to him there." After reading the words of that statute, "and not having afterwards gained a legal settlement in such parish," he added, "which brings it to this question, whether the master had by any act discharged the certificate, and gained a settlement in the parish into which he came by certificate." In Ivinghoe v. Stonebridge, 1 Stra. 265, the pauper was bound to a certificated person, who subsequently bought an estate in the parish, whereby the certificate was discharged, and the apprentice afterwards served him six months: the facts happened before the statute of Anne, but the Court held, that even if they had \*occurred since that act, the apprentice would have gained a settlement. Rex v. Nacton, 3 B. & Ad. 543, is an authority in favour of this settlement. If the apprentice himself, in the present case, had been a person included in a certificate, the question would have been different; his gaining a settlement might have been contrary to the express words of 9 & 10 W. 3, c. 11, which provides that no person who shall come into any parish by a certificate, "shall be adjudged by any act whatsoever to have procured a legal settlement in such parish," unless by taking a tenement of 10% value, or executing an annual office: and, on this ground, Rex v. Manningtree, 6 M. & S. 214, may be distinguished from the present case. But there are no corresponding words in 33 G. 3, c. 54, s. 24, applicable to the apprentice of a certificated person, the apprentice himself not being so. In Rex v. St. Peter's, Derby, 1 T. R. 218, the pauper was bound to a certificated man, who afterwards removed into a different parish, under a new certificate; but the pauper served him more than forty days after that time in the original parish; and it was held, that the pauper gained a settlement there by such service, the certificate to that parish having been discharged.

Cur. adv. vult.

Denman, C. J. on a subsequent day of the term, delivered the judgment of the Court.

The question in this case was, whether a pauper had gained a settlement in the parish of Horton. The pauper was bound apprentice to a master who was \*252] at that time residing at Horton, under a certificate from a \*friendly society, but before the term of apprenticeship expired the master gained a settlement in Horton by renting a tenement, and the pauper served him under the indenture of apprenticeship more than forty days after that time.

The question turns upon the proper construction of the 33 G. 3, c. 54, s. 24, by which it is enacted, "that no person who shall be an apprentice bound by indenture to any person who did come into or shall reside in any parish, township, or place under the authority of this act, and not afterwards having gained a legal settlement in such parish, township, or place, shall gain or be adjudged to have any settlement in such parish, township, or place, by reason of such apprenticeship or binding; but all such apprentices shall have their settlements in such parish, township, or place, as if they had not been bound; any act or acts of parliament to the contrary notwithstanding." These words are copied nearly verbatim from 12 Ann. stat. 1, c. 18, s. 2, which act has received a judicial construction in the case of Rex v. Hinckley, 4 T. R. 371, by which case we think we are bound.

That case differs from the present in one circumstance only, vis. that in that case the pauper having been bound to a certificated man, was afterwards assigned to another person in the same parish who was under no disability; whereas here the pauper continued with the original master after his certificate was discharged. But the reasons given by Lord Kenyon, in delivering the judgment of the Court, which was evidently much considered, apply to the present case as

much as to that, and we cannot decide in this case that the \*pauper gained a settlement without over-ruling Rex v. Hinckley, 4 T. R. 371.

The words of the statute are plain; that an apprentice bound to a man who did come into or shall reside in a parish under a certificate, and not afterwards having gained a settlement, shall not by such apprenticeship or binding gain a settlement in that parish, but shall be as if he had not been bound. Now the words "not afterwards having gained a settlement," are grammatically to be referred to the preceding words "come into or reside," and manifestly point to the situation of the master at the time of the binding. If the master be residing under the certificate at the time of the binding, no settlement can by possibility be acquired by the apprentice in the certificated parish, notwithstanding a subsequent removal of the master's disability; but it is otherwise if the binding is after the discharge of the certificate, where the master has gained a settlement in the certificated parish. Lord Kenyon says, "it is necessary that the binding should be such as would be capable of conferring a settlement by service under the original master in that place, otherwise no settlement can be gained there by virtue thereof; for the legislature intended that no act whatever of this sort done by a certificated man, should help to bind the parish." Here, according to this opinion, the binding was not, at the time it took place, such as would be capable of conferring a settlement, nor could any subsequent circumstances make the binding more efficacious, whatever effect they might have on the service: the \*consequence is, that the pauper remained as if he had not been bound, and gained no settlement in Horton.

The case of Ivinghoe v. Stonebridge, 1 Str. 265, was pressed in argument, but in that case the service expired before the passing of the statute of Anne, and besides, the original binding was not to a certificated person, and was free

from all objection.

The case of Rex v. St. Peter's, Derby, 1 T. R. 218, was also pressed. It is sufficient to say, that in that case the present question was not presented to the Court, but it was decided without argument, on the sole point, whether one certificate was discharged by the granting of another; and the case was also prior to Rex v. Hinckley, 4 T. R. 371.

Neither does our opinion militate against the case of Rex v. Nacton, 3 B. & Ad. 543, decided in Easter term last; for that case proceeded entirely on the ground that the master never did reside under the certificate, but came into the

parish in a condition to obtain a settlement.

Upon the whole we are of opinion that the case of Rex v. Hinckley must govern the present decision, and that the order of sessions must be affirmed.

Order of sessions affirmed.

#### \*GODSON v. SANCTUARY. Nov. 20.

**\*255** 

A fieri facias was sued out on a judgment entered up under a warrant of attorney, and the sheriff seized the goods before ten in the forenoon of 13th of August, and sold the same ten days afterwards. On the 13th of October following, about noon, a commission

issued against the defendant, under which he was declared a bankrupt:

Held, first, that the seizure of the goods by the sheriff was a sufficient executing or leving, within the meaning of those words in the statute 6 G. 4, c. 16, s. 81; secondly, that more than two calendar months had elapsed between the execution and the issuing of the commission; thirdly, that although the execution issued on a judgment entered up in pursuance of a warrant of attorney, yet, having been executed more than two months before the issuing of the commission, it was protected by s. 84, and not taken out of that section by the proviso in s. 108. Semble, that that proviso only applies to executions executed within two calendar months before the issuing of a commission.

ACTION on the case against the defendant as sheriff of Sussex, for a false

return of nulla bona to a writ of fi. fa., issued at the suit of the plaintiff against the goods and chattels of one A. Weller. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Trinity term 1832, the jury found a verdict for the plaintiff for 170l. 10s., subject to the opinion of

this Court on the following case:-

On the 12th of August, 1830, a judgment was signed on a warrant of attorney (dated the 4th of the same month) by the plaintiff against A. Weller, and on the same day a fieri facias was issued thereupon, directed to the defendant as sheriff of Sussex, indorsed to levy 170l. 10s., besides, &c., and was delivered to the defendant to be executed; and he issued his warrant, in pursuance of which the sheriff's officer, shortly before eleven o'clock in the forenoon of the 13th of August, entered the premises of Weller and took possession of his goods. He remained ten or twelve days, holding such possession, and then sold under the writ sufficient of such goods to raise the above sum of 170l. 10s., poundage and expenses, and received the amount.

On the 13th of October, 1830, about twelve or one o'clock in the afternoon, \*256] a commission of bankrupt issued \*against Weller, under which he was duly found and declared a bankrupt. The act of bankruptcy had been committed some time in June, 1830. The assignees having indemnified the sheriff, the money was paid over to them, and the defendant made his return as

above stated.

Hutchinson for the plaintiff. The plaintiff, the execution creditor, is entitled to recover, because his execution was levied more than two months before the issuing of the commission, and is therefore protected by 6 G. 4, c. 16, s. 81, which enacts, "that all executions against the goods and chattels of such bankrupt bona fide executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed." It may be said, first, that the seizure of the goods by the sheriff was not an executing or levying within the meaning of that act; but when the sheriff entered and seized the goods, the property was divested out of the bankrupt and vested in the sheriff, so that he might sell, even after he was out of office, Clarke v. Withers, 2 Ld. Raym. 1072. [PATTESON, J. It was held by a great majority of the Judges in Giles v. Grover, 9 Bingh. 128, that the property of the goods seized in execution is not out of the bankrupt The plaintiff might have compelled the sheriff to sell, and was enuntil sale.] titled to a priority. Stead v. Gascoigne, 8 Taunt. 527, could not have been decided as it was if that were not the law. In Sadler v. Leigh, 4 Campb. 195, the point was not taken; there was no sale in that case, and if the doctrine to be \*257] contended for on the part of the \*defendant is right, the question on the fraction of a day could not have arisen. [PATTESON, J. As between the plaintiff in the execution and the sheriff, the latter may be called upon, after seizure, to return the writ, though the property may not be divested out of the debtor. PARKE, J. This execution was founded on a judgment entered up on a warrant of attorney. Does not the proviso in section 108, prevent the plaintiff from receiving more than a rateable part of his debt?(a)] Here, the plaintiff is not a party seeking a benefit under the commission: he was not within the 108th section as a creditor who, at the time of the bankruptcy, had security for his debt. On this point Wymer v. Kemble, 6 B. & C. 479, is an authority.

<sup>(</sup>a) By that section it is enacted, "That no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors."

There an actual sale of the goods had taken place before the bankruptoy; here it had not; but the seizure by the sheriff was two months before the commission issued.

As to the question, whether two months had elapsed between the levying of the execution and the issuing of the commission, the authorities establish that where time is to be computed from an act done, the day on which the act is done is to be included in the computation, Rex v. Adderley, Doug. 463, Castle [\*258 v. Burditt, 3 T. R. 623, \*Glassington v. Rawlins, 3 East, 407, Cowie v. [\*258 Harris, 1 M. & M. 141; but upon this point Ex parte Farquhar, 1 Montague & Mac. 7, is decisive. According to these cases, the two months would not include any part of the 13th of October. But the fraction of a day will be noticed if necessary, Thomas v. Desanges, 2 B. & A. 586, Sadler v. Leigh, 4 Campb. 195; and at all events, more than two months had elapsed between eleven o'clock of the forenoon of the 13th of August, and twelve o'clock at noon of the 13th of October.

W. Clarkson, contra. It must be conceded, since the case of Giles v. Grover, 9 Bingh. 128, that the seizure of goods under a fi. fa. is a sufficient levying or executing withing the meaning of this statute; but, here, two months had not elapsed between the seizure and the issuing of the commission. The seizure took place on the 13th of August; the commission issued on the 13th of Octo-There cannot be three thirteenths in two months, and the day of the seizure must be excluded. It is true that in Cowie v. Harris, 1 M. & M. 141, where a commission issued on the 14th of May, Lord Tenterden held, at Nisi Prius, that a dealing on the 14th of March was not invalid as being less than two calendar months before the issuing of the commission, for he said that both days could not be reckoned inclusively, so as to make March the 14th not "more than two calendar months' before May the 14th, the date of the commission. But that opinion is at variance with the decision of the Court of King's Bench in Hardy v. Ryle, 9 B. & C. 603, which was an action against a justice for false \*imprisonment; the plaintiff there was discharged from prison on the 14th of December, and the writ in the action issued on the 14th of June, and it was held, that the action was brought within six calendar months after the act committed. But assuming this point to be against the defendant, the plaintiff is not entitled to recover, because he was a creditor having security for his debt; and he, therefore, is to receive only a ratcable proportion of such debt. In Wymer v. Kemble, 6 B. & C. 479, there was a sale completed before the act of bankruptcy. Notley v. Buck, 8 B. & C. 160, is in point: there the goods were seized before, but not sold till after, the act of bankruptcy; and it was held that the sheriff was not justified in paying over the money to the execution

creditor, but that it belonged to the assignees.

Hutchinson in reply. The plaintiff was not a creditor having security for his debt at the time of the bankruptcy, for the sale took place before the commission issued. The case is clearly within the eighty-first section, and the execution creditor is entitled to the property levied by seizure two months before the issuing of the commission, unless that right is divested by sect. 108. There are no express words taking away the right given by sect. 81, and that section being clear and distinct, ought not to be controlled by a subsequent one which is

ambiguous.

DENMAN, C. J. The question submitted to the Court is, whether the execution was levied more than two months before the issuing of the commission, within \*the meaning of the 6 G. 4, c. 16, s. 81. We may assume that the execution was bona fide, the contrary not being imputed. The first point adverted to by the counsel for the plaintiff has been very properly abandoned by the defendant's counsel; for after the decisions which have taken place on the subject, it would be impossible to contend that the seizure by the sheriff in this case was not a levying within the act. (See Wray v. Lord Egremont, ante, 122.) Another question is, whether two calendar months elapsed between the levying

of the execution and the issuing of the commission. The language of the eightyfirst section is, "that all executions bona fide executed or levied more than two calendar months before the issuing of the commission, shall be valid, notwithstanding any prior act of bankruptcy." Now, if there had been no authority whatever on the subject, it seems to me, that we should be compelled by this section to ascertain with precision the time when the two things took place: first, the time at which the execution was levied, and secondly, the time at which the commission issued. Here, there can be no doubt that more than two calendar months did elapse between those two proceedings. The authorities which have been cited to this effect are decisive. Ex parte Farquhar, 1 Mont. & M. 141, is precisely in this point. There, on a petition by mortgagees praying for a sale, it appeared that one of the mortgages was executed on the 18th of February, 1826; that the commission issued on the 18th of April following; and that an act of bankruptcy was committed before or on the 18th of February, 1826. The Vice-Chancellor held, that the two calendar months expired \*on the 17th of April; on the principle that, where the computation of time was to be from an act done, the day on which such act was done was to be included. and his judgment was afterwards confirmed by Lord Chancellor Lyndhurst. Now that it is an express authority on the point in question; and consequently, this execution is protected by section 81, unless it comes within the proviso at the end of section 108. I am of opinion that section 81, having in such very distinct and general terms protected all executions bona fide executed or levied more than two months before the issuing of the commission, the words of section 108 are not sufficiently explicit to divest the execution creditor of the right previously given by section 81. The words of the 108th section are very large, so as to make it almost necessary to impose some limitation on their meaning. There would be great difficulty in contending, nor has it been insisted on the part of the defendant, that all acts of bankruptcy at any former period should over-ride executions of this sort. I think that section 108 does not so far control section 81, as to prevent its clear and distinct words from operating in a case of this description; I am therefore of opinion that the execution creditor, having levied his execution more than two months before the issuing of the commission, is entitled to the proceeds of the goods, and consequently that the sheriff made a false return, and that the plaintiff is entitled to recover.

PARKE, J. I am of the same opinion. The facts of the case are shortly these: the plaintiff, who was creditor on a judgment entered up on a warrant of attorney, issued a fi. fa., and the sheriff, by eleven o'clock of the \*18th of August, seized the goods of the bankrupt, but did not sell until some time afterwards, and between twelve and one o'clock of the 18th of October the commission of bankrupt issued. The question is, whether the assignees or the execution creditor are entitled to the money produced by the sale of the goods. The first point is (supposing this to be a case within sect. 81), whether the execution was executed or levied more than two calendar months before the issuing of the commission. Now, first as to the meaning of the words executed or levied, that has been settled by numerous decisions, on the construction of the 21 Jac. 1, c. 19, s. 9, (where the words used are "served and executed,") which establish, that as soon as the sheriff seizes the goods, the execution is executed. The same construction must be put upon the words "executed or levied" in this statute, and therefore supposing the plaintiff to be entitled to the benefit of section 81, his execution was executed or levied by eleven o'clock of the forenoon of the 13th of August. The next question is, whether the commission was issued more than two calendar months from that time. Now, if the day of the act done is to be taken into consideration, as it should be, according to the argument adopted by the Master of the Rolls in Lester v. Garland, 15 Ves. 248, as applicable to that case, where the plaintiff is privy to the act, then the day of the seizure in this case must be reckoned as one, and, consequently, if the commission issued at any time on the 13th of August, it issued more than two calendar

months after the execution. Upon this point Ex parte Farquhar, 1 Mont. & Mac. 7, adjudged first by the Vice-Chancellor \*Sir J. Leach, and afterwards by Lord Lyndhurst, is decisive. Substituting for "two calendar the words "one day before the issuing of the commission," the case will be clear. As the 13th of August would be one day before, any time on the 14th of August would be more than one day. Besides, if here the fraction of a day be taken into account, (as it may be,) it would appear that more than two calendar months had elapsed between the time of the seizure and the issuing of the commission, that is, between eleven o'clock of the forenoon of the 13th of August, and twelve o'clock of the 13th of October, because sixty-one complete days, which are the two calendar months, would have elapsed by eleven o'clock of the 13th of October, and the commission did not issue till twelve or one o'clock of the afternoon of that day. Making the computation either way, the commission issued more than two calendar months after seizure, which is sufficient to entitle a creditor to a preference under this clause.

The next question is, what is the effect of sect. 108? It appears to me that section 81 applies to all executions levied more than two months before the issuing of the commission, whether founded on judgments after verdict or on judgments by default or confession, the words of that section being general, and not in any way limited or qualified; and that the 108th section applies only to executions on judgments by default or confession, or nil dicit, where the seizure has taken place within the two calendar months before the issuing of the commission. That construction will reconcile the two sections of the act. The 108th section, however obscure in its terms originally, has now received a judicial construction which makes it tolerably clear. \*The creditor who has issued execution on a judgment after verdict, though within the two months, is entitled to a preference if the seizure was before an act of bankruptcy; but where the judgment is by default or confession, then, to entitle the creditor to a preference, there must have been a sale as well as a seizurc. (a)

TAUNTON, J. I am of the same opinion. There is abundance of authority to show that the law will advert to the fraction of a day; and that being so, the only question is, whether more than two calendar months did not elapse between eleven o'clock of the 13th of August and twelve at noon of the 13th of October. Now Lord Holt, in an anonymous case in 1 Salk. 44, (reported, 2 Ld. Raym. 1096, as Fitzhugh v. Dennington,) says that it has been adjudged, (Herbert v. Torball, Keb. 589; Sid. 162,) that if one be born the 1st of February, at eleven at night, and the last of January, in the 21st year of his age, at one of the clock in the morning he makes his will of lands, and dies, it is a good will, for he was then of age. Then, if he become of age on the 31st of January, he of course must be above the age of twenty-one on the 1st of February. It follows by analogy, therefore, that more than two calendar months had elapsed at the time when this commission issued.

The next question is, whether the execution, notwithstanding the proviso of the 108th section, be within the protection of the 81st. The language of that section is very general, and applies to all executions whatever, executed two months before the issuing of the \*commission. This execution, therefore, is within its protection, unless it is expressly taken out of it by section 108. That section appears to me to apply to executions issued within two calendar months, or, in other words, to such executions as are not protected by section 81; and if that be so, it is unnecessary to consider the cases in which a judicial construction has been put upon section 108. If that section were not limited by the eighty-first, there would be no period of limitation whatever; an execution issued on a judgment founded on a warrant of attorney, would be liable to be disturbed at the distance of many months, or even years, by an act

<sup>(</sup>a) See Wymer v. Kemble, 6 B. & C. 479; Notley v. Buck, 8 B. & C. 160. Also Crosfield v. Stanley, ante, 87.

of bankruptcy. It appears to me that the eighty-first section was intended to interpose a sort of statutable regulation, and to establish that where the two months had not begun, the execution should, in all cases whatever, be protected. I am of opinion, therefore, that the sheriff made a false return, and that the

plaintiff is entitled to recover.

PATTESON, J. I am of the same opinion. There are three questions: first, whether, by the seizure of the bankrupt's goods, the execution can be said to have been executed or levied; secondly, if so, whether or not the two calendar months had elapsed between the 13th of August and the 13th of October; and, thirdly, whether section 108 applies to this case. The first point has been sbandoned on the argument for the defendant, on the supposition that it was adjudged in Giles v. Grover, 9 Bingh. 128; but the point there decided was, \*266] that by seizure under an execution, the property was not divested out of the defendant in the execution. It was \*there pressed very much in argument, that by a scizure of the goods, an execution was always considered executed within the meaning of the 21 Jac. 1, c. 19, s. 9, and consequently that the property in the goods was thereby divested out of the debtor. although it was admitted that ever since that statute the law had been, that by seizure the execution was executed, the consequence attempted to be deduced from it, that as soon as the seizure took place the property was divested out of the debtor, was denied. I think that never was the law. At all events, if it ever was so held, the contrary was decided in Giles v. Grover, 2 Bingh. 128.

As to the second question, I entirely agree with my Lord, that if there had been no decision on the point, the language of the act requires that the precise time when the execution was executed, and the precise time at which the commission was issued, must be ascertained; and the case of Ex parte Farquhar, 1 Mont. & Mac. 7, is quite decisive, that more than two months had elapsed in the present case, between the 13th of August and the 13th of October.

With respect to the third question it is sufficient to say that sect. 108, in my judgment does not apply to any case protected by sect. 81, and that makes it unnecessary to consider the propriety of the decisions which have taken place on sect. 108, which I believe has given occasion, within a few years, to more litigation than any section in any act of parliament ever did.

Judgment for the plaintiff.

#### \*267]

#### \*DOYLE v. POWELL.

Goods and freight were insured at and from Liverpool to Monte Video and Buenos Ayres if open, or the ship's final port of discharge in the River Plate, with liberty to wait two months at Monte Video if needful, at a premium of five guineas per cent., to return 21. per cent. for risk ending at Monte Video on arrival. The vessel arrived on the 2d of August at Monte Video, which was then blockaded by an enemy's fleet to prevent vessels passing to Buenos Ayres. The blockade did not cease till the 4th of October. The vessel afterwards sailed for Buenos Ayres, and was lost: Held, that the risk was at an end as soon as the vessel had staid two months at Monte Video, and that the underwriters were, therefore, discharged.

Assumpsit on a policy of insurance upon goods and freight by the ship Triton, at and from Liverpool to Monte Video and Buenos Ayres if open, or her final port of discharge in the River Plate, (with liberty to wait two months at Monte Video if needful,) at a premium of five guineas per cent., to return 21. per cent. for risk ending at Monte Video on arrival. The declaration averred a total loss by the perils of the seas. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Trinity term 1831, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case:—

The plaintiff was master and owner of the ship Triton, and being about to

proceed upon the voyage after mentioned, caused the policy in question to be The plaintiff sailed on board the Triton from Liverpool for Monte Video and Buenos Ayres, with a cargo, (consisting partly of goods of his own,) on the 7th of May, 1828. The vessel arrived on the 2d of August at Monte Video, at which time there was a war between the government of the Brazils and that of Buenos Ayres, and a blockading squadron of the Brazilian govern. ment was stationed off Monte Video, between that port and Buenos Ayres, to prevent vessels sailing up the river to Buenos Ayres; but negotiations were pending, and a peace was shortly expected. The plaintiff having discharged part of his cargo at Monte Video, and taken in ballast and some goods for Buenos Buenos Ayres on the 28th of September, and would have proceeded thither, but that he was prevented as after mentioned. Intelligence arrived at Monte Video on the 12th of September, that peace had been made; but peace was not ratified until the 30th of September, and intelligence of that event was received at Monte Video on the 4th of October, on which day the blockade was raised and until that day, the squadron remained off Monte Video, and no vessels with cargoes were allowed to clear out for Buenos Ayres. Those vessels which did sail were in ballast, and were cleared out for Valparaiso. On the 2d of October, notices were stuck up at the Mole Head and at the custom-house, that no vessels should leave Monte Video for Buenos Ayres without the payment of certain duties, as well upon the goods on board, as upon the goods landed, and from ten to fifteen days was the period fixed for such payment. The master (the plaintiff), on the 2d of October applied to the consignees of his ship, as well as to other persons on shore, to pay the duties on his cargo, but without effect. On the 5th of October the plaintiff, taking advantage of a fog, clandestinely sailed from Monte Video for Buenos Ayres without having paid the duties: he arrived in the outer roads on the 6th of October, and, on the following day, in the inner roads, where the vessel was sunk with the goods insured on board. The defendant paid into Court 2 per cent. as a return of premium for risk ending at Monte Video. The question for the opinion of the Court was, whether, under the terms of the policy, the risk was determined by the stay of the plaintiff for more than two months at Monte Video? If the Court should be of opinion that \*it was, then a nonsuit was to be entered; if otherwise, a verdict for the plaintiff for such sum as an arbitrator should award.

The case was argued during the present term.

Kelly for the plaintiff. The risk was not determined by the stay of the ship at Monte Video (though for more than two months), under the very peculiar circumstances of this case. The waiting having been occasioned by the blockade, was not one contemplated by the policy in limiting the specified time to two The instrument must be construed so as to carry into effect the intention of the parties. Giving the construction contended for by the defendant, will have the effect of determining the risk, under whatever circumstances the staying longer than two months occurred. The intention of the parties, when they introduced into the policy the liberty to stay two months, was to substitute that express stipulation for the one which the law would otherwise imply; that the vessel should not wait more than a reasonable time. If there had been no express liberty to stay two months reserved by the policy, but a mere liberty to touch, and the vessel, having arrived at Monte Video, had been detained by a superior force for a considerable period, that would not have determined the risk; and if not, why should the express reservation of a liberty to stay two months have that effect?

Maule contrà. The policy must undoubtedly be construed so as to give effect to the intention of the parties, but that intention (collected from the language of the instrument) was, that the risk should determine as soon \*as the vessel had remained two months at Monte Video. The voyage described [\*270]

in the policy is "from Liverpool to Monte Video and Buenos Ayres if open, or her final port of discharge in the river Plate, with liberty to wait two months at Monte Video, if needful." The words if needful are construed by the plaintiff to mean "if the blockade continues;" but that is not their meaning. If the vessel had been at liberty to stay a reasonable time, that would have imported a liberty to stay as long as there was a detention by embargo. The vessel was not under restraint at Monte Video. She might have gone from thence, though not to Buenos Ayres. This case is something like Browne v. Vigne, 12 East, 283. There the ship was insured "from London to any port or ports in the River Plate, until her arrival at her last port of discharge in the River Plate;" and the master, intending to discharge her carge at Buenos Ayres, passed Maldonado; but hearing that Buenos Ayres was then in the hands of the enemy, he went to Monte Video, with intent to make a complete discharge there if the market were suitable: he discharged a part, but not finding the market there so favourable as he expected, he had not abandoned his original intention of going to Buenos Ayres, if it should afterwards be practicable; while however, he was still discharging part of his carge at Monte Video, Buenos Ayres continuing in the enemy's hands, a loss happened by a peril of the sea. It was held that the voyage ended at Monte Video. The effect of the leave to stay is in this case to put an end to the policy at the end of two months. It is in the nature of a warranty that the vessel shall not stay more than two months. Now a \*warranty to sail on or before a particular day is not fulfilled if the ship does not completely unmoor on that day, though she then has her cargo on board, and is quite ready to sail, and is only prevented doing so by stress of weather, Nelson v. Salvador, 1 M. & M. 309. The delay here was the Where a ship, being disabled by perils of the sea, put into port to repair, and the master was obliged to sell part of the goods to defray the expenses, that was held, (in an action on a policy on the goods,) not to be a loss by the perils of the sea, though they were the remote cause of it; the proximate cause being the want of funds to pay for the repairs, Powell v. Gudgeon 5 M. & S. 431, Sarquy v. Hobson, 2 B. & C. 7. If it be held that the underwriters are liable on the policy as long as Buenos Ayres was closed, they will be liable to a greater risk than the parties intended.

Kelly in reply. The words, "with liberty to stay two months at Monte Video," is not a warranty that the vessel shall not stay there longer than that time. In Brown v. Vigne, 12 East, 283, Monte Video was, at the time of the loss, the port of discharge. Here Buenos Ayres was the port of discharge at the time of the loss.

Cur. adv. vult.

DENMAN, C. J. on a subsequent day in the term delivered the judgment of the Court. The only question in this case is, what is the meaning of the words, "with liberty to wait two months at Monte Video if needful." To decide that, we must consider what the effect would be if those words were omitted. \*vessel might have sailed to Monte Video, and have discharged her cargo there, without going to Buenos Ayres, and in that case there would have been a return of 2 per cent. premium, in consequence of the risk having ended at Monte Video; or if, on her arrival at Monte Video, Buenos Ayres had been open, she might have sailed to that port. If, however, that port was not open, but under blockade, she would not have been at liberty to wait at Monte Video till the blockade was over. The clause in question enables the vessel to remain at Monte Video for two months. It seems to have been the intention, that if the blockade had ended sooner, she should proceed to Buenos Ayres; but at all events, she could not stay longer than two months at Monte Video; though, if she had sailed at the end of two months, she would have been protected by the policy. No other construction can be put upon this policy, framed as it is. In order to construe it as required by the assured, words must be introduced, and it must be read as if the liberty was to stay two months, or longer; but the latter words not being in the policy, we think that the vessel was at liberty to

stay two months and no longer at Monte Video; and she having staid longer, the risk was determined at the end of the two months, and the underwriters are discharged. Judgment for the defendant.

# \*The Duke of NEWCASTLE v. The Hundred of BROXTOWE.

In an action on 7 & 8 G. 4, c. 31, against the hundred of B., for the felonious demolition of Nottingham Castle by rioters, the plaintiff produced in evidence certain orders made by the justices at the quarter sessions for the county, in which the castle was described as being in that hundred. No proof was given that the justices who made those orders were resiants in the county: Held, that the orders were admissible as evidence of reputation, for that the justices, from the nature of their office, must be presumed cognizant of the subject.

It was proved by other evidence, that for nearly two centuries the castle of N. had been

reputed to be within the hundred of B.

The defendants attempted to prove that the town of N. had been from the earliest period separated from any jurisdiction of, or connection with the adjoining hundreds, and for that purpose gave in evidence an extract from Domesday Book, in which the town was mentioned previous to the enumeration or description of the hundreds in the county, and various presentiments during the reigns of Ed. 1, Ed. 3, and Hen. 6, by the jurors of the town of N., of deaths within the castle and its precincts; and they produced a charter of Hen. 6, whereby the town of N. was made a county of itself, and the castle was specially excepted.

The Judge, after recapitulating all the evidence, told the jury that the excepting of the castle when the town was made a county, did not shew in what hundred the castle originally was; that the evidence of reputation given by the plaintiff was entitled to great weight, and that when things had gone on for two centuries in one uniform course, it was reasonable to infer that that course had prevailed from the earliest period, unless the evidence to the contrary was certain. It being objected that by this summing up too much weight was given to modern reputation, and too little to the an-

cient documents: Held, that the direction was proper.

Semble, that in assessing compensation for the demolition of a dwelling-house under 7 & 8 G. 4, c. 31, the jury ought to consider what sum will be necessary to repair the injury and replace the building in the state it was in when the outrage was committed; and not whether the plaintiff was likely to make it his residence, or whether it was suitable for such residence.

This was an action on the statute 7 & 8 G. 4, c. 31, to recover damages for felonious demolition in part of Nottingham Castle, by persons unlawfully, riotously, and tumultuously assembled. Plea, the general issue. At the trial before Vaughan B., at the Summer assizes for Nottingham, two questions were made: first, whether Nottingham Castle was within the hundred of Broxtowe; and, secondly, assuming it to be so, on what principle the compensation given

by the statute was to be calculated.

Upon the first point, the plaintiff gave in evidence letters-patent of the 8 Jac. 1, whereby that king granted to E. Ferrers and F. Phelps, inter alia, the dovehouse \*close, the brewhouse, and the site, ground, and foundation of the castle mills, described as theretofore being part of the possessions of the castle of Nottingham; secondly, a grant of the 18th of February, 20 Jac. 1, whereby that king granted to Francis Earl of Rutland, inter alia, the castle of Nottingham, and the site, circuit, ambit, and precinct thereof, and the close called Dove-cott Close in Nottingham Park, and a meadow called King's Meadow, lying in or near the liberties or precincts of the town of Nottingham; all which were described in the grant as parcel of the lands and possessions belonging to the king in right of his crown of England. The plaintiff then put in a series of documents, among which were the following:-An extract from the Hundred Rolls taken by special commission in the third year of Ed. 1. One of the articles of inquiry was of purprestures made upon the king, and by whom made, and under the head of 'Wapentake of Brokolstowe' was this finding:

That the Lord Henry, father of the Lord King Edward, made a certain weir across the river Trent, which had laid under water the meadow of the lord the king under the castle of Nottingham, and the meadow of the prior of Lenton. The land-tax assessments under the 4 W. & M. c. 1, and office copies of duplicates of the assessments under the same from the year 1693 to 1744: in these the castle and brewhouse yard had been included as parts of Broxtowe hundred. Entries in a book of orders made at the quarter sessions in April and October 1654, and January and April 1655: in these it was stated, that the castle and brewhouse were in the hundred of Broxtowe, and the inhabitants of the hundred were thereby ordered to maintain certain poor people living under the castle and at the brewhouse, who had been previously relieved out of the \*general county stock. The first two orders gave as a reason for their having been so relieved, that the brewhouse and yard were not formerly known to be of any particular parish, but that they were then known to be in the wapentake of Broxtowe, and chargeable therewith to the relief of their own poor. Another order of the 1st of January 1660 was also given in evidence, to shew that on occasion of a robbery of A. R. in Nottingham Park, the justices, with the consent of the grand jury, &c. to save the expense of an action, ordered the money to be levied on the hundred of Broxtowe, and paid to the person robbed. was contended that these orders were not admissible as judgments of the Court of quarter sessions, because the justices had no authority to make them; nor as evidence of reputation, because it was not proved that the justices resided in the county, or had any peculiar knowledge on the subject-matter; and, further, because it appeared from the orders themselves, that at the time when they are made, it had been matter of dispute whether the brewhouse yard was within the hundred or not. The learned Judge thought they were admissible as evidence of reputation. Evidence was then given of the call of a constable for "brewhouse yard," since 1696, among the constables for Broxtowe hundred; and that it had been included among the townships in the hundred in the county rate of 1818, and in order of sessions made for payments of sums as compensation for injuries done, pursuant to the stat. 9 G. 1, c. 22, and 7 & 8 G. 4, c. 31.

The defendants attempted to shew that this was the first occasion (unless those mentioned in the orders of sessions about the time of the commonwealth were to be taken as proved) in which any direct charge had been made on the hundred in respect of the castle or its \*precincts; and for this purpose they gave evidence, that the town of Nottingham, being an ancient royal burgh, had from the earliest period been always free from any jurisdiction of or connection with the adjoining hundreds; and they produced an extract from Domesday Book, in which there was a distinct entry of the town of Nottingham previous to the enumeration or description of the hundreds in the county, but no mention was made of the castle. They then proved that there had been distinct juries for, and distinct amerciaments upon the town and the several hundreds at various iters (assizes) during the reigns of Ed. 1, Ed. 3, and Hen. 6; and in order to shew the connection of the castle with the town rather than with any adjoining hundred, they gave evidence of presentments during those reigns by the jurors of the town of Nottingham as to deaths at the castle, and at the king's mill in the precincts of the castle; and after producing various documents to shew the possession of the castle by the crown from the earliest period of legal memory to the reign of Hen. 6, they put in a charter of the twenty-seventh year of that king, by which the town of Nottingham was declared to be a county of itself, apart from the county of Nottingham, but the castle was specially excepted.

As to the value of the building, the plaintiff called one witness, who stated that the cost of restoring the castle would be 31,280l. The defendants called Mr. Henry Wood, a Nottingham architect, Mr. Nicholson, a builder of Southwell, and Mr. William Cubitt, a London builder. Mr. Wood had made esti-

mates of the damage on three principles; the first, taking the net rental which appeared in evidence to be 171*l*. per annum, and which, at thirty years' purchase, would amount to 5130*l*. The next was made with reference to the sale of the \*materials, which he estimated at 5081*l*.; and the last calculation proceeded on the principle of restoration, which he thought could be done for 15,386*l*. Mr. Nicholson concurred in this latter estimate. Mr. Cubitt estimated the price of restoration at 21,000*l*.

The defendants proved also, that the castle of Nottingham had not been occupied by the plaintiff or any former owner for more than a century; that it had become unfit for the residence of the plaintiff's family by reason of several steam-engines having of late years been erected near it, and of the plaintiff himself having sold ground immediately adjoining to it, and having let portions of the park on building leases. The castle itself had been divided into two

dwelling-houses, which together let at the net rent above stated.

The counsel for the defendants, in his address to the jury, contended, first, that the documentary evidence of the connection of the castle with the town, and of the independence of the town of any hundred, were entitled to much greater weight than the evidence of reputation given by the plaintiff; and, secondly, upon the question of damages, that the true principle of compensation was, taking the net annual rent to be the criterion of the annual value, to give

a reasonable number of years' purchase on that value.

The learned Judge directed the jury, first, to find for the plaintiff if they thought upon the evidence that the castle was locally situate within the hundred of Broxtowe; and he recapitulated all the evidence, and observed, upon the charter of Hen. 6, that leaving the castle in the county of Nottingham, when the town was made a county of itself, did not shew in what hundred the castle originally was, and that the orders of sessions and the \*land-tax duplicates were entitled to great weight, as shewing that, in point of reputation, the castle had, for two centuries, been considered part of the hundred; and he added that, when things for a great length of time had gone in a certain course, it was reasonable to infer that they had always done so, unless the evidence to the contrary were certain. The question of damages he left generally to the jury. They found for the plaintiff, damages 21,000%. In the early part of the term,

Wilde, Serjt. moved for a new trial. The orders of session were not admissible even as evidence of reputation, because it was not shewn that the justices by whom they were made were resident in the county, or had any peculiar knowledge as the question whether the castle and its precincts were within any particular district or division of the county; and in one of those orders it expressly appears to have been matter of controversy at a former period whether the brewhouse yard were or were not formerly within the hundred of Broxtowe. The learned Judge did not present the case to the jury as he ought to have done, for he gave too great weight to the evidence of modern usage and reputation, and too little to the ancient documents produced on the part of the defen-The damages were excessive. The stat. 7 & 8 G. 4, c. 31, s. 2, entitles the party damnified to full compensation. The learned Judge ought to have stated to the jury the principle upon which that compensation ought to be calculated. They assessed the damages on the principle that the plaintiff was entitled to have the castle rebuilt. Now that may be properly applied to buildings used by the owner for the purposes of habitation; but \*Notting-ham Castle had not for a century been so used by its owner. It was not [\*279] an ancient possession of the family of the present duke, nor granted to them by the crown, but purchased between 1660 and 1680 from the Earl of Rutland: and the plaintiff had clearly no intention of living in it, for he had granted the land adjoining upon building leases. The rental is the proper criterion of the annual value of a building; and the compensation to which the plaintiff was entitled was a reasonable number of years' purchase upon the rental actually produced by the castle. Cur. adv. vult.

PARKE, J., now delivered the judgment of the Court.

In this case, my Brothers Taunton and Patteson and myself, before whom the motion for a new trial was made (my Lord Chief Justice not having at that time taken his seat on the Bench), are of opinion that no rule should be granted.

The first objection was, that certain orders of sessions, in number five, and made between the years 1654 and 1660, each inclusive, were improperly received

in evidence.

These documents were admitted, not as orders upon matters over which the magistrates had jurisdiction, but as evidence of reputation; and in that point of view we are of opinion that they were admissible. Four of them contain an express statement, the fifth an implied one, that the castle (or the brewhouse, or the park of Nottingham which belong to it) is within the wapentake or hundred of Broxtowe: the statement is made by the justices of the peace, assembled in sessions, who, though they were not proved to be resiants in the county or \*280] hundred, must, from the nature and character of their \*offices alone, be presumed to have sufficient acquaintance with the subject to which their declarations relate; and the objection cannot prevail, that they were made after a controversy upon that subject had arisen, because there appears to have been no dispute upon the particular question whether the castle and its precincts were in the hundred of Broxtowe or not. These statements, therefore, fall within the established rule as to the admission of evidence of reputation.

The second objection was, that the learned Judge did not present the question to the jury in the manner in which he ought to have done; not that he misinstructed them in point of law, but that, in observing upon the facts, he ascribed too great weight to the evidence of modern usage and reputation, and particularly to the above-mentioned orders, and too little to the ancient documents produced on the part of the defendants. But we must receive with very great caution objections of this nature; for if we were to yield to them on all occasions in which we might disagree with some observation made on particular parts of the evidence, upon which it is the province of the jury to decide, we should seldom have any case which involved many facts brought to a termination. is only in those cases in which we are satisfied that the jury have been led to a wrong conclusion that we ought to interfere; and we cannot possibly say that they have been induced to form a wrong conclusion in this. Without meaning to say that the learned Judge was wrong in attaching great weight to these particular documents, we all agree that the general scope of his observations upon the evidence was perfectly correct. We understood him to have said, in sub-\*281] stance, that as by the usage and reputation \*for nearly two centuries, the castle and its precincts had been considered as being within the hundred, it ought to be inferred that they were legally so, unless the ancient documents clearly and satisfactorily proving that they were not. This is only an example of the principle which is applicable to all rights of way and common, to tolls, to moduses, in short, to all prescriptive and ancient rights, customs, exemptions, and obligations: in all which long usage should always be referred, if possible, to a legal origin; and it is only by the constant practical application of this principle that much valuable property and many important rights and privileges are preserved.

In adapting this principle to the present case, there being strong and uniform evidence of modern usage since the middle of the seventeenth century, the only question is, whether the older documents clearly show that this usage is wrong, and that the castle and its precincts could not have been within the hundred at the time of the first institution of that division? Now these documents prove, that from an early date, viz., at the time of Domesday, there was a borough of Nottingham: that the borough in later periods had a jury distinct from that of the hundred; one of them in the 3 Ed. 3 tends to shew that the castle was

Vol. XXIV.—9

within the jurisdiction of that jury; and the charter of Hen. 6 may be considered as demonstrating, that at the time of the erection of the borough into a county of itself the castle did, for some purposes at least, form a part of the borough, for the borough is made a county with the exception of the castle. But admitting this, what reason is there, why the castle, though being in the borough for some purposes, might not also be a part of \*the hundred? for as a borough may include a part of two counties (the city of Oxford and borough of Tamworth for example), why may it not comprise part of a hundred, or part of two or more hundreds? and we may not also reconcile the exclusion of the castle from the new county, on the supposition that it had originally belonged to the hundred? We do not think that any of these documents are so clearly inconsistent with the long usage and reputation in modern times as to prevent a jury from drawing the usual inference, that what has existed so long has existed from the earliest period necessary to give it validity.

It remains to consider the third objection, that the damages are excessive. This question is peculiarly for the consideration of a jury, and nothing has been said to induce us to think that they have proceeded on an erroneous principle of calculation: certainly, if that principle had been pursued which was contended for by the learned counsel who moved for the rule, it would have been so; for the jury would have done wrong to take into their consideration, whether the castle was an ancient possession of the noble family of the plaintiff or not, whether the plaintiff was likely to reside there, and whether the neighbourhood was suitable to such a residence. The true question is, what sum of money will repair the injury done by the mob? what will replace the house in the situation and state in which it was at the time of the outrage committed, as nearly as practicable? There seems every reason to believe that the jury have acted on this principle; and if so, they have done rightly. At any rate, it is impossible for us to say they have done wrong.

Rule refused.

# \*DOE dem. The Rev. EDWARD COOPER v. The Rev. HENEAGE FINCH and Others.

[\*283

Estates were settled to certain uses, with remainder to trustees for 500 years, to raise portions for younger children, remainder to the use of the first and other sons successively of the settlor in tail male, remainder to his heirs and assigns for ever. The estate came, by virtue of the settlement, to Edward, the settlor's eldest son, who also became the reversioner in fee. He levied a fine to his own use in fee, and devised the estates in trust for Thomas, his brother, for his life, remainder to the use of Thomas, his brother's son, for life, remainders to the sons of the last-mentioned Thomas successively in tail male; remainder to the use of E. C. in fee. Edward died without issue in 1774. Thomas, the brother, suffered a recovery in the same year, devised the estates to Thomas, his son, for life, with remainder over, and died in 1780. Thomas, the son, entered on his father's death:

Held, that Edward, being the tenant in tail, possessed of the immediate estate of freehold, was not precluded by the term of 500 years from levying a fine, which worked a discontinuance of the remainders; and that he thereupon acquired a tortious fee, which he might devise as above:

Held, also, that the entry of Thomas, the nephew of Edward, on the death of his father, did not remit him to the reversionary estate formerly vested in Edward.

EJECTMENT. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Hilary term, 1832, a verdict was taken for the plaintiff as to the premises comprised in the deed of settlement next mentioned, subject to the opinion of this Court upon the following case:—

By indentures of lease and release and settlement, bearing date the 2d and 3d of July, 1708, Thomas Allen conveyed to Edward Noell and Thomas Rowney and their heirs, the manor or lordship of Bibbesworth, otherwise Finchley,

in Middlesex, and other hereditaments in Finchley, to the use of Allen and his heirs until the marriage then intended to take place between him and Martha Noell, and afterwards to the use of Allen and his assigns for his life; remainder to the use of trustees during the life of Allen to preserve contingent remainders; remainder to the use of Martha Noell and her assigns for her life, for her jointure, and in bar of dower; remainder to the use of other trustees for the term of 500 years, upon the trusts declared in the said settlement for raising \$\frac{1}{284}\$ 4000%. For portions for younger \*children; remainder to the use of the first and other sons successively of the said Allen by the said Martha Noell, in tail male; remainder to the use of the heirs and assigns of Allen forever.

The marriage took place; and there was issue thereof two sons, Edward Allen and Thomas Allen. Thomas afterwards took the additional surname of Greenalgh: and in 1752 he married Ann Edwards, upon which occasion the 4000% to which he would be entitled on his father's death under the abovementioned settlement, as the youngest child of his father's marriage with Martha Noell, was settled on certain trusts in favour of himself and the said Ann Edwards and their children, but no assignment of the term of 500 years was ever made. By an order of Court in the present cause, the defendants were not to set up this term against the plaintiff's title.

Martha Noell (afterwards Allen) died in 1755, and Thomas Allen, the settlor, in April, 1764, whereupon the reversion in fee in the said manor and hereditaments descended to his eldest son Edward Allen. In July, 1764, Edward covenanted to levy a fine sur cognizance de droit come ceo, &c. to certain parties and their heirs, of the said manor, &c. to enure to the use of him, Edward, in fee; and the fine was levied accordingly in Trinity term, 4 G. 3, and duly pro-

claimed.

Edward Allen, in 1773, devised the estates above mentioned to John Gould and Edward Wynne and their heirs, to the use of the said Gould and Wynne and their heirs during the life of Thomas Allen Greenslgh, his brother, in trust for the said T. A. Greenslgh and his assigns during his life; remainder to the use \*285] remainder to the trustees during the life of the last-mentioned Thomas Allen, to preserve contingent remainders; remainders (which it is unnecessary to state particularly) to the use of the first and other sons of the last-mentioned Thomas Allen successively in tale male, and afterwards to the use of the daughters; remainder to the use of the Honourable Thomas Noell in fee, in case he should be living at the time of the failure of issue of the last-mentioned Thomas Allen, but if he should be then dead, to the use of the Rev. Dr. Edward Cooper (through whom the lessor of the plaintiff claims) in fee.

Edward Allen died in 1774, without issue; and thereupon his brother, T. A. Greenalgh, entered upon the said manor and hereditaments, and enjoyed the same till his death. By lease and release of the 15th and 16th of April, 1774 the said T. A. Greenalgh conveyed the same to Henry Wilmot and his heirs, to the intent that H. W. might be tenant to the præcipe in a recovery to be suffered thereof as in the said release was mentioned; and it was therein declared that the recovery should enure to the use of T. A. Greenalgh in fee. A com-

mon recovery was suffered accordingly, in Easter term, 14 G. 3.

T. A. Greenalgh, by his will executed in July, 1774, devised the said manor and hereditaments to his said son Thomas Allen and his assigns during his life, with divers remainders over, which failed of effect, and ultimately in fee to the right heirs of Sir Thomas Allen grandfather of the first-mentioned settlor.

T. A. Greenalgh died in 1780 without any issue but the said Thomas Allen, who thereupon entered on the said manor and hereditaments, and enjoyed the same till his death, which happened in 1830: he never had any issue; and he survived the Honourable Thomas \*Noell, mentioned in the will of Edward Allen. On the death of the last-mentioned Thomas Allen, the

defendants entered, and have continued in possession ever since. Dr. Edward Cooper died in 1792, leaving the lessor of the plaintiff his heir at law. The defendants were admitted to be the right heirs of Sir Thomas Allen. Either party was to be at liberty to turn the case into a special wordist.

party was to be at liberty to turn the case into a special verdict.

Follett for the plaintiff. The question upon which the case turns is, whether Thomas Allen Greenalgh was able to make a good tenant to the præcipe in the recovery suffered by him in 1774? and the plaintiff contends that he was not, inasmuch as the fine previously levied by his brother Edward discontinued the estate tail and displaced the remainders. Greenalgh, therefore, had no estate which he could convey so as to make a tenant to the præcipe, but only a remedy by formedon in the remainder, on the failure of the estate tail. The fine divested the immediate remainder in tail which he had, and Edward acquired a base fee, which he devised; and the reversionary fee was also in him. This view of the case is consistent with the law of discontinuance as stated by Lord Coke in commenting on Littleton, sect. 592.

W. Hayes, for the defendants, was here called upon by the Court to state the points on which he relied. First, the fine was not a discontinuance of the estate tail, because Edward, who levied it, was not tenant in tail in possession, there being a term of 500 years outstanding. [PARKE, J. That is removed out of the case by the order of Court. It is not set up by way of a defence in ejectment; but it may be adverted to in argument, to shew what was the state of the title at the \*time of the fine. Secondly, if the fine operated as a [\*287 Allen, and turned it to a right; that reversion then was no longer devisable; it did not pass by Edward's will; and the lessor of the plaintiff cannot in any

degree found his title upon it.

Follett. If the first objection could prevail, scarcely any fine levied by a tenant in tail would be effectual, for such fines are generally of old estates out of which terms of this kind have been granted and are subsisting. Perhaps such a term may not be affected by the fine, or it may be, that the termor would be entitled in equity to have it kept up; but the fine still works a discontinuance. This agrees with the distinction laid down in all the books, that where tenant in tail levies a fine, after an estate of freehold granted, there is no discontinuance, but otherwise where there is only a term of years outstanding. Com. Dig. Discontinuance, (C) 3, citing Co. Litt. 332 b. The law on this subject is collected in Cruise on Fines, p. 192, 193, 2d ed., where it is stated, that in Saffyn's case, 5 Rep. 124; Cro. Jac. 60, "it was resolved, that although a lessee for years had not himself such an estate as would enable him to levy a fine, yet it did not therefore follow that his interest should not be barred by a fine; that a term for years was within the statute 4 Hen. 7, c. 24, being comprchended under the word interest; and as the object of that act was to prevent strifes and debates, it would not have that effect, if its operation did not extend to long terms of years which are now so common." The doctrine on this head is further explained and \*commented upon in Iseham v. Morris, Cro. Car. 110, and Dighton v. Greenvil, 2 Vent. 329, also cited by Mr. Cruise in the passage above referred to, and 5 Cruise Dig. 185, 186: Reynolds v. Jones, 2 Sim. & St. 206, is an additional authority on the same point. There have been questions as between the termor and the person levying a fine, with respect to the operation of such fine upon the term; but it has never been suggested that the fine, levied by a tenant in tail, was prevented by such term from taking effect upon the estate tail.

As to the second point, it seems to be assumed, on the other side, that the lessor of the plaintiff founds his title wholly on the reversionary fee which was in Edward Allen before the levying of the fine. But this is a mistake. The fine levied by Edward gave him a new estate in fee, which displaced the remainders, and could, itself, only be divested by an action in formedon brought by the remainder-man on the failure of issue in tail of the party levying the fine.

It is like the case of a disseisin under the old law. On the death of Edward, Thomas, the brother, might have brought his real action; but he suffered five years to elapse after his right accrued without doing so. With regard to the operation of a fine, as working a discontinuance and giving a new estate, Doe dem. Odiarne v. Whitehead, 2 Burr. 704, is a leading authority. If, indeed, at the time of levying the fine, Edward had had the immediate reversion in him, the effect of the fine would have been to bring that reversion into possession; but here there was a remainder interposed, namely, the remainder in tail to \*289] Thomas the brother. Edward then acquired an estate which was \*defeasible, but was not defeated within the proper time; having the fee, he devised it with remainder, ultimately, to Dr. Cooper; and upon the determination of the other estates limited by the will, the heir of Dr. Cooper became entifed to the estate in fee created by the fine. The Court will not presume, in favour of the defendants' claim, that a formedon was brought by Thomas, the brother, within five years of Edward's death.

brother, within five years of Edward's death. W. Hayes, for the defendants. First, the fine did not work a discontinuance. The original settlement, under which both these parties claim, created a term of 500 years, which is admitted to have been still subsisting in 1764, when the fine Now a fine, to operate as a discontinuance, must be levied by a tenant in tail not merely seised, but having actual corporeal possession. TON, J. Is there any authority for saying that there must be a possession, as contradistinguished from scisin of the freehold? There have been many cases where the question was, whether a prior term was barred by a fine, but in which, according to this argument, such a point need not have arisen, since the term would have rendered the fine invalid.] It is only contended here that such fine could not have a tortious operation, by creating a new and wrongful fee, while the possession continued in the termors. In Doe dem. Maddock v. Lynes, 3 B. & C. 388, a party who had assigned a term in lands upon certain trusts, afterwards, and during the term, made a feoffment of the same lands; and it was held that such feofiment did not destroy the term and give a fee by disseisin, \*290] being made without the consent of the \*trustees, and they being at the time entitled to actual possession under the assignment. If the feoffment did not work a disseisin in that case, the fine does not create a discontinuance in this: there is no substantial distinction. The clear, undisputed possession in this case was in the termors: the tenant in tail was such tenant, expectant only on the determination of the 500 years; the termors had the immediate right; and during the 500 years the subsequent estates limited by the settlement, were, in the view of this Court, and with reference to the immediate enjoyment, merely equitable. [TAUNTON, J. In Doe dem. Maddock v. Lynes, 3 B. & C. 388, the attempt was to destroy a term assigned in trust for certain purposes, without the assent or knowledge of the trustees. If the feoffment had been made by the trustees themselves, and not by the cestuy que trust behind their backs, the Court might have come to a different conclusion.] present case differs from that, because here the term was not created by the party afterwards wishing to destroy it, but was a prior term, forming part of the inheritance transmitted by the original settlor, and of which the estate tail itself was part. It was admitted by Mr. Preston in Doe dem. Maddock v. Lynes, 3 B. & C. 398, that if the term continued, the termor's possession was the possession of the reversioner: so here, the possession of the termors for 500 years was a lawful possession of the whole inheritance, parcelled out as it was by the settlement into a number of particular estates to the uses there specified. actual entry was necessary by the termors, because, the limitation of the term \*291] being by way of use, it was executed in possession at the moment \*of executing the conveyance. It must be assumed on the other side, that the fine operated adversely to the termors: to operate as a discontinuance, it must have displaced the term. It is impossible to acquire a new reversion expectant on an old term: the termor must be dispossessed, Freeman v. Barnes,

1 Ventr. 55, 80. In that case it was held that the term was divested, there being proof of an intention to dispossess the lessee in trust: and it being objected that such a decision would prevent a man who purchased land by fine, from keeping on foot mortgages and leases, which it is often convenient to do, "the Chief Justice declared his opinion that in that case the fine should not bar, there not being any intention of the parties to that purpose." Discontinuance is, in its nature, a wrongful act; a tortious passing of the fee simple; Litt. 599, 612, 614: the argument then on the other side must be, that the fee simple was so wrongfully passed by force of the fine, while at the same time a rightful possession continued in the termors; which is a contradiction. [TAUNTON, J. Is there any cause to shew that a party, to create a discontinuance, must be in actual possession of the land?] He must be in such possession as would enable him to make a feoffment with livery of seisin. There could not be a tortious acquisition of a new fee (which is the effect of a discontinuance,) while the old title continued. Here the termors were in possession under the old term down to the time of bringing this ejectment. They had, if not the actual, the constructive possession; as was said by Bayley, J. in Doe dem. Maddock v. Lynes, 3 B. & C. 405, "The trustees were entitled to the actual possession, and we must therefore \*presume that they had it." Edward Allen in this case [\*292] was tenant in tail in remainder, expectant on the term of years, and consequently had no title to the possession. This is clear from Litt. s. 60, and Lord Coke's commentary on that section, Co. Litt. 49, a. Now a tenant in tail, to discontinue by fine, must have the actual, and also the lawful possession of the land, Co. Litt. 333, b., Briscot v. Chamberlain, Moore, 255. [PARKE, J. You contend that Edward Allen was tenant in tail in remainder, when he levied the fine.] He was; and not in possession in the sense contemplated by the books. And if a new fee was acquired here by the fine, it must have ransacked the whole inheritance: the tenant in possession must have been ousted: as Bayley J. said in Roe dem. Truscott v. Elliott, 1 B. & A. 86, there can be no ouster of a mere reversion. And, on the other hand, it has been already observed, that the term of 500 years was not one created by the tenant in tail, but was part of a chain of limitations created by the settlor, the common author of them all: and if this link remains, all remain. [DENMAN, C. J. Have you any authority for the distinction between a term created by the tenant in tail and by the original settlor?] No direct authority, but it rests on principle. The possession of the termor in this case was the lawful possession of all those in remainder or reversion; while it continued there could be no tortious alienation. [TAUNTON, J. again inquired if there were any authority for saying that a tenant in tail must be in actual possession of the land to discontinue.] In Baker r. Hacking, Cro. Car. 387, 405, tenant in tail and reversioner made a lease for the life of the lessee at a pepper-corn rent, and, \*the lessee surviving the tenant in tail, this was held to be a discontinuance of the estate tail and [\*293] the reversion, inasmuch as it was only the lease of the tenant in tail, since "the livery is only made by the tenant in tail, for he hath the sole power of the immediate freehold, and the immediate possession and inheritance." And the law is stated accordingly in the text books on the subject of discontinuance. [TAUN-TON, J. In Cruise on Fines, p. 254, 2d edit. it is merely said that "no person can create a discontinuance who is not in the actual possession of the estate tail by force of the entail." What is there to show that the tenant in tail had not that in the present case?] Possession must be understood in the strict legal sense: the party must have the immediate right of possession. Here the termor had that possession, and represented the whole inheritance. One test of the nature of the tenant in tail's interest is, whether it could have passed by grant? and clearly it could here. If Edward Allen had granted his estate tail to a stranger, that party would, by the grant, have acquired a base fee, which would have expired on failure of issue in tail. But if Edward had an estate in possession, that estate could not have passed by deed alone, nor without livery. It is

laid down in Co. Litt. 332, a. (referring to sects. 615, 616, 617, of Littleton) that "if a remainder or a rent service, or a rent charge, or an advowson, or a common, or any other inheritance that lieth in grant be granted by tenant in tail it is no discontinuance." And in Litt. s. 618,—"Of such things as pass by way of grant, by deed made in the country, and without livery, there such grant maketh no discontinuance, as in the cases aforesaid, and in other like cases, \*294] &c. And albeit such \*things be granted in fee, by fine levied in the king's court, &c. yet this maketh not a discontinuance." The same doctrine is laid down in Com. Dig., Discontinuance, (C) 3, citing the above section, and 2 And. 110. And Lord Coke in commenting on the last-mentioned section says, "It is a maxim in law that a grant by deed of such things as do lie in grant and not in livery of seisin, do work no discontinuance." Co. Litt. 332, a. [TAUNTON J. The first estate of freehold was in Edward. Would that have passed by a common grant?] Such a grant would operate as a grant of the remainder or reversion, as deeds often do, which would be inoperative but for an outstanding term of years. [PATTESON, J. You contend that wherever there is a term of years outstanding, there can be no estate in possession in the freehold.] The argument goes that length. The estate for years and the estate in fee, carved out of the same inheritance, "subsist together, the one in possession and the other in expectancy." 2 Blac. Com. 164. [PATTESON, J. As to the

possession of the land, no doubt that is so.]

But, secondly, if the fine worked a discontinuance, it divested the reversion in fee, and turned it into a right of action; that right, not being a devisable interest, could not pass by Edward Allen's will, but descended to the right heirs of the settlor, that is to the defendants, who are admitted to be right heirs of Sir Thomas Allen. Upon the death of T. A. Greenalgh, Thomas, his son, being in of the legal estate, was remitted to the original estate tail under the settlement, and consequently to the reversion expectant on that estate tail; and on his death the reversion became vested in possession in the defendants. Where tenant in tail with immediate reversion in fee levies a fine, the reversion becomes \*a right, and such right is extinguished in the fee acquired by the fine. \*295] It is not correct to say that the reversion is accelerated. The title acquired by the fine is founded, not on the reversion, but on the fee which is derived from the seisin of the estate tail, and rendered indefeasible by the reversion being reduced to a right. It is true, all charges upon the reversion are let in; but that is only because, the title being perfected by the extinction of the reversion in fee, it would be unjust that such title should not be subject to the incumbrances of the reversion. In the present case Edward, who levied the fine, was not the immediate reversioner; there was a remainder interposed, and consequently the effect of the fine was, not to give him a fee-simple by the reversion becoming merged, but to discontinue the reversion. In Baker v. Hacking, Cro. Car. 587, 405, tenant in tail and reversioner in fee joined in a lease not warranted by 32 H. 8, c. 28, and it was held that the reversion was discontinued, and the reversioner, having only a right, could not devise it. That case is, in principle, the same as this; only, here, the tenant in tail was himself the reversioner, but with a remainder interposed between the estate tail and the reversion. Then, however, it is contended, that although the reversion was turned into a right of action, which could not be devised, the tortious fee acquired by virtue of the fine was devisable, and had not been put an end to. Now, the defendants do not say that Thomas Allen Greenalgh, by his possession under the will of Edward, was remitted to an estate in fee claimable under the original settle-\*296] ment; for, by Edward's will, the legal \*interest was devised to trustees.

But the estate limited to Thomas, the son of T. A. Greenalgh, was a legal estate: and on the death of T. A. Greenalgh, Thomas, the son, had both the legal estate for life, and a right, by remitter, to the estate tail under the settlement, and to the reversion. Either, then, the remainders limited by the original settlement were not discontinued; or, if they were, the reversion also

M. T. 1832.

was discontinued, and, not being devisable by Edward, it descended upon the right heirs of the settlor, and came into possession when the legal estate vested in them. In either case there is a sufficient answer to this action.

Follett in reply. As to the first part of the argument, there is no ground for saying, that because the tenant in tail had not an actual bodily possession, his fine did not divest the remainder. All that is meant, when the books lay it down that the tenant must be in possession by virtue of the entail, is, that he must be actually seised of the freehold; he must have seisin of the estate tail by virtue of the entail itself, otherwise there is no discontinuance. It was so held in Driver dem. Burton v. Hussey, 1 H. Bl. 269. According to the argument on the other side, no fine could work a discontinuance where there was a term of years or a tenancy from year to year. The authorities cited only shew that a fine cannot so operate where there is an estate of freehold outstanding. In Doe dem. Maddock v. Lynes, 3 B. & C. 388, the question was, as to the operation of a feofiment to bar a term, and the Court decided that it did not so operate, because it was a feoffment made tortiously, without the \*assent of the termors. In Baker v. Hacking, Cro. Car. 387, 405, the reversion was expectant on a freehold. The like answer applies to Briscot v. Chamberlaine, Moore, 255. To shew that the interest of the tenant in tail in this case (a freehold limited after a term of years), was a remainder which would pass by grant, reference was made to a passage in Co. Litt. 332, a. But the context is as follows: "It is a maxim in law, that a grant by deed of such things as do lie in grant, and not in livery of seisin, do work no discontinuance. particular reason is, for that of such things the grant of tenant in tail worketh no wrong, either to the issue in tail, or to him in reversion or remainder." But "reversion or remainder" there, means reversion, &c., expectant on an estate of freehold; and this is proved by another passage in the same page. "If tenant in tail make a lease for years of lands, and after levy a fine, this is a discontinuance; for a fine is a feoffment of record, and the freehold passeth. But if tenant in tail maketh a lease for his own life, and after levy a fine, this is no discontinuance, because the reversion expectant upon a state of freehold which lieth only in grant passeth thereby." In Com. Dig., Discontinuance, (C) 3, and the authorities there cited, the rule established is, that a fine by tenant in tail does not operate where the estate tail is expectant on a freehold estate; and it is there said, that "if it be after a lease by him for years, it will be a discontinuance; for then the freehold passed by the fine, and all the estates are displaced." Whether or not the reversion expectant on a term of years will pass by grant, it is unnecessary to discuss; the question here is, whether the party was \*seised of the freehold by virtue of the entail: if the existence of a prior term of years prevented a discontinuance, scarcely any fine would be effectual, since there is hardly a case where the tenant in tail levying a fine is in actual bodily possession of the land. It was contended that this was not a discontinuance, because a tortious title was acquired by the party levying the fine; but without discussing this, (though a distinction is drawn in the books between an estate so acquired and the wrongful estate gained by a disseisor, and in fact the fine only enables a tenant in tail to aliene his estate as, before the statute de donis, he might have done without any fine,) it is sufficient to say, that the effect of a fine to give a complete estate in fee, capable of being conveyed or devised as such, has long been recognized, and no new rule can be introduced upon the subject.

As to the other point; it is contended that the ultimate reversion, which was in the right heirs of the settlor, (not in those of Sir Thomas Allen, though it is assumed on the other side that both are the same,) and which reversion descended to Edward Allen, was divested by the fine; and this may be conceded. But Edward had a new estate in fee by that fine: and as to the supposed remitter of Thomas, the son of T. A. Greenalgh, that, if Thomas entered under the will of his father, was barred by the father's recovery, so long as the recovery (although

bad for want of a proper tenant to the præcipe) continued unreversed. The doctrine is thus laid down in Co. Litt. 349, a. "Here it is to be understood, that regularly a man shall not be remitted to a right remediless, for the which he can have no action; for Littleton here saith, that there is no person against whom the issue, when he \*cometh to the land without folly may bring his action; and saith also, that this is the principal cause of the remitter; for neither an action without a right, nor a right without an action, can make a remitter. As if tenant in tail suffer a common recovery in which there is error. and after tenant in tail disseiseth the recoveror and dieth, here the issue in tail hath an action, viz., a writ of error; but, as long as the recovery remaineth in force, he hath no right, and, therefore, in that case, there is no remitter." in fact, Thomas Allen the son, if he took an estate at all, took under the statute of uses by virtue of Edward's will, and therefore cannot avail himself of a remitter: for that purpose he should have waived the right of entry under the statute, and brought a real action. A remitter only takes place where the defeasible estate has come to the party without his own concurrence; the doctrine is, that there must have been no "folly" in him. In Co. Litt. 348, b., it is said, "Since Littleton wrote, and after the statute of 27 H. 8, c. 10, if tenant in tail make a feoffment in fee to the use of his issue being within age, and his heirs, and dieth, and the right of the estate tail descend to the issue being within age, yet he is not remitted, because the statute executeth the possession in such plight, manner and form, as the use was limited. But if the issue in tail in that case waive the possession, and bring a formedon in the descender, and recover against the feoffees, he shall thereby be remitted to the estate tail, otherwise the lands may be so encumbered, as the issue in tail should be at a great inconvenience; but if no formedon be brought, if that issue dieth, his issue shall be remitted, because a state in fee-simple at the common law descendeth unto him." [TAUNTON, J. It \*does not appear by the case that Thomas Allen, the son, entered under the will of Edward Allen?] There was no legal mode in which he could enter, but under that will; and unless the entry be by some right, no remitter takes place. The argument on the other side is, that a defeasible estate was thrown upon Thomas the son, which could only be by Edward's will, and that Thomas, having also the old estate in him, was then remitted back to that original right. [TAUNTON, J. If the fine did not operate as a discontinuance, T. A. Greenalgh entered as remainder-man under the origi-PATTESON, J. In that case the recovery suffered by him was nal settlement. good, and Thomas Allen his son took only an estate for life under his will.]

DENMAN, C. J. This is the case of a fine levied by a person who had become tenant in tail under a settlement made in 1708; unless, by reason of a term of years created by the same settlement, he is not to be so considered. If he was tenant in tail, he was competent to levy a fine; and if so, no argument or authority has been adduced to show that the fine should not have all the ordinary legal consequences. We asked for such authority, but none was given: and, indeed, some of the cases which were cited for the defendants appear to establish the contrary doctrine; for where it is said that the possession of tenant for years is the possession of the party entitled to the freehold, that imports that such person is seised of the estate of freehold. The term of years, therefore, in this case, does not enter into the question, which is, not whether the tenant in tail was entitled to the corporeal possession of the land, but whether he was seised of a present estate of freehold. \*The defendants, to support their view of the case, were certainly obliged to go to the whole length of showing that a party, to levy a valid fine, must be entitled to the actual possession of the land. No authority was cited to such an effect, and it is among the first elements of the doctrines of discontinuance, that tenant in tail may displace remainders by levying a fine. Edward Allen, then, being tenant in tail, did levy a fine, and displace the remainder limited to his brother; and no step was taken to set aside the tortious estate (as it is described) arising from the fine so levied. That estate

was descendible, and capable of being devised: Edward Allen did devise it, and under that devise the lessor of the plaintiff claims. Then all the steps of the plaintiff's argument are complete: the estate in Edward was one of which a fine might be levied; it was levied, and by it the estate in the remainder, which would otherwise have taken effect, has been discontinued, and no step has been taken to set the proceeding aside. Upon these short grounds, I am of opinion that the plaintiff is entitled to recover.

PARKE, J. I am of the same opinion. The case turns upon two points, for the doctrine of remitter appears to me to be out of the question. First, as to the effect of the fine upon the estates in remainder. Edward Allen was tenant in tail in possession of the freehold, and no authority has been cited to shew that a fine by tenant in tail so possessed will not work a discontinuance. On the contrary, it is expressly laid down in Co. Litt. 332, b, that if tenant in tail make a lease for years, and afterwards levy a fine, "this is a discontinuance, for a fine is a feoffment of record, and the freehold passeth." For \*the defendants, a passage in Littleton, sect. 618, was relied upon, where it is said that a fine of such things as might pass by grant will not operate as a discontinuance. But it is clear, on reference to the context, that Littleton is there speaking of such things as commons and advowsons; and not of reversions or remainders after an estate for years, which, according to Lord Coke, in the passage just now cited (332, b.) are subjects upon which a fine will work a discontinuance. And Littleton says, (s. 618,) "Of such things as pass by way of grant, such grant maketh no discontinuance, as in the cases aforesaid." Then, what are the cases aforesaid? Where rents, advowsons, and commons are granted by deed. There being no authority for the defendants on this point, and the uniform opinion in the profession, as far as I am informed, being, that in a case of this kind a term of years goes for nothing, the only question is, whether or not Edward was tenant in tail in possession of the freehold? That he clearly was, and the effect of his fine, therefore, was to displace all the remainders, and among them that of his brother, who, consequently, could not suffer a valid recovery. The second point is, what effect the fine had upon the estate of the conusor, Edward Allen himself? The effect was, to destroy the estate tail, and to give Edward a base fee; a fee determinable only upon a real action being brought by the subsequent party in remainder; besides which, the reversion in fee was in him. He had therefore a devisable interest; and I am, consequently, of opinion that the lessor of the plaintiff is entitled to recover.

\*TAUNTON, J. There is no rule better established than that a fine by tenant in tail works a discontinuance, and divests remainders and reversions and puts them to a right: but it was said here that the prior term of 500 years prevented the fine from having that operation. I asked several times if there was any authority for such a position. I can find none. On the other hand, several cases have been cited where it has been held that the possession of the termor is that of the person entitled to the next immediate estate of freehold. The rule to be collected from the books appears to me this, that no person can create a discontinuance without being, not in actual possession of the land, nor entitled to possession of it, but in actual possession of the estate tail by virtue of the entail; and in this case the party levying the fine was so. only authority which at all supports the argument for the defendants is Littleton, sect. 618, and Co. Litt. 332, a, where it is said that of things which pass by grant, such grant works no discontinuance. The instances which Littleton puts (sect. 616, 617,) are rents, advowsons, and commons; and it is contended here that a remainder or reversion subject to a term of years may be conveyed by grant, and therefore that Edward Allen's interest lay in grant, and was not an estate in possession. I doubt the correctness of that proposition. interest in a rent, common, or advowson might be passed by mere grant at common law, but not so a remainder or reversion subject to an estate for life or years: there the conveyance was not perfect without attornment by the tenant,

and consequently such interests never lay simpliciter in grant, the assent of a third person being necessary. It is true, since 4 Ann. c. 16, s. 9, attornment is no longer necessary, \*but for the present purpose the law must be considered as it stood in the times of Littleton and Coke. Here then was a discontinuance, by which the cognizor of the fine acquired a base fee; an estate determinable under certain circumstances, but nevertheless a fee; and being seized of such fee, he made the devise of it under which the lessor of the plaintiff claims. The only remaining question is, whether or not a person seized of a base fee can devise it like a fee simple, and of that I think there is no doubt. It was decided in Jones v. Roe, (Roe dem. Perry v. Jones, 1 H. Bl. 30, S. C. in Error, 3 T. R. 88,) that a possibility, coupled with an interest, was devisa-The subject-matter there was an interest under an executory device. mere right of entry, indeed, was held not devisable, in Goodright dem. Fowler r. Forrester, 8 East, 552; 1 Taunt. 578, S. C. in Error, but that is different from the case of a possibility coupled with an interest which is assignable at common law during life, and therefore may be devised. A right of entry is not so assignable, and therefore not devisable. Most of the authorities on this point will be found in Jones v. Roe, (Roe dem. Perry v. Jones, 1 H. Bl. 30, S. C. in Error, 3 T. R. 88.). By the statute of wills, 32 H. 8, c. 1, s. 1, any person "having, or which hereafter shall have, any manors, lands, tenements, or hereditaments," as there described, may devise the same; and a person having a base fee cannot be said not to have the lands, though his estate in them is As to the question of remitter, it appears to me, for some of the reasons given by Mr. Follett, that the doctrine on that subject is not applicable to the present case. I am therefore of opinion that the plaintiff is entitled to recover.

\*PATTESON, J. On the subject of remitter, assuming the fine worked a discontinuance,) I think the answers given by Mr. Follett are correct. If Thomas, the son of T. A. Greenalgh, entered under his father's will, he adopted and was bound by his father's recovery, and took only an estate for life; if under the will of Edward, his uncle, he took under the statute of uses, and then the doctrine of remitter does not apply. It comes, therefore, to the mere question, whether or not the fine levied by Edward created a discontinuance. On that point the case is extremely plain. It is clearly laid down in the books, that any person who is tenant in tail in possession may levy a fine which shall discontinue remainders. What then is meant by the word possession? The fallacy of the argument for the defendant lies in the construction of that word. It does not mean that there is no term of years outstanding, but that the party is tenant in tail of the immediate estate of freehold, there being none prior, as distinguished from a tenant in tail in remainder where there is such prior estate of freehold. A distinction was attempted between terms created by the original settlor, and by the tenant in tail himself; and indeed the argument might otherwise be carried to the length of maintaining that a tenant in tail, by demising to a person who has to work the land for twenty-one years, was precluded from levying a fine during that time, to bar the remainder. But no passage has been Suppose a settlement cited in support of the distinction; no book alludes to it. limiting an estate for life to A., remainder to B. for life, remainder in tail to C., with a power of leasing, which power one of the tenants for life executes and dies, and the tenant in tail comes into possession; will the lease so granted under the power \*prevent the tenant in tail in possession from levying a fine? It is said that an estate tail, limited after an estate for years, is a remainder. I deny that as a general proposition. It is true, the passage cited from Co. Litt. 49 a, contains the word "remainder," and it is also true, that if an estate be granted to A. for years, and another estate to B. to commence when that determines, the latter estate is in some sense a remainder, because B. is not entitled to possession till the first estate determines, but still it is not a remainder in the sense in which that term applies to tenants in tail. Can any case be

shewn where an estate for years was given to A., with limitation over to B. for life or in fee, and B. was held not to take an immediate estate of freehold? In Berrington v. Parkhurst, 13 East, 489, an estate was limited to A. for ninetynine years, if he should so long live, and from and after his decease, or other sooner determination of the term, to trustees during the life of A. to support contingent remainders; remainder to the first and every other son of A. A. and his son levied a fine and suffered a recovery, without the concurrence of the trustees, and it was held void, because the trustees had an immediate estate of freehold, and not merely a contingent interest, in which case the decision would have been different. I can find no authority for saying, that a term of years will preclude a man who has the immediate tenancy in tail, the immediate interest in the freehold, from levying a fine; and if not, the effect of the fine must be the same as if there were no term. It is said that there can be no tortious alienation during the lawful possession of the termor: and it may be true, that no such tortious \*alienation can take place so as to destroy the term. The question discussed in the cases on that subject has been, whether or not [\*307] the term was destroyed. But if the fine was void altogether where a term existed, that question could never have arisen. I appears to me, then, that the term of years in this case is out of the question, as far as regards the operation of the fine: that the fine, levied by a tenant in tail in possession of the immediate interest in the freehold, worked a discontinuance, and he acquired a tortious fee; and, consequently, that under his will the lessor of the plaintiff has a valid title. Judgment for the plaintiff.(a)

### The KING v. OAKLEY and Others. Nov. 22.

The stat. 15 Ric 2, c. 2, gave justices a summary jurisdiction to convict, on their own view, for a forcible detainer after a forcible entry.

The stat. 8 Hen. 6, c. 9, recites that the stat. 15 Ric. 2, c. 2, does not extend to entries in tenements in peaceable manner and after holden with force, and then enacts that that statute shall be duly executed, and if from thenceforth any doth make any forcible entry in lands, &c. or them do hold forcibly after complaint thereof made within the same county where such entry is made, to the justices of peace, they shall cause the statute duly to be executed:

Held, that the statute of 8 Hen. 6, was intended to give a summary jurisdiction in cases of forcible detainer after unlawful entry; and that a conviction by justices on that sta-

tute, merely stating an entry and a forcible detainer, was insufficient.

THE defendants were brought into Court upon a writ of habeas corpus, by the return to which, it appeared they were detained in custody under a conviction, which stated that Edward Penfold complained to three justices therein named, that R. Oakley, W. T., J. R., G. H., and W. F., into and upon the mansion-house of him, Penfold, called Heath House, and divers outhouses to the same mansion-house belonging, situate, \*&c.; and also into and upon the divers closes, pieces or parcels of land, to wit, &c. of him, Penfold, situate, &c., then lately did enter, whereof Penfold was tenant by copy of court roll for the term of his natural life, and the same mansion-house, outhouses, closes, pieces or parcels of land from him, Penfold, unlawfully with strong hand and armed power did hold, and from him detain, against the form of the statute; whereupon Penfold, to wit, on, &c. at, &c., prayed of them so as aforesaid being justices, &c. that a due remedy should be provided to him in that behalf according to the statute; which complaint and prayer by them, the said justices, being heard, the said justices to the mansion-house, outhouses, and closes aforesaid, personally came, and did find and see the aforesaid R. Oakley, W. T., J.

<sup>(</sup>a) See the statute 3 & 4 W. c. 74, "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance."

R., G. H., and W. F., the aforesaid mansion-house, outhouses and closes, with force and arms, unlawfully with strong hand and armed power detaining against the form of the statute, and according as he, Penfold, so as aforesaid, had unto them complained; therefore it was considered by them, the aforesaid justices, that the aforesaid R. O., W. T., J. R., G. H., and W. F., of the detaining aforesaid by strong hand, by their (the justices') own proper view had, were convicted, and every of them was convicted according to the form of the statute, &c. The conviction then stated that a fine of 50l. was imposed on each of the defendants, and they were committed to Bedford gaol until they paid their fines.

Adolphus now moved that the defendants should be discharged. The conviction is insufficient, being for a forcible detainer only, and not stating any wrong\*309] ful or forcible entry. The justices have proceeded on their \*own view
on the stat. 15 Ric. 2, c. 2, but that statute applies to such forcible detainers only as are preceded by forcible entries. [Lloyd, contra, here intimated
that he should rely upon the stat. 8 H. 6, c. 9.] That act recites the statute
15 Ric. 2, c. 2, and that owing to certain defects therein, many wrongful and
forcible entries be daily made into lands by such as have no right, and ordains
"that it, and all other statutes of such entries, shall be duly executed," with an
additional enactment "that from henceforth where any doth make any forcible
entry in lands and tenements, or them hold forcibly after complaint thereof made
within the same county where such entry is made, then the justices shall cause
the said statute duly to be executed." That statute, therefore, applies to a case
where the holding forcibly is preceded by a forcible and wrongful entry. At
least the entry should appear to have been unlawful. Besides, the magistrates
upon the statute of 8 Hen. 6, cannot proceed upon their own view, but are to
make a precept to the sheriff commanding him to return a jury.

Lloyd, contra. Forcible entries upon lands and forcible detainers of land have been made offences by several statutes. (See Hawk. P. C. b. 1, c. 64; Dalton's Justice, c. 44, 125.) The stat. 15 Ric. 2, c. 2, first gave magistrates a summary jurisdiction in case of forcible entries. It enacts, that in case of such forcible entries and complaint thereof, as there mentioned, the justices are to take sufficient power of the county and go to the place where such force is made, "and if they find any that hold such place forcibly after such entry made, \*3101 they shall be taken and put in the next gool there to abide," \*&c. To

made, "and if they find any that hold such place forcibly after such entry made, \*310] they shall be taken and put in the next gaol there to abide," \*&c. To bring a case within that statute, undoubedly the forcible detainer must have been preceded by a forcible entry. It did not provide any remedy for cases where the entry had been peaceable, and the land afterwards detained by force; nor where, the entry having been forcible, the parties who made it had quitted the land before the magistrates arrived. To remedy this inconvenience the 8 Hen. 6, c. 9, was passed. It recites that the statute 15 Ric. 2, did not extend to entries into tenements in a peaceable manner, and after holden with force, and then declares that the said statute shall be duly executed, adding thereto, "that from henceforth where any doth make any forcible entry in lands or tenements, or them hold forcibly after complaint to the justices of peace, the justices shall cause the statute duly to be executed." Section 3, gives the justices power to inquire by a jury concerning such forcible entries and detainers, and, if it be found that any doth contrary to this statute, to rescize the lands so entered or holden, and to put the party in full possession. Section 7, enacts, that the statute shall not endamage any person where he or his uncestors, &c., have continued in possession for three years. The stat. 8 Hen. 6, c. 9, construed together with the 15 Ric. 2, c. 2, which it recites, therefore authorized two modes of proceeding: one by the justices on their own view, the other by summoning a jury to inquire into the forcible entry or detainer. Here, they have proceeded upon their own view. [PATTESON, J. Nothing is stated on the face of the conviction to shew that the entry of the defendants was not lawful.] The stat. 8 Hen. 6, c. 9, makes a forcible detainer after a peaceable entry an offence. [TAUNTON, J. The entry may be peaceable, yet wrongful.] If the statute

applies only to forcible detainers after an unlawful entry, the case of \*a tenant at will or for years holding over after the respective interests have expired, will not be within it. Yet such cases are within the mischief.

DENMAN, C. J. I am of opinion that this conviction cannot be sustained, the facts set out in it not being sufficient to give the magistrates jurisdiction. There is a material distinction between a forcible entry and a forcible detainer. The stat. 15 Ric. 2, c. 2, makes a forcible entry in all cases an offence cognizable by justices in a summary way, but a forcible detainer only when it is preceded by a forcible entry. The stat. 8 H. 6, c. 9, makes a forcible detainer an offence so cognizable by justices, even where it is preceded by a peaceable entry. to me, that the entry there spoken of must be unlawful, or, at all events it must be shown, that the forcible detainer there spoken of was unlawful. Now, for any thing that appears on this conviction, the original entry by Penfold may have been both peaceable and lawful, and his subsequent possession and detainer rightful, and I cannot think that the legislature meant that the act of a man in maintaining his own rightful possession with force against a wrong-doer should authorize the justices to turn him out of possession. Assuming, therefore, as we may in this case, that the original entry by Penfold was peaceable and lawful, the subsequent detainer ought to have been shown, by facts disclosed on the face of this conviction, to be unlawful. Here, no such facts are stated. It is not sufficient for the justices to state that they found the detainer unlawful; they ought to have stated facts which made it so. There being no such statement, the conviction is bad, and the defendants are entitled to be discharged.

\*PARKE, J. The question has been reduced to two points: first, whether a party can be convicted of a forcible detainer on view of the [\*312] justices; and, secondly, whether there should be, on the face of the conviction, an allegation that the entry on the land by the defendant was unlawful. The case arises on the statute 8 Hen. 6, c. 9. I think that statute clearly gives the justices a summary jurisdiction in cases of forcible detainer. When complaint is made to the justices, the party charged may traverse any fact stated in the information, Regina v. Layton, 1 Salk. 353. If he does not choose to traverse, the facts alleged in the complaint must be taken as admitted. Then as to the objection, that the conviction does not state the original entry to have been unlawful, I incline to think that the statute 8 Hen. 6, c. 9, does not apply to cases where the original entry is lawful, and considering the charge is of a criminal nature. I think it should have been stated on the face of the conviction, that the entry was unlawful. I should have wished to take time to consider on that point, had not my Brothers entertained a clear opinion upon it. It will not follow from our decision, that the stat. 8 Hen. 6, c. 9, does not apply to the case of a tenant at will or for years, holding over after the will is determined or term expired, because the continuance in possession afterwards may amount in judgment of law to a new entry. Hawk. P. C., b. 1, c. 64, s. 34.

TAUNTON, J. I am of opinion that the conviction is insufficient. This is a highly penal statute, and ought not to be extended by loose and uncertain construction. \*In order to bring a case within the summary jurisdiction [\*313 of the magistrates, every thing necessary to constitute the offence must be clearly and positively stated. The statute 8 Hen. 6, c. 9, after reciting the 15 Ric. 2, c. 2, declares "that that statute does not extend to entries in tenements in a peaceable manner, and after holden with force." A forcible detainer after a peaceable entry was therefore not a case within the statute 15 Ric. 2, c. 2. The stat. 8 Hen. 6, c. 9, then enacts, "that from henceforth where any doth make any forcible entry into lands, &c., or them hold forcibly after complaint thereof made within the same county where such entry is made, to the justices of peace by the party grieved, the justices shall cause the said statute (of 15 Ric. 2,) to be duly executed." It has been argued that any forcible holding is sufficient to authorize the justices to convict. It seems to me that every forcible holding (though such holding may under some circumstances be the

ground of an indictment at common law) is not within the statute, but that it applies only to a forcible detainer preceded by an unlawful entry. The principal alteration introduced by the statute 8 Hen. 6, c. 9, was, to make a forcible detainer after a peaceable entry an offence. A party may, however, enter peaceably, but unlawfully; it by no means follows that, because he may have entered peaceably, he had any lawful right to enter. It should, then, have appeared by the conviction that the entry was unlawful, and it has been usual in cases under this statute so to state it.

Patteson, J. This conviction cannot be supported. The stat. 15 Ric. 2, c. 2, gave magistrates a summary jurisdiction in all cases of forcible entry; but in \*314] cases \*of forcible detainer, only where there had been a previous forcible entry, and there may have been good reasons for not making every forcible detainer an offence cognizable by justices in a summary way, for it would be hard to allow a man to be turned out of possession for detaining with force that land to which he is rightfully entitled. But notwithstanding that statute, a party who had acquired the possession of lands peaceably, though unlawfully, might afterwards detain them forcibly. That was a mischief which the stat. 8 Hen. 5, c. 9, was intended to remedy. Now there is no statement in this conviction that the entry was unlawful. In Rex v. Elwell, 2 Ld. Raym. 1514; 3 Ld. Raym. 360, where the defendants were convicted before justices, on their view, of an unlawful detainer, it was stated in the information that they unlawfully ejected, expelled, and amoved the complainant, and the messuage unlawfully withheld, and that precedent is adopted in Burn's Justice, (vol. ii., title Forcible Entry.) There are no words in the conviction here to satisfy me there was any unlawful entry. I cannot entertain a doubt that one of the remedies intended to be given by that statute, was, to extend the summary jurisdiction of magistrates to cases of forcible detainer preceded by a peaceable but an unlawful entry. If it were not confined to such cases, the consequences would be, that a person who had had two years' rightful possession of land, might be liable, under any circumstances, to be fined and imprisoned for forcibly maintaining that possession against a wrongdoer. The party was discharged out of custody.

### \*315] \*CLARKE v. The IMPERIAL Gas Light and Coke Company. Nov. 24.

By statute 1 & 2 G. 4, c. exvii. incorporating a gas light company, it was enacted, that the directors should have the custody of the common seal, and power to use it for the affairs and concerns of the company, who were themselves by another clause empowered to make orders under seal at their meetings, for the government of the company, and for regulating the proceedings of the directors. No power was expressly given by the act to grant annuities. At a special general meeting of the company, a committee, previously appointed for certain purposes, reported that it was expedient that the then clerk, whose health was bad, should be invited to retire upon a pension, on condition of abstaining from acts prejudicial to the company; that such proposal had been made to him, and that he had accepted it. The meeting voted that the report should be received and entered on the minutes, and that the directors should carry into effect the committee's recommendation. No order to this effect was made under seal. The directors, by deed in the name of the company, granted an annuity to the clerk on his retirement, subject to conditions of the nature above stated, and they put the corporate seal to it: Held, that the seal was properly affixed by the directors; that the granting of such annuity was warranted by the statute; that it was a concern of the company, within the first-mentioned clause; and that no order of the company under seal was necessary to authorize it.

The act prescribed that nothing should be done at any special general meeting, but the business for which it was called; and certain forms were required for calling it. On a special case stated, which set out entries of the proceedings whereby the grant was authorized, it did not appear that those forms had been gone through, and the com-

pany, who were sued on the above deed, alleged this irregularity in answer: Held, that it lay on them to give strict proof of the default; and this not being done, but a possibility appearing that the forms might have been complied with, the Court would not presume the contrary.

By the statute, the orders and proceedings entered in the company's books were to be considered as originals, and read in all courts, &c. Quære, Whether this rendered

them admissible evidence as between the company and a stranger?

COVENANT for arrears of an annuity alleged to be payable to the plaintiff by virtue of an indenture under the common seal of the defendants. The indenture was set out on over. It recited that the company had been incorporated and established for lighting certain parts of the metropolis with gas, by certain statutes (1 & 2 G. 4, c. exvii. and 4 G. 4, c. xev., both public); that the plaintiff had been their clerk at a salary of 700%. a year, and had conducted himself diligently and faithfully in that employment, but had lately been incapaciated by ill health: that a committee of proprietors, duly appointed by a general meeting of the company, had reported to a special general meeting that in consequence of the plaintiff's state of health, \*it appeared expedient to invite him to retire on a pension of 400l. a year, on the usual condition of abstaining from acts to the prejudice of the company; that such proposal had been made to and assented to by him; and that (for reasons which the committee assigned) it was likely to prove but a small burden to the company: the indenture further recited that the report was approved by the meeting, and referred to the directors to be carried into execution; and that, the said report and proceedings having been communicated to the plaintiff, he, in consideration of the said pension, had resigned his office. And it was then witnessed, that in consideration of his past services, and of his resignation in compliance with the said report and proceedings, and in consideration of 5s. paid, &c. the said company in pursuance of the recommendation of the committee in their report, and of the resolution made thereon by such general meeting as aforesaid, and in exercise of any powers or authorities to them given or in them vested by the aforesaid acts of parliament, or either of them, and of every other power and authority in anywise enabling them in this behalf, did grant to the plaintiff, his executors, &c. one pension, annuity, or clear annual sum of 400l., payable out of and charged upon all and singular the stock, funds, estate, and effects of the company, and the gains and profits thereof, to have, hold, &c. from the date of the said indenture (when he resigned his office as aforesaid), for the term of his natural life; and there was a covenant by the company for payment of the said annuity in the manner and at the times in the indenture specified; upon condition, nevertheless, that the said annuity should be forfeited, if the plaintiff should (except by leave of the company) manufacture \*or supply, or become an officer of, or connected with, any other company who should manufacture or supply, or undertake to manufacture or supply, gas for lighting within the parts and district which the first-mentioned company were then entitled to supply and light with gas. The defendants pleaded non est factum. At the trial before Lord Tenterden, C. J., at the sittings in London after Michalmas term, 1831, a verdict was taken for the plaintiff for 400l., subject to the opinion of this Court upon the following case:—

The indenture was produced by the plaintiff, and was proved to be under the The evidence given by the defendants was as follows:—A corporate seal. general meeting of proprietors, duly convened, was held on the 8th of March, 1827, and was attended by many, but not all, of the proprietors. The proceedings, as after stated, are entered in the books of the company, and the entries are correct statements of the business transacted at such meeting. The first entry is, "Resolved, that a committee be appointed to investigate and examine the accounts of the company from its formation to the present period, (any three of whom shall form a quorum), and that such committee shall have the power to call for the production of, or to inspect, all books, documents, &c. in the custody or power of the directors, and of every officer of the company, and to report." By the second resolution, the directors and other parties were requested and authorized to give information to the committee. By the third, the committee were requested to make up a debtor and creditor account, and a balance sheet containing a full statement of the company's affairs, &c. By the fourth and fifth the committee were empowered to employ an accountant, and to make \*318] \*amendments in the books, &c. The sixth is as follows:—"Resolved, that the said committee be requested and empowered to examine into and consider the duties of the several officers of the company in all or any of their several departments, together with the salaries attached to their offices, and to report thereon at the next general meeting of the proprietors." Much other business is entered in the books as transacted at the same meeting, but it is not material to the present case.

On the 23d of July, 1827, the plaintiff (then being clerk) sent a circular to the proprietors, giving notice of a special general meeting to be held on the 3d of August, "to receive the report of the committee appointed to examine into the accounts and concerns of the company at the general meeting held on the 8th day of March last, and to adopt such measures thereon as the said meeting shall deem expedient." Advertisements to the same effect were published in Advertisements to the same effect were published in the newspapers, as required by statute. The meeting was held accordingly; some, but not all, of the proprietors attended. The proceedings are entered in the company's books, which state that, the advertisements and circular calling the meeting having been read, the report of the committee appointed on the 8th of March was also presented and read, and a resolution passed, that the same should be received and entered on the minutes, and the directors instructed to take steps for carrying into effect the recommendations therein contained. report contained, among other things, that statement respecting the company's clerk, the present plaintiff, which is, in substance, recited in the indenture, as set out above. On the 19th of September, 1827, a special general meeting was held in pursuance of a circular letter and advertisements duly \*issued, in which the proprietors were requested to meet "for the purpose of Mr. electing a fit and proper person to be clerk of the company, in the place of Mr. Henry Clark (the plaintiff) who has resigned." Some (but not all) of the proprietors attended. The entry of the proceedings in the company's books is, that, after the notice of meeting had been read, the following report of the directors was presented and read:-"Your directors, in conformity with the resolution passed at a general meeting of the proprietors held on the 3d of August last, proceeded to carry into effect the order for granting an annuity of 400% to Mr. Henry Clarke, who has acceded to the terms proposed, and in consequence resigned the situation of clerk to this company." Then follow other entries of business done at the meeting, but not material to this case.

The indenture was, before the commencement of the action, assigned to a proprietor of the company, who, in that capacity, attended the aforesaid meetings. No proof was given of the time or manner of affixing the corporate seal, nor, except so far as is above stated, of any authority or direction given to any person to affix the same. None of the entries above mentioned is under the corporate seal. The questions for the opinion of the Court were, first, whether the above evidence for the defendants was receivable; and, secondly, if it were, whether it constituted a defence to the action by shewing the deed to be void. This case was argued on a former day of the term.

Platt for the plaintiff. The books were not evidence for the company, being mere documents of their own, to which the plaintiff, as regards this action, is \*320] a stranger. The company, being incorporated, has a certain \*common seal, which, when once affixed to a deed, is evidence of their being parties to it: whether proper steps were taken to authorize the affixing of it or not, may be matter of dispute among themselves, but cannot affect the right of a third party. Their books are nothing more than the memorandum of a private

Vol. XXIV.—10

Г320

person, and can have no greater effect to invalidate their own deed. The instrument itself is regular on the face of it, it grants what the company might grant, and for purposes which are legitimate, and beneficial to them.

R. V. Richards contrà. The evidence was receivable, as tending to avoid the deed. In the case of a deed executed by an individual, the plaintiff proves the execution and delivery: in the instance of a corporation, the seal is prima facie evidence of regular execution; but in the latter case it may be proved that the seal was affixed without proper authority, and the deed therefore invalid; just as, where an individual pleads non est factum, whatever shews that he was at the time incapable of binding himself by deed is evidence to support the plea. Formerly the special matter would have been pleaded with the conclusion, "et sic non est factum;" but that is no longer customary. A defendant may prove, under the general plea of non est factum, that a bail-bond was executed by him after the return of the writ, Thompson v. Rock, 4 M. & S. 338; or that a bond was delivered as an escrow, Stoytes v. Pearson, 1 Esp. N. P. C. 255. It is the same with a corporation; and, "If a person pretending to be mayor of a corporation, put the corporation seal to a deed, yet it is not, by that, the deed of the corporation." Anonymous, 12 Mod. 423. In the Derby Canal Company v. Wilmot, 9 East, 360, an incorporated \*company sold land, and directed their clerk to seal a conveyance, which they placed in his hands, but not to part with it till certain accounts were adjusted; and it was held that the sealing, under these circumstances, did not pass the estate. The circumstances, therefore, under which a corporation seal was affixed, may be inquired into: and here it may be shewn that that act was done without proper authority. The company's books are evidence on that point; for, by 1 & 2 G. 4, c. cxvii. s. 60, (which incorporates the company) the orders and proceedings entered and signed as there specified, "shall be deemed and taken to be original orders and proceedings, and shall be allowed to be read in all courts and places whatsoever, and by and before all judges, justices, and others." [TAUNTON, J. They must be evidence for some purposes; the question is, whether they are so for this.] The business referred to a committee by the resolutions of March 8th, 1827, was not such as the meeting of proprietors could lawfully delegate; but assuming that they could, the committee were not authorized to report upon a matter not referred to them, namely, the granting a pension to the clerk upon his resigning his office: nor was the meeting of the 3d of August empowered to take that subject into consideration; for, by 1 & 2 G. 4, c. cxvii. s. 61, no business is to be transacted at any special general meeting besides that for which it shall have been called; and the notices of the 23d of July say nothing of a proposed grant of an annuity. By sect. 62, of the last-mentioned act, dividends are to be made half-yearly out of the clear profits, subject to certain regulations; one of which is, "that no dividend shall be made whereby the capital of the company shall be impaired." \*To grant an annuity like the present, [\*322] is contrary to the policy of this section, which is, that the funds of the year shall pay the year's expenses; and such a grant does tend to impair the capital. The company might as well pay the current expense of coals by annuities charged on the future funds; or give their servants reduced allowances, securing to them annuities for life on their dismissal. Sect. 71, gives power to the directors to use the common seal "for the affairs and concerns of the company," but that is only for the ordinary affairs. In a matter like the present, they could only be authorized to use it by an order or by-law; and by sect. 76, any by-law made at a general, or special general meeting "for the good government of the company, and for regulating the proceedings of the directors," must be under the common seal. In Dunston v. The Imperial Gas Light Company, 3 B. & Ad. 125, the majority of the Court seem to have been of opinion, that a resolution for giving remuneration to a director, which is not provided for by the statute 1 & 2 G. 4, c. cxvii. ought to have been made in the form of an order under seal. There is no provision in the act for remunerating the clerk.

It does not any where appear to have been intended by the act, that the company should grant annuities, and they cannot take upon themselves to act as a corporation for other purposes than those for which they were incorporated. This was one argument adverted to by the Court in Broughton v. The Manchester Water-works Company, 3 B. & A. 1, where it was held, that that corporation could not accept bills payable at less than six months. In that case it was observed, that if such acceptances could be given, the corporation might \*323] \*become a banking company: and so, if the present deed were held available, this gas company might become a society for granting annuities.

Platt in reply. It may be admitted that, on non est factum, evidence is receivable to shew that the supposed deed is no deed at all; as in the case of infancy, or coverture, or an instrument delivered as an escrow. But here, even supposing the books to be evidence, (which has not been established,) it does not result from the proceedings that, owing to any irregularity, the indenture in question was no deed. (He then referred to the several entries set out in the case.) But the clause that the books shall be evidence, is only one of the terms of the partnership; they might be evidence as between the partners, but yet not against strangers. By 1 & 2 G. 4, c. cxvii. s. 71, the directors have the custody of the common seal, to be used for the affairs and concerns of the company; and it appears from the case that they did affix it in the present transaction, which clearly was an affair and concern of the company. No fraud is imputed. The seal being in the hands of the directors for these purposes, it is absurd to require an order under seal to them; for they must also seal that. Dunston v. The Imperial Gas Light Company, 3 B. & Ad. 125, only decided that the instrument there in question, which was an order for giving a remuneration to directors, ought to have been under seal to bind the company. within the scope of the act that servants of the company should be remunerated; \*324] and this Court is not called upon to lay down restrictions as to the \*mode of navment. The appoint is not and applied to the smooth of navment. of payment. The annuity is not properly a charge upon future funds, the whole interest being in the present members: but if the charge were such, the proper redress would be by application to a court of equity. This is not taking up of money on annuity by way of loan, which would be contrary to sect. 31, but an actual repayment of past services. Sect. 62, only regards an improper distribution of supposed profits. If the current expenses of the company exceeded the income, the capital must be touched. Broughton v. The Manchester Water-works Company, 3 B. & A. 1, was the case of a corporation not established for trading purposes assuming the power to accept bills, which is very different from executing a deed. Cur. adv. vult.

DENMAN, C. J. now delivered the judgment of the Court. The question in this case turned upon the validity of a bond granted by the company to Mr. Clarke, who had been in their service, and which was in the nature of a retiring pension. It was contended in the first place that this bond was void, as not having been executed conformably to the act of parliament by which the company was constituted, and the case was put, on behalf of the defendants, of a corporation seal having been affixed to a deed by one who had assumed the office of mayor. But here the seal was undoubtedly applied by those who had the legal custody of it,

that is, the directors of the company.

It was further urged, that the bond was granted for a purpose not warranted \*325] by the act, and in this respect \*Broughton v. The Manchester Waterworks Company, 3 B. & A. 1, was supposed to apply. Mr. Justice Holroyd there observed, that a bill of exchange could not bind the company, who could only contract under seal, and this the defendant must be supposed to know: and it was said by another learned Judge, that if a company, established for purposes however limited, could accept bills, it might erect itself into a banking company. So it was argued here by the defendant's counsel, that this, which is a company for supplying London with gas, would be converted into a company for granting annuities, if a bond of this kind were to be sustained. We are,

however, of opinion that the general authority confided to the directors to manage the concerns of the company may well authorize a grant like this, particularly to an officer entitled to a salary, wishing to retire on account of ill health, and agreeing to abstain from transferring his services to any other company.

A third objection was, that no such contract could be made without the consent of the general body of proprietors, called together by notice for this particular object. The act does require this, and if we could distinctly see that the forms prescribed by the act in this respect had not been complied with, the argument would have great weight. But, on the contrary, if we were to inquire into the facts, we might perhaps find that the forms of the act had been strictly complied with. It is enough to observe, that proof of this irregularity does not appear in plain terms upon the case, and the company, when they seek to set aside their own formal act on the ground of irregularity in the preliminary proceedings,\* ought to make out such defence by the most cogent proof. Although the case sets out the proceedings impeached as irregular, it is [\*326] not asserted that other proceedings might not have taken place, in which all the requisite forms were complied with. For any thing that appears in the case, it is possible that due notice may have been given for considering whether the proposal made by the committee on the 3d of August should not be carried into effect; the general meeting of proprietors may have concurred in the steps taken by the directors for executing it; and if this was regularly done before affixing the seal to the instrument, all was right: and then, inasmuch as the seal was set by those who had the power of affixing it, and to an instrument giving effect to a bargain which the company had power to make, as no fraud is imputed to the plaintiff, and there is a possibility, upon the facts set forth, that the apparent irregularity may not have occurred, we think the plaintiff is entitled to judgment. As our opinion proceeds upon the supposition that the facts set forth in the company's books are true, the question, whether or not they were admissible on their behalf, does not arise. Postea to the plaintiff.

## \*The KING v. The HUNGERFORD Market Company. Nov. 24. [\*327

## (Ex parte Elizabeth Davies.)

By stat. 11 G. 4, c. lxx., the Hungerford Market Company were empowered to purchase certain premises for the purposes of the act, and by sect. 6, it was enacted as follows:-That if any person interested in such premises shall, for twenty-one days next after notice given him of their being required for the purposes of the act, refuse to treat, or not agree, for the sale thereof, in every such case the company shall cause the value of, and recompense to be made for such premises to be inquired of by a jury; and for summoning and returning such jury they are empowered to issue their warrant to the High Bailiff of Westminster, who is required to impannel, summon, and return such jury, and is empowered to swear twelve, and to examine witnesses before them, &c.; and they shall assess the damages and recompense, &c.:

Held, that the company, having given such notice to an occupier, could not withdraw from it, though they offered to pay all reasonable costs incurred by him in consequence; but that the act obliged them, on his demand, to issue their warrant to the High Bailiff for summoning a jury. And the Court granted a mandamus to compel

them so to do.

A RULE nisi had been obtained for a mandamus to the company to issue their warrant (pursuant to the statute 11 G. 4, c. lxx.) for summoning a jury to assess damages and compensation to Elizabeth Davies for her interest in the Ship public-house. The affidavits in support of the rule stated, that the said E. Davies was possessed of the premises in question, under a lease for twenty-four years from September, 1822, and that, after some correspondence respecting a proposed purchase of them by the company, (in which the parties did not agree

as to the steps to be taken with respect to a valuation,) she received from their clerk a notice (stated to be given in pursuance of sect. 6, of the above-mentioned act) to the following effect:-"That the messuage or tenement called," &c., (describing it) "and mentioned and contained in the schedule to the said act, is required for the purposes of the said act, and that it is the intention of the company of proprietors duly constituted by the said act, to contract for the purchase of all subsisting leases, terms, estates, and interests therein, and that \*328] in case you shall not within the space of \*twenty-one days from the date hereof, treat, contract, and agree with the said company for the sale of the said premises, and all subsisting leases, &c., therein, it is the intention of the said company forthwith after the expiration of twenty-one days, to issue their precept to the high bailiff of the city and liberty of Westminster to summon and impannel a jury for the purpose of inquiring into and assessing the damages and recompense to be given for and in respect of the said premises, and all interests therein, according to the provisions of the said act. Dated this 25th day of February, 1832." A similar notice was given to Mrs. Drake, the owner of the freehold. It was further stated, that in the expectation that these notices would be acted upon, Mrs. Davies reduced the stock upon her premises, and had ever since the notice been ready and willing to give up possession to the company, on receiving a reasonable compensation; and that the premises had been surveyed and valued on her behalf, and preparations made to support her claim before a jury: that a request being made on her behalf on the 17th of April, by S. T. Bull, her surveyor, to know when the case would be submitted to a jury, the company's clerk, on the 2d of May, returned the following answer:-"Sir,-I am desired by the court of directors to acknowledge the receipt of your letter of the 17th of April, and to remind you that you have been informed that the premises of Mrs. Davies are not wanted. I am, Sir, &c." It was further alleged, that the premises had been much lessened in value by the company's works. On behalf of the company it was stated, that on the 3d of April their attorney conferred with the attorney of Mrs. Drake, and not being able to agree with him upon terms, declined the premises, and paid \*his bill of costs; that he informed Mr. S. T. Bull of this shortly after the 3d of April; and that he was not apprised, till the 6th of June following, that the attorney for Mrs. Drake did not also act for Mrs. Davies: that on the said 6th of June, H. W. Bull, as attorney for Mrs. Davies, gave him notice, that he, Bull, would attend the court of the company on the following day, to know what course they meant to pursue: that H. W. Bull accordingly had an interview with the company on the 7th, and that on the 8th, the deponent, the company's attorney, by their direction, wrote to him as follows:—"Sir,—I am desired by the board of directors to inform you, that as the sum asked for the purchase of the freehold of the Ship public-house, and Mrs. Davies's interest therein, so greatly exceeds the sum the company had reason to expect, they declined the purchase altogether, of which your client was informed on the 3d of April last. The company however are willing, and I hereby offer on their behalf, to pay any necessary and reasonable expense your client may have incurred in consequence of the notice of the 25th of February last."

Sir James Scarlett now shewed cause. Under the circumstances disclosed by the affidavits, the company were not bound to take these premises. (He then commented upon the facts sworn to, and the correspondence.) The sixth section of the act(a) enables the \*company, if the owners of messuages, &c., after twenty-one days' notice, will not treat with them for the sale of such

<sup>(</sup>a) By which it is enacted, that if any person interested in, or having or claiming power to sell, the messuages, &c., in the first schedule to the act described, or any part thereof, shall, for the space of twenty-one days next after notice in writing, signed by the clerk of the company, shall have been given to him (as is there specified) of such messuages, &c., being required for the purposes of the act, neglect or refuse to treat and agree, or shall not agree, for the sale of the said premises, or shall be prevented by absence or disability,

premises, to have a jury summoned, who shall assess the compensation: but the clause is not so worded as to be at all events compulsory on the company. Although they may have given notice, there is a locus positientize, and here it is not unreasonable that the company should claim it. Their notice was given on the 25th of February; the written answer of their clerk to Mrs. Davies's surveyor was sent in the beginning of May; and they have offered to pay all reasonable expenses incurred by Mrs. Davies in consequence of the notice.

\*Kellu and Channell contra. The notice binds the company as well as the individual, otherwise great injustice would be done. The first [\*331 sections of the act give particular facilities to the company in treating for, and taking conveyances of, certain premises which are described in a schedule: and until the expiration of three years from the 29th of September, 1830, (sect. 4,) they may compel the owners of such premises to sell them; for by sect. 6, they may, without any other treaty, at once give notice to the occupiers of such premises that the same are required for the purposes of the act, and if the parties do not, within twenty-one days after such notice, agree with the company upon terms of sale, a warrant is to issue for summoning a jury to assess compensation, whose verdict, by section 7, is to be final. Every thing here, as respects the tenant, is done in invitum. It is at the option of the company to give notice or not. In the present case notice is given: the tenant begins selling off his stock, employs a surveyor, and incurs other expenses: and it is now said, that after this has taken place, the company may turn round and renounce the premises. The Court would not hold that the legislature had intended to give such a power. unless the words of the act were too strong to leave a doubt. But here the language is imperative; that if an agreement be not come to after notice, "in every such case the company shall cause the value and recompense to be inquired into and ascertained by a jury." Under this act the company obtain the whole benefit of a contract for the sale and purchase of the premises (on terms to be afterwards ascertained), by merely giving notice to the owner and occupier. Can it be said that they shall also be at liberty to withdraw from such contract at \*their own pleasure? And if so, may not this be done at any time before [\*332] the jury have given their verdict, or even before the high bailiff has made his adjudication in pursuance of it? If the notice has the effect of a contract, it can only be rescinded by both parties.

DENMAN, C. J. The parties forming the company have obtained an act of parliament, giving them great privileges in the purchasing of certain property. There is no power reserved to them of countermanding a notice once given, in case of disagreement as to terms, but they may summon a jury to ascertain them; that is their protection in case of an exorbitant demand. If they are not bound by their notice, it follows that, after giving it, they are free, during the long or cannot be found or known, or shall not produce a clear title, "then and in every such case the said company or their successors shall cause the value and recompence to be made for such messuages, wharfs, lands, or hereditaments, to be inquired into and ascertained by a jury of twelve indifferent men of the said city of Westminster; and for the summoning and returning such jury the said company and their successors are hereby empowered from time to time to issue a warrant under their common seal to the High Bailiff of the said city and liberty of Westminster, or his deputy, thereby commanding and requiring him to impannel, summon, and return an indifferent jury of twenty-four persons," &c.; and the High Bailiff is required to impannel, summon, and return such number, out of whom he is empowered to swear twelve to be the jury for the purposes aforesaid, &c.; he is further empowered and required to summon witnesses, and examine them on oath before the said jury; and he shall cause the jury to view the places in question if necessary, and use all lawful ways and means for his own and the jury's information, as he shall think fit; "and the said jury shall assess the damages and recompence to be given for the messuages, &c., to the respective owner or owners and occupier or occupiers thereof, according to his, her, or their respective interests therein, and shall give in their verdict thereupon," and after such inquiry and verdict the High Bailiff "shall thereupon order, adjudge, and determine the sum or sums of money so assessed by the said jury to be raid for the said messuages, wharfs, lands, or hereditaments, or any interest therein, according to such verdict or inquisition of the said jury."

period of three years, (allowed by the fourth section of the act,) to take the property or not, at their discretion, and the owner is at their mercy during that time. I cannot think that the legislature so intended. The rule must therefore be made absolute, and the company must go to a jury, which is the security they

have provided for themselves by this act.

PARKE, J. I am of the same opinion. The company are not bound to purchase the property mentioned in the schedule, but the question is, at what period they shall be said to have exercised their option. Now, I think, that this is done when they have given notice, and that, according to reason and good sense, such notice ought to be as binding on them as the owner or occupier. construction, which I should be disposed to put independently of express words in the statute, is supported by the language of section 6, which enacts, that if the owners or occupiers shall not, \*for the space of twenty-one days after notice, have agreed upon terms of sale, the company "shall cause the value and recompense to be inquired into by a jury," &c. This Court came to a similar conclusion in a late case of The King v. The Commissioners for improving Market Street, Manchester.(a) The language of the statute there was different, and I believe there were no compulsory words, but the Court thought, from the general purview of the act, that the commissioners were to be considered as having exercised their option when they gave notice of taking the premises, and that they could not withdraw from it. The case has not been reported, but, I believe, would be found to bear upon the present.

TAUNTON, J. I am of the same opinion. If the notice could be countermanded, the company may state what they consider as a countermand in their

return to the mandamus.

PATTESON, J., concurred.

Rule absolute.

# (a) The KING v. The Commissioners for improving MARKET STREET, MANCHESTER. January 27, 1831.

A RULE nisi had been obtained on a former day in this (Hilary) term, for a mandamus requiring the commissioners to issue their warrant to the sheriff of Lancashire, his under sheriff, or one of the coroners, to summon a jury, and inquire into and assess compensation to one Newall for certain premises, pursuant to the act 1 & 2 G. 4, c. cxxvi.

It appeared that on the 28th of November, 1829, the commissioners gave notice in writing to Newall that the messuage or premises, or so much of the same as was requisite for widening Market Street, occupied by him or his under tenants, situate in the same street, were wanted for the purposes of the act; and the notice required him to give up possession of the premises or such part thereof, to the commissioners, on the 29th of November, \*334] 1830. Notices were also given to Newall's tenants \*of the other parts of the premises. In the course of 1829 and 1830 some negotiation took place between Newall and the commissioners respecting the purchase, but they could not agree upon terms, and in December, 1830, the premises still remaining unpurchased, Newall, who complained that he was materially injured by the delay, as well as by the proceedings of the company in the improvements they were carrying on, gave them notice to issue their warrant (as above) for summoning a jury; at the same time stating that he was ready to sell at a reasonable price, but persisted in declining the offer already made. On the part of the commissioners, affidavits were put in, stating that their funds were limited, and subject to the payment of interest on a very large debt, and that they were under restrictions as to borrowing further sums; that they gave the notices merely with a view of being enabled to take any favourable opportunity which might occur for purchasing, (there being no power given them by the act to remove any party without such notice,) but not with any final determination to purchase at all events; that the sum demanded was unreasonable, and that Newall. though he claimed compensation for good will, had refused to give any estimate of it; that if a jury gave any sum at all approaching that now demanded, it was doubtful if the funds would be adequate for a considerable time; and that the improvement to be effected by taking the premises in question would not, in the judgment of the commissioners, warrant such an expense.

The act 1 & 2 G. 4, c. exxvi., empowered the commissioners, by sect. 23, to purchase certain premises described in a schedule, by agreement with the owners, or if an agreement could not be come to, then by assessment, as after mentioned. By sect. 27, if part only of any premises were wanted, the commissioners were required to purchase the whole, if the owners were unwilling to sell part. By sect. 31 it was enacted as follows:—

That if the owners, &c., shall neglect or refuse to treat, or shall not agree with the commissioners, "the sheriff of the said county of Lancaster, or his under sheriff, or some one of the coroners of said county, shall, upon the warrant of the said commissioners, and he and they is and are hereby required and authorized to cause it to be inquired into and ascertained upon the oaths of a jury, &c., (which oaths the said sheriff, &c., is and are hereby empowered and required to administer), what damages will be sustained by, and what recompence and satisfaction shall be made to such owners," &c., and shall assess and award the sum to be paid for the purchase of such houses, &c., and also for good-will, &c.; and the sheriff, under sheriff, &c., is empowered and required to summon witnesses, and examine them on oath, and shall order a view if necessary, and use all other lawful ways and means for information; and after verdict the sheriff, &c., shall order the sum assessed to be paid by the commissioners; and the verdict shall be final. "And for the summoning and returning of such a jury or juries the said commissioners are hereby empowered to issue their warrant or warrants to the said sheriff, &c., to summon, impannel, and return at some \*convenient place in the said town of Manchester, a jury of not less than thirtysix, nor more than forty-eight, &c.; and twenty-one days notice shall be given to the owners, &c., interested in the premises; and the said sheriff, &c., is empowered to impannel, summon, and return such number accordingly, out of whom he shall swear twelve to be the jury for the purposes aforesaid." By sect. 37, no occupier of any house, &c., shall be liable to be removed from the possession thereof by virtue of this act until the expiration of twelve calendar months after notice in writing shall have been given him by the commissioners that such house, &c., will be wanted for the purposes of the act, nor until they shall have paid the compenstion agreed upon or assessed in that behalf. By sect. 43, the powers of this act, so far as they are compulsory upon owners, &c., to sell any messuages, &c., for the purpose of the act, shall cease from and after the expiration of twelve years from the passing thereof.

Courtenay and Wightman now shewed cause against the rule for a mandamus, which

was supported by Cross, Serjt.

THE COURT made the rule absolute, and the mandamus issued.

In the ensuing Easter term the commissioners made their return to the mandamus, containing similar statements to those sworn to in their affidavits in opposition to the rule; they also alleged, that in the course of the year after the giving of their notice, they had been obliged by a vote of the ley-payers to make new purchases, by which great expense would be incurred, and that a great part of the premises for which Newell required compensation, had been bought by him with a full knowledge that they, or part of them, would be required for the purposes of the act; they further stated that a very small portion of the premises was in fact requisite for those purposes; and that the commissioners had not, and did not know that they should ever have funds applicable to the payment of Newall's demands.

A rule was afterwards obtained, calling on the commissioners to shew cause why the return should not be quashed, and a peremptory mandamus issue. In Trinity term Courtenay and Wightman shewed cause, and Cross, Serjt. supported the rule.

The Court made the rule absolute.

A sheriff executing a fiera facias after notice of the allowance of a writ of error, is liable in trespass, though there has been no further supersedeas of the execution. Notice to the sheriff of such allowance is notice to his officers, and renders them liable in trespass for proceeding with the execution.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and seizing and detaining his goods. Pleas, by Marshall and Poland, the general issue, and justification, as sheriff of Middlesex, under a fi. fa. Replication, that after the judgment, and before the issuing of the fi. fa., a writ of error issued directed to the Chief Justice of the Common Pleas (in which Court the judgment was given) commanding him to return the proceedings into the Exchequer Chamber, which writ of error was duly allowed, and at the time when, &c. was in force, and was a supersedeas to the fi. fa.: and that before the time when, &c. plaintiff duly gave notice to all the defendants of the writ of error and the

<sup>\*</sup>BELSHAW v. CHAPMAN MARSHALL, Esquire, HENRY PO-LAND, Esquire, PHILIP SELBY, and GEORGE ROBINSON. Nov. 24.

allowance thereof, and duly required them to cease to execute the writ, but that they neglected and refused to comply, and after such notice committed the trespasses. Rejoinder, that the plaintiff did not duly give notice to the defendants Marshall and Poland of such writ of error and the allowance thereof, nor duly require them to cease to execute the writ: and upon this issue was tendered and joined. The defendants Selby and Robinson pleaded, first, the general issue, and, secondly, a justification by Selby as sheriff's bailiff, and Robinson as the servant of Selby, under a warrant issued by the sheriff in pursuance of the above-mentioned fi. fa. The replication was the same as that above stated. Re-\*joinder, that before the time when, &c. the plaintiff did not give notice to Selby and Robinson of the writ of error and allowance thereof, nor require them to cease, &c. Issue thereon. At the trial before Lord Tenterden, C. J. at the sittings in Middlesex after Easter term, 1832, it appeared that the writ of execution was issued, and the warrant thereupon made and delivered to the officers, on the 3d of December, 1830, and they on that evening, between seven and eight o'clock, entered the plaintiff's premises and took possession. On the same 3d of December, about five in the evening, a clerk of the plaintiff's attorney served a copy of the allowance of the writ of error (at the same time producing the original) at the sheriff's office in Red Lion Square: he also served another copy shortly after on the attorney for the party at whose suit the judgment had been signed. The same evening, about eight o'clock, the plaintiff's attorney went to the premises where the officers were in possession shewed them the original allowance, told them that it operated as a supersedeas, and warned them against proceeding with the execution: he also informed them that the allowance had been served at the sheriff's office, and on the attorney for the party who had obtained judgment. The officers did not withdraw. No distinct evidence was given as to the hour at which the writ of execution came to the sheriff's office, or when the warrant was issued; but Selby had stated that he did not receive the warrant till seven that evening. It was urged on behalf of the defendants, that the sheriff could not be considered as having due notice to cease from executing the fi. fa. till he was served with a writ of supersedeas, and that at all events no regular notice appeared to have been given to the officers. \*Lord Tenterden, in summing up, stated the question for the jury to be, whether the allowance of the writ of error was served at the sheriff's office before or after the writ of execution came there: in the former case, he directed them to find for the plaintiff; in the latter, for the defendants. The jury were of opinion that the allowance arrived first at the office, and gave a verdict for the plaintiff. Leave having been given to move to enter a non-suit,

Campbell, in last Trinity term, moved for a rule nisi to that effect, or for judgment non obstante veredicto. (Before Lord Tenterden, C. J., Littledale, J., and Parke, J). The principal question is, whether a sheriff, acting under a fi. fa. regularly sued out, can be made a trespasser by merely having been served with the allowance of a writ of error, no supersedeas having issued. It is undoubtedly established by Perkins v. Woolaston, 1 Salk. 322; Meagher v. Vandyck, 2 B. & P. 370; Braithwaite v. Brown, 1 Chitt. Rep. 238, and other cases, (See 2 Wms. Saund. 101 g.) that a writ of error operates as a supersedeas from the time of allowance, even without notice served. But to what purpose does it so operate? To stay execution, but not to make the sheriff a trespasser, when the allowance which is to make him so has perhaps been kept secret by the party interested. So long as there is no actual supersedeas issued, the fi. fa. is a justification to the sheriff, though by the practice of the Court, the allowance of a writ of error supersedes the execution. At all events the officers are not liable, for there was nothing which could be construed as notice to them till they had [\*339 entered to make the levy. [PARKE, J. In \*Bleasdale v. Darby, 9 Price, 606, it was held by Wood B. that trespass would lie against the plaintiff and the sheriff, where a fi. fa. had been issued and executed after the allowance of a writ of error had been served. Is there any precedent of the actual ssuing of a supersedeas by the Court in a case like this?] The statute 3 Ja. 1, c. 8, provides, that in the actions there enumerated no execution shall be stayed by any writ of error, or supersedeas thereupon to be sued, unless the plaintiff in error shall, before such stay made or supersedeas to be awarded, enter into recognizance as required by that act.

Cur. adv. vult.

PARKE, J. on this day delivered the judgment of the Court. We have looked into the authorities, and are clearly of opinion that the notice of the allowance of a writ of error was sufficient to render the sheriff liable in this action, without any supersedeas being issued; nor does there appear to be any precedent for such a proceeding: and notice to the sheriff was notice to the officers. There will, therefore, be no rule.

Rule refused (a).

### JOHN and THOMAS WAGSTAFF v. WILSON.

A letter written to the plaintiff's attorney before action brought by the attorney who afterwards appears in the cause for the defendant, is not evidence of a fact admitted therein, without further proof that the defendant authorized the communication.

TRESPASS for taking away a horse. At the trial before Parke, J., at the last Summer assizes for Yorkshire, the plaintiffs, to shew that the taking was authorized \*by the defendant, put in a letter written before the action [\*340 was commenced, by Messrs. Smith and Hinde, the attorneys who afterwards acted for the defendant in the cause. The plaintiffs' attorney had written two letters to the defendant, which he received; the first charging him with having seized the horse under a mistaken supposition, and demanding it back; the second complaining that the horse had not been returned but sold, and threatening legal proceedings unless reparation were made. The answer, signed by Messrs. Smith and Hinde, was as follows:-"Dear Sir, Mr. Wilson has brought us your letter of the 16th instant, respecting a horse belonging to Mr. William Storey, his tenant, distrained for rent in arrear. prepared to prove that the horse in question was legally distrained, with other chattels, by Mr. Wilson's authority, and was afterwards removed from the premises by your client or his agents, and therefore we think Mr. Wilson justified in the steps he has taken. We are," &c. There was no proof that the letter had been written with the defendant's sanction, except that one of the writers was his attorney on the record. No answer was sent by the defendant himself. The learned Judge thought the letter not admissible, and the plaintiff was nonsuited.

Hoggins (in the early part of this term) moved for a rule to shew cause why there should not be a new trial, on the ground that the letter ought to have been received, being written in answer to a communication upon the subject-matter of the action, and by the party who was now the defendant's attorney on the record; and he cited Marshall v. Cliff, 4 Camp. 133, Roberts v. Lady Gresley, 3 Car. & P. 380, \*Peyton v. The Governors of St. Thomas's [\*341 Hospital, 3 Car. & P. 363, and Wilmot v. Smith, 3 Car. & P. 453.

PARKE, J. (b) In Marshall v. Cliff, 4 Camp. 133, the attorney's letter relied upon to prove the joint-ownership of the defendants, contained an undertaking to appear for them. That was a step in the cause. In Roberts v. Lady Gresley, 3 Car. & P. 380, the party whose letter was produced, and whose agency was relied upon, had already acted in the business as agent for the defendant, and Lord Tenterden thought there was evidence to go to the jury

(a) See Meriton v. Stevens, Willes, 271.

<sup>(</sup>b) This case was moved before Denman, C. J. took his seat on the bench.

that he continued so when the letter was written. The other cases are clearly distinguishable. There is no ground for a rule.

TAUNTON, J. and PATTESON, J. concurred.

Rule refused.

\*342] \*The KING v. The Justices of St. PETER'S Liberty, YORK.

The 41 G. 3, c. 23, s. 8, enacts, that if on the hearing of an appeal from any poor-rate, the sessions shall order the sum rated on any person to be lowered, and it shall be made appear that such person has paid in respect of such rate a sum which he ought not to have been charged with, the said court may order such sum to be returned, together with all reasonable costs occasioned by the overcharge: Held, that the application for an order to refund, must be made to the same court of general or quarter sessions which heard the appeal, or, at least, to that court which ordered the rate to be lowered; and, therefore, where the sessions confirmed a rate, subject to a case, and this Court sent the rate back to be amended, by reducing the charge on the appellant; and the court below at the Easter (being the next) sessions ordered the sum to be lowered accordingly; an application at the Michaelmas sessions for an order on the overseers to refund the difference between the sum first charged, and which the appellant had paid, and the sum ultimately fixed, was held to be too late.

In August 1828 the undertakers of the Aire and Calder Navigation were rated to the relief of the poor of the township of Brotherton, in the West Riding of Yorkshire, in the sum of 150l. on a total annual value of 2,000l. as "the owners and occupiers of a cut or canal, and that part of the river Aire lying within the township of Brotherton, the dams, locks, and weirs, tolls, dues, &c. They appealed against the rate at the October sessions, and the appeal was entered and respited until the Christmas sessions, but the overseers of Brotherton had no notice in writing of the entry and respite, and in December they distrained a vessel belonging to the company for the amount of the rate. The company, to prevent the vessel being sold, paid the 1501. under a protest, and 131. 3s. 31d. costs. At the Christmas sessions the appeal was heard, and a case granted for the opinion of the Court of King's Bench; and that Court on hearing the argument in Trinity term 1829, (see 9 B. & C. \$20,) decided that the company were not rateable in respect of the river, and sent the rate back to the sessions to be amended by striking out that part. While this appeal was \*343] pending, other rates were made on the company for \*the same amount, and in the same terms, and appealed against; and on the hearing of an appeal against one of these rates in January 1830, the sessions amended the same by striking out the words "and that part of the river Aire," subject to the opinion of the Court of King's Bench on the question whether the company were rateable for dams on the river; and that Court on the 21st of January 1832, (see 3 B. & Ad. 139,) made a rule that the rate should be sent back to be amended by reducing it from 150%. to 15%. 16s., the amount chargeable on the canal and lock. At the April sessions 1832 the rates were reduced from 150% to 15%. 16s. pursuant to the rules of Court. A demand was afterwards made on the overseers of Brotherton for the difference in amount between the sums due from the company on the rates as ultimately amended, and the sums paid to the overseers of Brotherton, under the distress in December 1828, and afterwards upon the subsequent rates. At the October sessions, an application was made by the company for an order of sessions on the overseers to refund the sums of money so paid to them, after deducting the amount of the several rates chargeable. That court refused to make any order, on the ground that the application ought to have been made at the April sessions, when the rates were altered. A rule nisi having been obtained for a mandamus to the justices to make the order.

Alexander and Bliss now shewed cause. The application for an order on the

overseers to refund ought to have been made to the same court of quarter sessions which ordered the rate to be reduced. The stat. 41 G. 3, c. 23, s. 8, enacts, "that if on the hearing of any appeal from any rate for the relief of the poor, the court of \*general or quarter sessions shall order the sum rated on any person to be decreased or lowered; and it shall be made [\*344 appear to the said court that such person has, previously to the hearing of such appeal, paid any sum of money in consequence of such rate which he ought not to have paid or been charged with, then and in every such case the said court shall order such sum to be repaid and returned to the person having paid the same, together with all reasonable costs occasioned by such person having paid or been required to pay the same." It is manifest from the words said court, and "on the hearing of any appeal," that the legislature intended the application for an order of repayment to be made to the same court of general or quarter sessions which ordered the sums assessed on any person to be lowered. The power given by the statute is not an original power, but annexed to the appellate jurisdiction, like the authority to award costs. Here it ceased with the April sessions.

Sir James Scarlett and Wightman contrà. The statute ought to receive a liberal construction; and so construing it, the words said court signify the sessions generally, and not the justices who compose any specific court of general or quarter sessions. It was impossible here to apply for the order to the justices who heard the appeal, for they had ceased to constitute a court of quarter sessions before it had been ascertained by the decision of the Court of the King's

bench that the sums paid were not due.

DENMAN, C. J. The motion ought to have been made either to the court of quarter sessions which heard the appeal, or to the court which ordered the sums rated \*on the company to be decreased or lowered. The application here was too late.

LITTLEDALE, J. concurred.

TAUNTON, J. The court of quarter sessions had no power to order money improperly paid to overseers to be refunded until this statute gave it them; and the statute limits the power to the court of sessions which heard the appeal, or at least to the court which orders the sums rated on any person to be lowered. No application was made in this case to either the one or the other.

PATTESON, J. concurred.

Rule discharged.

#### The KING v. E. O. JONES and others. Nov. 25.

Indictment, after stating that a commission of bankrupt had issued against A. by virtue of which the commissioners adjudged him to be a bankrupt, charged that he and other defendants conspired to conceal a part of his personal estate: Held, that even since the stat. 6 G. 4, c. 16, s. 112, such an indictment is defective for not shewing that the party had actually become bankrupt.

Indictment stated that "on, &c. (1828) at, &c. a commission of bankrupt founded on the statute made and then in force concerning bankrupts, was duly awarded and issued against E. O. Jones, directed to the commissioners therein named, thereby giving them authority to proceed according to the statute with the body of the said E. O. Jones, as also all his lands which he had in his own right before he became bankrupt, &c. by virtue of which said commission, the commissioners found that the said Jones did become a bankrupt within the true intent of the said statute before the suing forth of the said commission, and did adjudge him to be a bankrupt accordingly." It then charged that all the defendants, contriving and intending to cheat the creditors of Jones on, &c. at, &c. unlawfully did conspire to conceal and \*embezzle a great part of the personal estate of Jones so then having been declared and adjudged a

bankrupt, that is to say, twenty-two Bank of England notes for 100% each, and in pursuance of such conspiracy, Jones did deliver to E. T., (one of the defendants,) and E. T. did, in pursuance of the said conspiracy, receive and have from Jones the said several bank notes of him Jones so then declared bankrupt, to the intent that the same might be removed, concealed, and embezzled. Plea, not guilty. The defendants having been convicted at the Bristol Summer assizes 1831, a rule nisi was obtained for arresting the judgment, on the ground that the indictment was defective in not stating the petitioning creditor's debt, the trading, and the act of bankruptcy.

Merewether Serjt. now shewed cause. It must be conceded that so long as the 5 G. 2, c. 30, was in force, an indictment against a bankrupt for removing or concealing his goods must have stated a petitioning creditor's debt, a trading, and an act of bankruptcy. But that statute (by sect. 1,) made it felony in any person who had become a bankrupt, and against whom a commission had issued, to conceal any part of his personal estate to the value of 20l. This is repealed by 6 G. 4, c. 16, which by sect. 112, makes it felony if any person against whom a commission has been issued, and who has been thereupon declared bankrupt, shall not surrender himself, &c.; or if any such bankrupt shall remove, conceal, or embezzle any part of his estate to the value of 10l. It is sufficient, therefore, since the latter statute, for an indictment to allege the issuing of the commission, and the adjudication that the party was a bankrupt. [Parke, J.

\*347] According to your argument, if \*a commission issued against a person who was not a trader or not indebted, he would be liable to be transported for seven years if he did not surrender and discover his estate, as required by the statute. The words "such bankrupt" in sect. 112, mean a person not merely declared a bankrupt by the commissioners, but a person liable to be so declared.] The legislature had in view the enactments of the 5 G. 2, c. 30, when they passed the 6 G. 4, c. 16, for the former act is recited in the preamble. But, independently of this point, the indictment is good, because it charges that the defendants conspired to do an unlawful act. [Parke, J. The concealment of Jones's goods was not an unlawful act, unless he had duly become bankrupt.]

Bompas, Serjt. and Crowder contrà. The Court, in construing an indictment, will not infer that the words therein used constitute a crime if they will bear any other construction. Now it is consistent with the allegations of this indictment, that Jones may have been illegally, and without jurisdiction, declared bankrupt; and if so, he had a right to conceal his own goods. words of sect. 112, "if any such bankrupt shall remove, conceal, or embezzle," &c. refer to the section which describes the persons against whom a commission may issue, and sect. 12 authorizes the Lord Chancellor to issue a commission, on a petition made to him in writing against any trader having committed an act of bankruptcy, by any creditor of such trader. A commission, therefore, can only be lawfully issued upon the petition of a creditor against a trader who has committed an act of bankruptcy. Sect. 31, provides, that when an action is brought against any person appointed by the commissioners for any thing \*done in obedience to their warrant, there must be a previous demand of a perusal and copy of such warrant, and a refusal to give the same for six days after such demand; and if after such demand, and compliance therewith, any action be brought against the person so appointed without making the petitioning creditor defendant, the jury, on production of the warrant, shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the commissioners. The statute, therefore, contemplates a case where the commission issued in due form might, nevertheless, be invalid, and give no title to the parties acting under it. If, according to the argument urged on the other side, the words "any such bankrupt" in sect. 112, may mean a person against whom an invalid commission has issued, it will follow that the bankrupt might be liable to an indictment for felony, for concealing goods which in fact were his own property, and which he might be entitled to recover in an action. That

never could have been intended. The words, "if any person against whom any commission has been issued, or shall hereafter be issued, whereupon such person hath been or shall be declared bankrupt," must be construed to mean where

he has legally been declared bankrupt.

Denman, C. J. It is quite clear, that if this indictment had charged Jones with felony, it would have failed, because it does not contain averments that he was a trader, &c. or had become bankrupt. The question then is, whether the indictment be good, because it charges a conspiracy to defraud the creditors of a bankrupt against whom a commission had issued de facto. The same answer applies in either case. If the party against whom the commission issued was not a trader, \*the commission was illegal. The indictment ought to charge a conspiracy, either to do an unlawful act, or a lawful act by unlawful means. Here the indictment charges a conspiracy to remove and conceal the goods of Jones; but if the commission was bad, Jones had a right to remove them. If we were to hold such an indictment good, it would follow as a consequence, that a party who was entitled to recover goods in an action, if taken from him, might be declared a felon for removing the very same goods. There is nothing stated on the face of this indictment to constitute an offence.

Parke, J. I am of the same opinion. This indictment ought to have shewn a conspiracy to do an unlawful act, or to do a lawful act by unlawful means. Now it does not state enough to shew that the defendants conspired to do any unlawful act; it ought to have alleged, not merely the issuing of a commission of bankrupt, but that there had been a trading by Jones, and a petitioning creditor's debt, and that he became bankrupt. Without such allegations the indictment would clearly have been insufficient under the statute 5 G. 2, c. 30, and then that reduces it to the question whether an offence is charged within the statute 6 G. 4, c. 16. I think it is not. Section 112, implies that the commission therein mentioned shall have duly issued. The twelfth section shews that a valid commission could issue only against a trader who had committed

an act of bankruptcy, and upon the petition of a creditor.

TAUNTON, J. The indictment ought to contain averments of all matters necessary to constitute the offence; it is not sufficient merely to allege matter which makes \*it probable that an offence has been committed. It was not enough to shew in this case that a commission issued, or that the commissioners adjudged the party to be a bankrupt. He must actually have become bankrupt. This indictment sets out the commission in part, and states that the commissioners were directed to proceed with the lands which Jones had in his own right, &c. before he became bankrupt. The commission, therefore, issued on the supposition that the party had become bankrupt. But the indictment ought to have shewn distinctly that he had become so. It is consistent with all the allegations, that Jones's goods may have been seized unlawfully, he never having subjected himself to the jurisdiction of the commissioners; and if this were so, it was not an unlawful act in him to remove or conceal them. The indictment is, therefore, defective.

Patteson, J. It is conceded that so long as the statute 5 G. 2, c. 30, was in force, it was necessary to shew, in such an indictment as this, that a valid commission had issued against the person adjudged a bankrupt; but it is said that the law in this respect is altered by the statute 6 G. 4, c. 16, s. 112. It is quite clear that if the removal of the goods by Jones would not have been illegal, a conspiracy by him and the other defendants to remove them is not, unless the means used for that purpose were unlawful, which is not alleged. The question, then, is, did the legislature mean to enact that a person against whom an illegal commission of bankrupt issued should be guilty of felony if he removed his own goods? Without an express enactment to that effect, I could not come to such a conclusion. I think the words "such bankrupt," in s. 112, import, not merely a person \*against whom a valid commission has issued, but one who has become bankrupt. The rule for arresting the judgment must be made absolute.

#### CAREW v. EDWARDS. Nov. 26.

The statute 6 G. 4, c. 16, s. 127, which vests in assignees the future effects of a bankrupt who had before been bankrupt, or taken the benefit of an insolvent act, and has not paid 15s. in the pound under the subsequent commission, does not apply to a bankrupt who had obtained his certificate under such subsequent commission, before that statute passed; and, therefore, where A., after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate before the passing of 6 G. 4, c. 16, but did not pay 15s. in the pound, and he was afterwards sued on a bond executed before his discharge under the insolvent act, but not inserted in his schedule, it was held, that his certificate did not bar the action.

Debt on bond. Pleas, first, non est factum; secondly, bankruptcy. At the trial before Patteson J., at the Middlesex sittings after Hilary term 1832, the following appeared to be the facts of the case. The defendant had, some years ago, and since the date of the bond, been discharged under an insolvent debtor's act, but the bond had not been inserted in the schedule; a commission of bankrupt had afterwards been issued against him, under which he obtained his certificate before the 2d of May 1825, on which day the statute 6 G. 4, c. 16, received the royal assent, but his estate had not produced 15s. in the pound. It was contended for the plaintiff that he was entitled to a verdict and judgment against the effects of the bankrupt by the 5 G. 2, c. 30, s. 9, and for the defendant that by 6 G. 4, c. 16, s. 127, his effects were vested in his assignees, and his certificate an absolute bar to the action. The learned Judge directed a verdict for the plaintiff. A rule nisi for a new trial was obtained upon the ground that the certificate barred the action.

Sir J. Scarlett and Follett now shewed cause. It never could have been the \*352] intention of the legislature \*that the 127th section of the new bankrupt act should make the certificate obtained by every bankrupt since the passing of the 5 G. 2, c. 30, under the circumstances mentioned in s. 9, a bar to subsequent actions by the creditors. The 135th section enacts, "that nothing herein contained shall affect or lessen any right, claim, demand, or remedy which any person now has under any commission of bankrupt, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted." Now here the plaintiff had at the time of passing that statute a demand upon the bankrupt, to which his future effects were liable, and there is no specific enactment which takes away that right.

White contra. The words of section 127, are retrospective as well as prospective. They are "if any person who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid." They evidently include a person who had already obtained his certificate at the time of passing the statute. So section 121, enacts, "that every bankrupt who shall have duly surrendered and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt." In Robertson v. Score, 3 B. & Ad. 338, the Court intimated an opinion that section 127, applied to cases where the first certificate was granted under a commission issued before the passing of the act;

the same construction applies where the second was so granted.

Cur. adv. vult.

\*353] \*Denman, C. J. now delivered the judgment of the Court. This was an action on a bond. The defendant pleaded, first, non est factum; secondly his bankruptcy. It was proved at the trial that the defendant had been discharged under an insolvent debtors' act some years ago, and since the date of the bond, but that the bond had not been inserted in his schedule; that a commission of bankrupt had since that discharge been issued against him, under which he obtained his certificate in 1825, before the day on which the statute

6 G. 4, c. 16, received the royal assent, but the estate had not produced 15s. in the pound. Under these circumstances the plaintiff contended that he was entitled to a verdict, and judgment against the effects of the defendant, under the 5 G. 2, c. 30, s. 9. The defendant, on the other hand, contended that by the 127th section of the 6 G. 4, c. 16, his effects were vested in his assignees, and therefore that his certificate was an absolute bar to the action according to the case of Robertson v. Score, 3 B. & Ad. 338, in which the certificate pleaded in bar had been obtained after the passing of the 6 G. 4, c. 16, a former certificate having been obtained by the party, under a commission issued before that act. The question, therefore, is, whether the 127th section of the 6 G. 4, c. 16, has a retrospective operation, so as to vest in the assignees of a bankrupt under a second commission, where the estate does not pay 15s. in the pound, and where the bankrupt has obtained his certificate under the 5 G. 2, c. 30, those effects which did not vest in his assignees under that act, but were liable to be taken in execution by his creditors. The language of the 127th section of the \*6 G. 4, c. 16, which appears to have been taken with some omissions from the 9th section of the 5 G. 2, c. 30, (a), is by no means clear, [\*354] and it is extremely difficult to collect from it whether the legislature intended to alter the effect of a certificate obtained prior to that act or not. If it did, the rights of creditors, and of the bankrupt himself, would be much affected; and by the 135th section of the act, we find it enacted "that nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, demand, or remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted."

Now we cannot find any words in the 127th section by which the right of a creditor situated as the plaintiff was, to sue the bankrupt and recover a judgment, and have execution against his effects, is specifically and expressly taken away, or the effects of a bankrupt situated as this defendant was, are specifically

and expressly vested in his assignees.

We think therefore, on these grounds, that the certificate is no absolute bar in the present case, and the grounds of our judgment leave the case of Robertson v. Score wholly untouched.

Rule discharged.

The second writ was sued out of Chancery without any return made to the first; never-

the class it was held to be regular.

The stat. 1 W. 4, c. 3, s. 2, which enacts, that all writs returnable in the King's Bench, Common Pleas, or Exchequer, on general return days, may be made returnable on the third day exclusive before the commencement of each term, &c.; and the day for appearance shall as heretofore be the third day after such return, exclusive of the day of the return, &c., applies to all writs, not merely to those on mesne process, and consequently it extends to a writ de contumace capiendo.

THE defendant, on the 12th of May, 1832, had been arrested by an officer of the sheriff of Surrey, under a warrant granted upon a writ de contumace capi-

<sup>\*</sup>The KING on the Prosecution of the Rev. H. SMITH, Executor of the late Lady BLAKE, v. BLAKE. Nov. 26.

A defendant arrested on an irregular writ de contumace capiendo, was brought up by habeas corpus before a Judge, to be discharged. Immediately after his discharge, and before he had time to return home, he was again arrested on a similar writ, for the same matter: Held, that he was protected from arrest redeundo.

<sup>(</sup>a) This latter clause is in express terms made retrospective only, both as to the first and second certificate.

endo, issued out of the Court of Chancery into the county of Surrey. On the 17th of May he was brought before Patteson, J., at Serjeant's Inn, by writ of habeas corpus, to apply for his discharge, on the ground that the first mentioned writ was irregular, not having twenty days between the test and return, as required by 5 Eliz. c. 23, s. 2. The learned Judge desired him to be brought up again on the following morning, when he ordered him to be discharged out of custody as to the first mentioned writ. The sheriff's officer had the defendant in custody at Symond's Inn Coffee House until the discharge or liberate was brought, and then left him, and in less than two minutes afterwards an officer of the sheriff of Middlesex came into the room and arrested the defendant on a warrant granted on another writ de contumace capiendo, issued out of Chancery for the same matter for which he had been arrested by the sheriff of Surrey, and returnable on the 23d of May. An application was then made to Patteson, J., \*356] to discharge the defendant, on the ground that he was \*protected redeundo. The learned Judge in the first instance refused to discharge him, but afterwards did so on his entering into a recognizance to appear before the Court, in order that the question might be decided whether he was improperly arrested on the second writ. A rule nisi was obtained for quashing the writ on three grounds: first, that the defendant was privileged from arrest redeundo; secondly, that the last writ de contumace capiendo was irregular, for that a capias ought to have issued out of K. B. after the former writ; and thirdly, that the writ, being made returnable on the 23d of May, was irregular. It appeared by an affidavit in answer to the rule, that it was the invariable practice in the cursitor's office to issue one or more writs de contumace capiendo either in one or more counties running at the same time, or into the same counties from time to time as often as occasion might require, upon production of the former writs, and proof given of their never having been executed or taken effect by caption.

Sir J. Scarlett and Hoggins showed cause on a former day. The defendant was not privileged from arrest either during the time he was attending before the Judge, or on his return from such attendance, because, the writ of habeas corpus having been sued out by him, he must be taken to have attended volun-Rex v. Sir F. Delaval, 1 Sir W. Blackst. 410, will be relied on by the There Lord Mansfield said, "wherever the Court does not think fit to deliver the parties into any special custody, it will privilege them redcundo. \*357] If the Court refuses that, it impliedly directs the parties to break \*the peace, even in Palace Yard." There he manifestly contemplated the case of an illegal restraint without authority; but in this case the caption and custody under the first writ would have been legal, if the cursitor had not committed an error in the form. In cases of subpœna, the privilege is allowed to the witness, because he attends the Court by its command, and with a view to the administration of justice. If there had been a detainer against the defendant, he would not have been discharged as to that. Then it is said that the second writ was irregular, because a capias ought to have issued after the first; but by the stat. 5 Eliz. c. 23, s. 4, a capias is to issue where the sheriff has returned non est inventus. Here he made no such return, and could not, because he had the defendant in custody. Thirdly, the writ is made returnable pursuant to the 1 W. 4, c. 3, s. 2, which enacts, that all writs returnable on general return days, may be made returnable on the third day exclusive before the commencement of each term, or on any day not being Sunday between that day and the third day exclusive before the last day of the term. Here the term began on the 26th of May, and the 23d was the third day exclusive before the first day of term.

Follett contrà. The privilege from arrest extends to all persons resorting, bona fide, to a competent tribunal; even parties to a suit. A plaintiff, who institutes a suit, may in some sense be said to attend the trial of a cause voluntarily; but he has the privilege. It extends also to bail, and to a barrister or attorney attending the courts in the exercise of his professional duty. Secondly,

Vol. XXIV.—11

here the party prosecuting the writ has proceeded \*irregularly, for, the writ de contumace capienda having been delivered out to the sheriff, a [\*358] capias ought to have issued out of K. B. The 53 G. 3, c. 127, s. 1, substitutes the writ de contumace capiendo for that of excommunicato capiendo, and directs that the provisions contained in the 5 Eliz. c. 23, as to the latter writ, be applied to the writ de contumace capiendo. Now, sect. 2 of that statute enacts, that every writ of excommunicato capiendo that shall be granted out of Chancery shall be returnable in K. B., and that, after it shall be scaled, it shall be brought into that Court and there delivered of record to the sheriff; and if the sheriff make default in returning it at the day, he is subject to be fined. [TAUN-TON, J. Sect. 4 enacts, that if the sheriff return non est inventus, the justices of K. B. are to award a capias. Here no return has been made to the first writ, whereon to found a capias. DENMAN, C. J. In Rex v. Eyre, 2 Str. 1189, it was excepted to a second writ de excommunicato capiendo, that a former writ of excommunicato capiendo being enrolled in K. B., the Court of Chancery could not issue a second writ, but by 5 Eliz. c. 23, such second writ was to issue from K. B.; but the answer, given at the bar and adopted by the Court, was, that the act related only to the case where the first writ had actually issued, and the sheriff had returned non est inventus. PARKE, J. There can be no doubt that the second writ in this case issued conformably to the practice of the Court of Chancery, as stated in the affidavits.] Then the writ ought to have been returnable in term. The 23d of May is not in term. That defect is not cured by 1 W. 4, c. 3, s. 2, which section only applies to writs on mesne process, for it enacts that the \*day for appearance shall, as heretofore, be the third day after such return. [PARKE, J. It applies to all writs returnable in the King's Bench, Common Pleas, or Exchequer on general return days. The question is reduced to this, whether a defendant is privileged from arrest in returning from attendance before a Judge on a habeas corpus sued out by himself.] Cur. adv. vult.

DENMAN, C. J., now delivered the judgment of the Court. In this case, which was argued before us on Saturday, all the questions were disposed of but one; and that was, whether the defendant was privileged from being taken under a writ de contumace capiendo. He had been in custody under a former writ of the like nature, and had sued out a writ of habeas corpus; and the learned Judge before whom it was returnable, being of opinion that it was void for want of a proper interval of time between the teste and return, discharged him; whereupon the prosecutor sued out another writ, and apprehended him on it on his way home from the Judge's chambers. And upon consideration we think he was privileged from arrest on this occasion. There is no case to be found in which this privilege has been extended to persons going and returning on a writ of habeas corpus except that of Rex v. Delaval, 1 Sir W. Blackst. 410, 439; 3 Burr. 1434, S. C., which is, however, not precisely like this case. But as it turned out in this instance, that the defendant's detention under the former writ was wrongful, and he was driven to his habeas corpus to obtain his liberty, it may fairly be considered as coming within the principle whereby parties \*to a suit, for the sake of public justice, are protected from arrest in coming to, attending upon, and returning from the Court. The rule, therefore, must be absolute with costs; Mr. Blake to bring no action for this arrest. Rule absolute.

The KING on the Prosecution of THOMAS CORPE v. The Treasurer and Directors of the ST. KATHARINE DOCK Company. Nov. 26.

It is discretionary in the Court either to determine the validity of a return to a mandamus on motion, or to order the case to be set down in the crown paper for argument.

The St. Katharine Dock Company were incorporated by act of parliament, which directed

that all actions against the company should be prosecuted against the treasurer or a director for the time being; but that the body or goods, lands, &c., of such treasurer or director should not, by reason of his being defendant in such action, be liable to execution. An action having been brought by T. C. against the treasurer as such, and another by the company, in the name of the treasurer, against T. C., all matters in difference were referred to an arbitrator, who awarded that T. C. had cause of action against the defendant, as such treasurer, for a certain sum, and directed that the treasurer should pay T. C. that sum on demand; and as to the other suit, he awarded that the treasurer, as such, had no cause of action, and ordered him, as such treasurer, to pay T. C. the costs on demand: Held, that a mandamus would lie to the treasurer and directors, commanding them to pay the sums awarded.

MANDAMUS to the defendants recited that by an act of 6 G. 4, c. cv., certain persons were incorporated by the name of "The St. Katharine Dock Company;" that two actions had been commenced in K. B., one at the suit of G. C. Glyn, as treasurer of the company, against Thomas Corpe, and another at the suit of Corpe against Glyn as such treasurer; that Corpe's action was brought for the recovery of certain sums of money alleged to be due to him from the company; that pending the two actions an order was made by Lord Tenterden that all matters in difference between the parties should be referred to an arbitrator, the costs of the causes to be in his discretion; that that order was made a rule of Court; that the arbitrator awarded that Corpe had a good cause of action against Glyn as such treasurer for the sum of 2560l., and ordered Glyn, as such trea-\*361] surer, to pay Corpe on \*demand that sum, together with the costs of such action, and that the said action should be stayed; and as to the other action, the arbitrator awarded that, at the time of the commencement thereof, Glyn, as such treasurer, had not, nor had he then, any cause of action against Corpe for the matters therein mentioned, and that the action should be discontinued, and the costs thereof paid by Glyn, as such treasurer, to Corpe on demand. (See Corpe v. Glyn, 3 B. & Ad. 801.) The writ then, after stating "that the two several sums awarded had not been paid by Glyn," proceeded "to command the treasurer and directors of the company to pay or cause the same to be paid to Corpe."

To this writ the treasurer and directors made a return, containing statements, the object of which was to shew that the award was not final, because the arbitrator had not decided one of the matters in difference brought before him. A rule nisi was obtained for quashing the return, on the ground that it did not thereby appear that the arbitrator had not adjudicated upon that particular matter; and the Court, upon cause being now shewn, were of that opinion; but as their judgment on this point turned entirely upon the very special terms in which the return was framed, it has been thought unnecessary to notice

it here.

Sir James Scarlett and Platt shewed cause on the above point; and they further contested the motion on the following grounds. The Court will not quash the return on motion; the case ought to have been set down in the crown paper, as in Rex v. The Mayor of London, 3 B. & Ad. 255. Secondly, any \*362] objection to the writ \*itself may be made even after a return. Now, to found an application for a mandamus, there must be a specific legal right, and a want of specific legal remedy, Rex v. The Archbishop of Canterbury, 8 East, 213; and, therefore, it will not lie to compel a man to obey an order of sessions, Rex v. Bristow, 6 T.R. 168, or to oblige the Bank of England to transfer stock, Rex v. The Bank of England, 2 Dougl. 524, there being a remedy in the one case, by indictment, in the other, by a special action of assumpsit. Here, there is no want of a specific legal remedy; for an action might have been brought on the award, and though it would have been formally against Glyn, as treasurer, it would have been, substantially, against the company, and execution might have issued against their effects.

Campbell (Solicitor-General), contrà. It is discretionary in the Court to quash a return for insufficiency, on motion, or to order the case to be set down

for argument. If the return be clearly bad on the face of it, the Court will quash it on motion. But if the case be one of difficulty, they will, as in Rex r. The Mayor of London, 3 B. & Ad. 255, order it to be brought on in the crown paper. Here the case is devoid of any difficulty, for Corpe has a legal right without any practical legal remedy. If he brings an action on the award, it must be against Glyn, and the execution, which must follow the form of the judgment, must be against him also. But the 6 G. 4, c. cv., s. 161, expressly provides that the body or goods of the treasurer shall not, by reason of his \*being defendant in any action, be liable to be taken in execution. (See Corpe v. Glyn, 3 B. & Ad. 801.) Then, if that be so, Corpe is without legal remedy unless a mandamus be granted. The act does not authorize execution to issue against the effects of individual members of the corporation, as in Bartlett v. Pentland, 1 B. & Ad. 704.

Bartlett v. Pentland, 1 B. & Ad. 704.

Denman, C. J. The first question in this case is, whether a mandamus will lie, and it undoubtedly will if the party has no other legal remedy. It does not appear that Corpe has any power of taking in execution the goods of the company. An action on the award must be against the treasurer, and the judgment would be against him; and as the execution must follow the form of the judgment, it would be against Glyn as treasurer; but the act of parliament incorporating the company provides that the body or goods of the treasurer shall not, by reason of his being defendant in any action, be liable to be taken in execution. Then as to the course of proceeding, I take it to be perfectly clear, that it is discretionary in the Court either to quash the return at once on motion, or

to have the case set down in the paper for argument.

PARKE, J. The first question in this case is, whether a mandamus should The objection, that it ought not to have issued at all, though it might more properly have been made at the time when cause was shewn against the rule for issuing it, may be made in this stage of the proceeding. Now, as the act of parliament provides, that neither the person nor property of \*the treasurer, when made defendant, shall be liable to be taken in execution, it follows that there is no other mode but a mandamus by which payment of this debt can be enforced. In Wormwell v. Hailstone, 6 Bingh. 668, where an action was brought against the clerk of trustees of a turnpike road under a statute which permitted the trustees to sue and be sued in the name of such clerk, a verdict having passed for the plaintiff, he sued out execution against the goods of the clerk, and it was held that execution could not issue against that individual personally; but Tindal, C. J. in delivering judgment, said there could be no doubt that the funds of the trustees might be made answerable for the amount ascertained in the action (in case of a refusal to apply them,) either by a mandamus or a bill in equity. As in this case there is no other legal remedy by which the company can be made subject to the payment of its debte, it follows that a mandamus will lie.

TAUNTON, J. and PATTESON, J. concurred.

Rule absolute.

## \*Ex parte MATANLE. Nov. 26.

[\*865

The rule of Trinity term, 21 G. 3, which empowers the marshal of the King's Bench to to regulate the admission of persons to visit the prisoners, does not authorize him at his pleasure to prevent an attorney from visiting his client in the prison, but he must have some ground to shew for so doing; provided the attendance of such attorney is on the client's business, and necessary to, or required by him.

ALEXANDER had obtained a rule, calling upon the marshal of the Marshalsea to shew cause "why W. G. Matanle, an attorney of this court, should not be admitted, at all seasonable times, into the interior of the prison of this court, and the rooms of the prisoners therein, in the same way as other attorneys of

this court usually are." In support of this application, it was sworn by Mr. Matanle that he had been accustomed to go into the prison as other attorneys did, but that on the 17th of June last he called there "for the purpose of conversing with one Joseph Lancaster, who was, and still is, a prisoner there, and was then, and still is, a client of this deponent;" and he was then refused admittance in consequence of certain alleged misconduct (which he denied) with respect to an order of discharge formerly brought to the prison by him for a prisoner named Barrett. He further stated, that he had several clients in the prison, whose interests had been, and were, materially affected by his exclusion. An application had been made to Littledale, J. at chambers, but he thought he could not make an order upon the marshal for Mr. Matanle's admission. The affidavits in answer stated grounds upon which the supposed misconduct was imputed.

The Solicitor-General now shewed cause. By a rule of Court, Trin. 21, G. 3, the marshal is to "prescribe in what manner, and for how long, visitors shall be \*366] \*allowed to see or stay with the prisoners, according to the circumstances of every case, in his discretion." (a) And if the exercise of that discretion were liable to be questioned, the facts of this case justify the marshal's conduct. The rule is made for the benefit of prisoners, not of attor-

neys. The Court then called upon

Alexander in reply. The rule of 21 G. 3, is not the only one on this subject. The rule Mich. 3, G. 2, directs, "that the turnkeys of the said prison do diligently attend at the gate or door of the said prison as the duty of their office requires; and do admit all such persons to have access to any of the prisoners as by law are entitled thereto." It cannot have been intended by the rule of 21 G. 3, that the marshal should absolutely exclude any person, even a professional man, at his discretion, though he may regulate the admission of visitors and their conduct, according to the words of the rule. This Court may control the marshal, and in a case like the present it ought to be shewn to the satisfaction of the Court that the party excluded was not a proper person to be admitted. [Denman, C. J. The discretion given to the marshal is an answer to such an application as this, unless the facts shew that he has misconducted himself in the exercise of it.] They shew it in this case. If the rule were such as it is assumed to be on the other \*side, the marshal might order the perpetual exclusion of any person at his pleasure.

DENMAN, C. J. We hardly think the description of visitors, spoken of in the rule of 21 G. 3, extends to the party making this application: the rule seems more properly referable to the wives and families of prisoners, and to persons who might be likely to bring in spirituous liquors. An attorney going in upon the business of his client ought not to be excluded unless some ground can be shewn for it. But upon that subject there are in the present case conflicting affidavits. And the affidavits in support of this motion do not say that the attendance of the party was necessary to his client, or had been required by him, or even that it was upon business. The rule must therefore be dis-

charged.

PARKE, TAUNTON, PATTESON, J., concurred.

Rule discharged.

## Sir WILLIAM LONG, Knight, v. WORDSWORTH, a Prisoner.(b)

A copy of a bill filed against an attorney or prisoner, does not require the indorsement

<sup>(</sup>a) "That the Marshal of the Marshalsea of this Court shall permit no persons to enter into the prison without their being first searched to see whether they have any spiritous liquors about them, and that he do not suffer the wives or children of any of the prisoners to lodge in the prison under any pretence whatever. And that the Marshal do prescribe in what manner and for how long visitors shall be allowed to see or stay with the Prisoners, according to the circumstances of every case, in his discretion."

(b) This case was decided Nov. 16th.

directed by rule II, Hilary, 2 W. 4, to be made upon the copy of any process served for the payment of a debt.

PLATT had obtained a rule, calling upon the plaintiff to show cause why the defendant should not be discharged out of custody on filing common bail. A bill had been filed against the defendant at the plaintiff's suit for debt, and a copy served upon the turnkey, but there was no indorsement upon the copy so served, of \*the amount of the debt, and the attorney's claim for costs; and it was contended that, by rule II. Hil. 2 W. 4, (a), such indorsement was necessary, and the want of it made the proceeding irregular.

Chandless shewed cause, and contended that the rule, being applicable only to process or copy of process, did not extend to the copy of a bill filed againt

a prisoner.

Platt contrà. A bill is the only mode of commencing a suit against a prisoner, and the policy of the rule applies to it, as well as to what is more properly termed process. [PATTESON, J. We have held that a bill against an attorney is not process within this rule.(b)] There the proceeding does not charge the person; there is not, therefore, the same reason for such a rule.

PER CURIAM. There is no distinction. No process is served in either case.

Rule discharged.

### \*GREEN and Others v. MITTON, Gent. Nov. 26. [\*369]

The parties

Plaintiff commenced his action in Hilary term, 1831, and declared in trover. The parties went to issue, and plaintiff was put under a peremptory undertaking to try. In Michaelmas term, 1832, having been advised that the action was misconceived, he moved for leave to substitute a count in detinue for that in trover, and add one in debt; and it was sworn that no new ground of action was contemplated. Leave refused.

CAMPBELL, Solicitor-General, had obtained a rule to shew cause why the plaintiffs should not be at liberty to amend the bill, issue, and record in this case by substituting a count in detinue for a count in trover, and by adding a count in debt. It appeared that the action was brought for the recovery of certain deeds on which the plaintiffs had advanced money, and which had come into the defendant's hands, and were (as was said) improperly detained by him. On behalf of the plaintiffs it was stated that the bill was drawn in trover by the advice of a special pleader, but the plaintiffs' attorney had lately been informed that it ought to be in detinue; that the object of the action, in whichever form brought, was the same, namely, to recover the above-mentioned deeds: and that the motion was not made with any view but the better attainment of that object. On the other hand it was stated, that the action was commenced as long ago as Hilary term, 1831; that the plaintiffs were then fully apprised of all the facts; and that they had been put under a peremptory undertaking to try after Easter term last. There were conflicting affidavits on the merits.

Sir James Scarlett, now shewed cause. There is no pretence for changing the form of action as desired here, when the parties are at issue. Where a plaintiff has applied merely to amend a declaration by changing the form from case

(b) In Lewellin v. Norton, moved in the bail court, Easter term, 1832, and referred to

all the Judges of this Court.

<sup>(</sup>a) "That upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the cost of such writ or process, arrest, or copy and service and attendance to receive debt and costs, and that upon payment thereof within four days, to the plaintiff or his attorney, further proceedings will be stayed." 3 B. & Ad. 390.

\*370] to debt, the application has been \*rejected, Levett v. Kibblewhite, 6 Taunt. 483. [PATTESON, J. The Court of Common Pleas has allowed a declaration in assumpsit to be changed to debt, after issue joined and a peremptory undertaking, Billing v. Flight, 6 Taunt. 419.] That might be on a statement of very peculiar merits: as where the amendment would save an action from being barred by the statute of limitations. (a) Here no such merits are stated. If such a motion were acceded to, no limits could be assigned to the practice.

The Solicitor-General contra. Justice will be done by the rule, and the defendant cannot be prejudiced. The rule will be drawn so as to provide for the costs to which he may have been subjected by the action being misconceived;

and on the merits his situation will not be altered.

DENMAN, C. J. It is a great act of indulgence to grant such an application as this, and the Court fear that, by making the rule absolute, they would establish a very inconvenient precedent. Where the parties agree, it may be otherwise; but the amendment being objected to, we cannot grant it. The case in Taunton, (Billing v. Flight, 6 Taunt. 419,) where assumpsit was changed to debt, was under very peculiar circumstances. The rule must be discharged.

PARKE, TAUNTON, and PATTESON, Js., concurred. Rule discharged.

# \*371] WALKER v. SAMUEL GARDNER, JOHN GARDNER, and JAMES HARRIS. Nov. 26.

A debtor, being arrested, offered a warrant of attorney. The plaintiff's attorney, who had also advised the defendant in previous stages of the business, came at his request to the place where he was in custody, and proposed another attorney whom he brought with him, to read over the warrant of attorney to the defendant, and attest it on his behalf. The defendant acquiesced, but the attorney so introduced was not known to, or sent for by him: Held, that this was not a compliance with the rule, Easter 4 G. 2, (and see Reg. Hil. 2 W. 4, I. 72,) which declares that no warrant of attorney executed by a person in custody of the sheriff, &c., shall be valid, unless there be present an attorney on his behalf, to be expressly named by him, and attending at his request, to witness it; and the warrant of attorney and proceedings thereon, were set aside for irregularity.

In the last vacation Sir James Allan Park, J. made an order at chambers that the judgment signed and execution issued on a warrant of attorney in this cause should be set aside for irregularity, and the warrant of attorney delivered up to be cancelled. During this term Sir James Scarlett obtained a rule to shew cause why that order should not be discharged, in support of which

application he cited Osborne v. Davis, 4 Taunt. 797.

It appeared from the affidavits for and against the present rule (which were in many respects contradictory), that Samuel Gardner had employed Smallridge, an attorney at Gloucester, to borrow a sum of money for him on mortgage, from one Walker, a client of Smallridge, and that Samuel Gardner, at Smallridge's suggestion, induced John Gardner to join him in a promissory note for 30*l.*, as a further security for the sum advanced. They were afterwards (July 1832) arrested for the amount of the note, and lodged in custody at a public house at Gloucester. At four o'clock on that day, after being in confinement about three hours, they sent for Smallridge, to confer with him as to an arrangement for their release, and they proposed to him to pay the debt and costs by instalments of 1*l.* per month, but he required that it should be 5*l.* 5*s.* for the first two months, and \*that they should procure some person to join them in a warrant of attorney to secure the payments. They named the defendant

<sup>(</sup>a) Executors of the Duke of Marlborough v. Widmore, 2 Stra. 890; 1 Barn. B. R. 408, 413, S. C. See 1 Tidd, 698, 9th edit.

Harris, who was sent for, and arrived about nine. Notice of this was given to Smallridge, who thereupon sent his clerk to the inn to prepare the warrant of attorney, and about ten o'clock went thither himself with John Hulls, another attorney, whom he requested to accompany him for the purpose of attesting the execution: the reason assigned in his affidavit for doing so was, that, as it was late, there might be difficulty in procuring the attendance of an attorney, if the defendants were not provided with one. It was further sworn by Smallridge and Hulls, that, upon their entering the room, Hulls informed the defendants S. and J. Gardner who and what he was, and stated that it was necessary some attorney should be present to attest the execution of the warrant of attorney, and explain it to them, and inquired whether they had any particular attorney whom they should wish to attend on their behalf; to which they replied that they had not, and they had no objection to Hulls doing what was necessary, as they perfectly understood what they were going to do. (This conversation was denied by S. and J. Gardner in their affidavits in answer, and they stated that Hulls was a stranger to them, and not looked upon by them as their attorney, and that, at the time in question, they considered Smallridge as acting on their behalf.) The warrant of attorney, for securing 401., was read over to the defendants, and (as stated on one side, but denied on the other) was explained to them by Hulls; it was then executed by them, and attested by Hulls in their Hulls demanded and received payment of them for his attendance. The defendant John Gardner, \*paid one instalment of 51. 5s. without making any objection.

The Solicitor-General now shewed cause. Osborne v. Davis, 4 Taunt. 797, is no authority, at least in the present case. That was a decision on a rule of the Common Pleas, Hil. 14 & 15 Car. 2, also adopted in K. B. the same year: but does not affect the later rule of the Court of King's Bench, Easter 4, G. 2, by which the Court (taking notice of great inconveniences following from holding a warrant of attorney to confess judgment by one in custody to be good, if any attorney, though for the opposite party, were present,) ordered, that in future "no warrant of attorney executed by any person in custody of any sheriff or other officer, for the confession of judgment, shall be valid or of any force, unless there be present some attorney on the behalf of such person in custody, to be expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant of attorney before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof."(a) Here, even upon the affidavits on the other side, it would be necessary to contend that a stranger who happens to be present, though not sent for by the party in custody, may be asked to attest the deed, and supply the place of an attorney on his behalf, which is not the intention of the rule.

\*Sir James Scarlett contra. Upon the facts stated in support of this application, it cannot be contended that Hulls was not an attorney present on behalf of the defendants within the meaning of the rule of Court. Osborne v. Davis, 4 Taunt. 797, is applicable to the later rule as well as to that of 14 & 15 Car. 2, and surely Hulls was the attorney of the party who paid him.

DENMAN, C. J. The rule of Court was certainly violated in this case by Smallridge, in taking an attorney to attest this instrument who was not named or sent for by the party in custody. The present rule must, therefore, be discharged; but as an instalment was paid under the warrant of attorney without objection, it must be upon the undertaking of the defendants not to bring any action.

PARKE, J. concurred.

TAUNTON, J. I am of the same opinion. Hutson v. Hutson, 7 T. R. 7, is decisive on this point. Lord Kenyon there observed, "There is great weight in the observation made by the counsel in support of the rule (Bayley,) that

<sup>(</sup>a) See 2 Stra. 902, 1 Tidd, 549, 9th edit., and the rule, Hil. 2 W. 4, I. 72, 3 B. & Ad. 384, to the same effect.

\*375]

the defendant, under the pressure of an arrest, ought to be considered incapable of waiving the benefit of this rule, and that, at all events, and in all cases, he should be protected by the advice of an attorney expressly attending for him."

Patteson, J. concurred.

Rule (for rescinding the order) discharged.

#### SIMS and Others v. BRITTAIN and Others.

A., B., and others, were owners of a ship in the service of the East India Company. B. was managing owner, and employed C. as his agent for general purposes, and amongst others, to receive and pay moneys on account of the ship; and C. kept a separate account in his books with B., as such managing owner. To obtain payment of a sum of money due from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner, and upon a receipt signed by B. and one of the other owners, C. received on account of the ship 2000l. from the East India Company, and placed it to B.'s credit in his books, as managing owner. The part owners having brought money had and received, to receiver the balance of that account: Held, that C. had received the money as the agent of B, and was accountable to him for it; that there was no privity between the other part owners and C., and subsequently that the action was not maintainable.

Assumpsit for money had and received. Plea the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after last term, the

following appeared to be the facts of the case:-

The plaintiffs were surviving joint owners of a ship called the Princess Charlotte of Wales, which was in the service of the East India Company. Another part owner, now deceased, of the name of Gribble, was appointed by all the owners ship's husband. The defendants were employed by Gribble as his agents for general purposes, and amongst others, to receive and pay moneys on account Besides Gribble's general account, there was a separate account kept by the defendants in his name, as managing owner, of the ship's disbursements and earnings: the account between Gribble and his co-owners was also kept at the defendant's counting-house. The last two accounts did not correspond, the defendants' commission for managing the ship, and a charge for the hirc of their counting-house for the audit of the account between Gribble and the owners, being carried through several years to Gribble's general account with the defendants by his direction. The defendants always received their directions from him. In order to obtain a final settlement of the freight of this \*376] vessel with the \*East India Company, it was necessary that the receipt for the balance should be signed, not by the managing owner only, but by one or more of the other owners also. This had been done in the month of April 1829, and the balance of 2000l. and upwards, received by the defendants on the joint receipt of Gribble, and of Sims, one of the plaintiffs; and the amount was placed by the defendants to Gribble's credit, in his account with the defendants as managing owner of the ship. The action was brought by the plaintiffs to recover the balance appearing due on that account, as money had and received to The defendants sought to retain it, as there was a balance due from Gribble to them on the general account. Lord Tenterden was of opinion on the trial, that Gribble had been permitted by the owners to have the absolute dominion of the ship's carnings, and that there was no privity between the plaintiffs and the defendants; and therefore he directed a nonsuit.

Sir James Scarlett, in the early part of term, moved for a new trial. The money received by the defendants belonged to all the part-owners. The defendants knew that, for they could not obtain payment from the East India Company until they procured the concurrence of Sims. Having received the money after that, they must be taken to have received it on account of all, and to be responsible to all.

Cur. adv. vult.

PARKE, J., (a) during the term delivered the judgment of the Court.

\*This was an application to set aside a nonsuit, and for a new trial, made before my brothers Taunton, Patteson, and myself. We were desirous before we gave our opinion, to see Lord Tenterden's note, and the documents given in evidence, and having done so, we entirely agree with the opinion expressed by him at the trial, that there was no privity between the plaintiffs and the defendants; and consequently that this action will not lie. (He then

stated the facts of the case, and proceeded as follows.)

Although the concurrence of one of the plaintiffs was necessary in order to enable the defendants to receive the money from the East India Company, yet it was received by the defendants as the agents of Gribble, and they by such receipt became accountable to him for it. The transaction was, in effect, the same as if Gribble himself had received the money, and it had been handed over to Gribble, who had then placed it in the defendants' hands on his own account; in other words, had made a loan of the money to them. The entry of the sum to Gribble's credit on a separate account, is only a mode of keeping the accounts between Gribble and the defendants, for the sake of convenience: a plan which is adopted between a customer and his banker, the latter being nevertheless in

all such cases responsible and indebted to the customer alone.

In this case the money appearing to the credit of Gribble, was subject to his sole disposition, and payable by the defendants to his order only, and the case is just the same as if the defendants had been Gribble's bankers, and by his direction, and for his convenience, \*kept a separate account of one part of [\*378 his funds. If the other part owners, the plaintiffs, had been unwilling to trust Gribble alone with the money, they should have raised a separate account in their own names, or as owners of this ship, with the defendants; and then they would have been responsible to them. That they have not done; and therefore they cannot treat the defendants as their debtors. They were debtors to Gribble, and are now responsible to his executors. There must therefore be no rule.

## LUCAS and Another v. The LONDON DOCK Company. Nov. 26.

Goods consigned to A., and warehoused at the London Docks, were claimed by B. The Dock Company required an indemnity of A., the original consignee, before delivering them to him; A. refused, and brought an action of trover, with counts for special damage for the detention. On motion by the company for relief under the interpleader act, 1 & 2 W. 4, c. 58, B., upon due notice, not appearing, the Court held, that the claim of B. against the company was barred, but that A. ought not, by reason of the act, to be precluded from recovering for his special damage, if any.

The rule was made, that on the defendants undertaking to deliver up the wine, then, if A. should accept the same, the action should be discontinued on payment of costs by the defendants; but if A. should go on with the action, the count in trover should be struck

out, and A. proceed for the special damage only.

In July, 1830 forty-two casks of wine arrived at the London Docks from Calcutta, consigned to the plaintiffs, and warehoused in their names. In April, 1832 notices were severally given to the Company by persons named Masson and Lundie that the wines had been shipped from Madeira for Calcutta, and New Yerk by certain parties respectively entitled thereto, and that the captain of the ship had fraudulently sold them at Calcutta, from \*whence they had been shipped [\*379 for London, consigned as above; and the company were desired, on behalf of the alleged owners, not to deliver the wines without the order of their agents. In May following a letter was sent to the company threatening an action by one of the parties interested, if the wines were delivered without

<sup>(</sup>a) This case was moved before Denman, C. J. took his seat on the bench.

such order. The company (acting under counsel's opinion) afterwards offered to give up the wines to the plaintiffs on receiving an indemnity. This the plaintiffs refused, and gave notice of action. The company after some further communication with the parties, said they would deliver the wines to the plaintiffs; but the latter then answered that they had lost the sale, and could not take to the property. In this term the plaintiffs declared in trover for the wines, with counts alleging special damage. Sir James Scarlett in the course of the term obtained a rule calling on the plaintiffs to show cause why all proceedings should not be stayed on the defendants' delivering up the wines to the plaintiffs on payment of the rates and charges due thereon, or undertaking to abide by such order as the Court might make in the matter; notice of the rule being given to Masson and Lundie. The affidavits in opposition to the rule stated, that the wines were bona fide consigned to the plaintiffs as agents, under a bill of lading, that they had made advances on them, and that they had no notice that the shipper was not the actual owner. Masson and Lundie made no answer to the application.

The Solicitor-General and T. Clarkson now shewed cause, and contended that the defendants were not, upon this state of facts, entitled to relief by the statute 1 & 2 W. 4, c. 58, under which the rule was obtained; \*that the plaintiffs here were clearly entitled under the factors' act against all the world, and that the mere pretence of an adverse title by parties who did not

appear, ought not in any degree to interfere with their right.

Sir James Scarlett and F. Pollock, contra, urged that the case was one in which the defendants ought, upon the terms proposed, to be relieved from all liability; that the act 1 & 2 W. 4, c. 58, was not confined to cases which would be strictly the subject of a bill of interpleader, (see Johnson v. Atkinson, 3 Anstr. 798,) but was intended for the more general protection of companies like the present, and no ground was shewn for excluding the defendants from that benefit.

Before the statute of 1 & 2 W. 4, it was the constant practice PER CURIAM. in actions of this kind, where the defendant offered to deliver up the property, that if the plaintiff wished to proceed, such part of the declaration as was framed in trover merely, was struck out, and plaintiff left at liberty to proceed for any special damage. The same may be done here; the defendants will reap this benefit from the statute, that the claim of the third party, who does not appear, is barred; but the plaintiffs ought not to be precluded from recovering in respect of special damage, if they have sustained any. (See Fisher v. Prince, 3 Burr. The rule may be drawn up according to the precedent in 1 Tidd, p. 545, 365.) 9th edit.

The rule was to the following effect:—That, upon the defendants thereby undertaking to deliver up the wine, if the plaintiffs should accept the same the action \*should be discontinued on payment of costs by the defendants, to be taxed by the master; but if the plaintiffs should choose to proceed in the action, the count in trover should be struck out, and the plaintiffs proceed for the special damage only.

#### MEMORANDA.

In the course of this term Sir William Horne was appointed Attorney-General, and John Campbell, Esq., one of his Majesty's counsel, was appointed Solicitor-General, to his Majesty, and received the honour of knighthood.

# CASES

#### ARGUED AND DETERMINED

IN THE

# COURT OF KING'S BENCH,

# Bilary Cerm,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

CARVALHO and Others, Assignees of the Estate and Effects of A. P. FOR-TUNATO, a Bankrupt, v. BURN and Another.

A., who resided at Liverpool, was in the habit of making consignments of goods to B., his agent in South America, for sale, on the faith of and against which consignments. A drew bills proportioned to their amount, to be paid by the agent out of the proceeds; and the bills were negotiated by the indorsements of C., A.'s correspondent in London. Some of the bills so indorsed were refused acceptance by the agent. C., on receiving information that they had been so dishonoured, requested that A. would order his agent, in case he did not pay his, A.'s drafts, immediately to hand over to C.'s sgent such property as he had of A.'s, of an equivalent value to the bills that should not be paid by him. A. agreed to do so, but became bankrupt before his order to transfer the goods reached South America:

Held, that the bargain between A. and C. did not operate as a legal or equitable assignment of the property in A.'s goods, held by B., his agent, but that they remained the property of A. at the time of his bankruptcy, and passed to his assignees.

Trover. Plea, not guilty. At the trial before Parke, J., at the Lancaster Spring assizes, 1831, the jury found a verdict for the plaintiff, with 2049/.

damages, subject to the opinion of this Court on the following case:-

\*A. P. Fortunato, in the year 1829, and for some time previously, was a merchant in Liverpool.. He committed an act of bankruptcy on the 20th of May, 1829, upon which a commission of bankruptcy was duly issued against him, bearing date the 23d of June, 1829; and under which the plaintiffs were duly appointed assignces. The bankrupt, for some years before his bankruptcy, had been in the habit of making large consignments of cotton goods, belonging to himself, to one Rego, his agent at Bahia in South America, for sale there on his, the bankrupt's, account. The course of business was, and had been, for many years, for the bankrupt to consign goods to Rego, on the faith of, and against which consignments the bankrupt drew bills proportioned to the amount of those consignments, to be paid by Rego out of the proceeds. The bankrupt was in the habit of procuring the bills so drawn to be negociated in London by the indorsement of the defendants, his correspondents in London, who were merchants, and who received for so doing the customary brokerage.

In the years, 1828 and 1829, the bankrupt had made such consignments to Rego at Bahia by eight different vessels. Between the 29th of November 1828, and the 16th of March 1829 inclusive, the bankrupt drew and negociated bills so drawn, and indorsed as above stated, to the amount of 3800l., and received the value from the defendants. All those bills were dishonoured by Rego, and were afterwards accepted and taken up by Vogeler, the defendants' agent at Bahia, for their honour. Goods had been consigned by the bankrupt to Rego at Bahia to an amount which authorized the bankrupt to draw to the extent of \*3841 3800l., \*and insurances were effected on such goods by the defendants under the directions of the bankrupt. The bankrupt received due notice of the dishonor of all the bills.

On the 23d of March, 1829, the defendants received notice of the dishonour of the bills drawn in November, and, on the same day, wrote to the bankrupt the letter following:-"It is with the greatest concern we have to inform you, that we have this day received advices from Bahia, that Mr. A. D. C. Rego had refused to accept your draft on him on the 29th of November for 500%, which intelligence, as you may well conceive, has caused us no small degree of surprise and mortification, and particularly as we cannot but be apprehensive that the same unlooked for fate may likewise await your subsequent drafts on him. We have, therefore, most earnestly to request that you will not lose one moment in putting Mr. Rego in such a situation as to enable him to pay your drafts; and that you will also resort to the necessary means to furnish us with funds sufficient to reimburse us for the amount of any of your drafts that may come back to us protested for non-payment, whenever you are aware of such being the case." On the 27th of March, 1829, the defendants received from the bank-rupt the following letter, dated the 25th of March, 1829:—"The subject of your favour of the 23d grieves me most bitterly, especially at the present time, when I am quite unprepared to act as it is both my wish and my duty; therefore I request you to send back the protested drafts to your agent in Bahia to have them accepted by Mr. Rego, allowing him an extension of the time to liquidate, as, by this mode, you only will incur the inconvenience of delay, and \*385] I will give instructions to Mr. Rego to \*settle with your agent as the demands arise from the said bills."

On the 4th of April, 1829, the defendants wrote to the bankrupt the letter following:--" We are duly favoured with your letter of the 23d ultimo, and in reply thereto, we beg to observe, that the bills Mr. Rego refused to accept have not yet been returned to us, as it would have been quite irregular to have returned them merely for want of acceptance; but in case of non-payment on the days on which they became due, they are sure to be sent back with the necessary protests; and it is quite impossible for us or our agents to grant any extension of time, as we are not the holders of the bills, with whom alone rests the power of granting such accommodation. As indorsers of the bills, they will of course come back upon us first; however, we most fervently hope that such an unpleasant even will not take place, and that Mr. Rego will pay them. We have too high an opinion of your honour to suppose for a moment that you would have drawn these bills without having the means necessary for their discharge in the hands of Mr. Rego, and therefore we most earnestly request that you will write to Mr. Rego by the first vessel with orders that in case he does not pay your drafts, he will immediately hand over such property as he may have of yours, of an equivalent value to the bills not paid by him, to our agent Mr. Vogeler of Bahia, whom we have requested to pay the bills for our house." On the 11th of April, 1829 the defendants received from the bankrupt the letter following, dated the 9th:-- "Agreeably to your injunctions, I will write to Mr. Rego, per brig Wavertree, to sail on the 12th of this month, directing him to \*3861 hand over to Mr. Vogeler \*property of mine in his hands to cover the amount of bills that eventually may not be paid; I say eventually, because I do still hope that some of them will be accepted; for the cause of Mr.

Rego not having done so, was the impossibility of realizing and collecting debts. I beg to assure you that I will do all that is due of me to secure your property, and you shall not be sufferers in the least by this unfortunate transaction beyond some delay." On the 11th of April, 1829, the bankrupt wrote to the said Rego at Bahia the letter following:—"I have engaged and made promise to Burn and Co. that you shall pass into the hands of their agent in your city, Mr. Vogeler, all the property which might exist in your hands for my account. You will arrange with that gentleman the mode in which this order may be carried into effect, with this understanding, that it is essential that the whole be done under perfect secrecy, for which I shall consider myself as very much obliged by you. It appears to me that the best plan would be to pay him the liquidated amounts as fast as the same are received." This letter reached Rego in June, 1829, and he on the 11th of that month wrote to the defendants as follows:— "The reason which obliged me to refuse acceptance to the bills which Mr. Fortunato drew upon me on the 29th of November last and subsequent months, was the stagnation of a great part of the goods which he consigned to me, and of which there still exists a great part in my possession, which I will deliver to Mr. Vogeler in consequence of the order to do so which I have received from him (Mr. Fortunato), which delivery I intend effecting by the end of the current month." On the 15th of July, 1829, Rego wrote and sent to the \*defendants a letter containing the following statement:—"The present has for its sole object the informing you that on the 30th ultimo I placed at the disposal of Mr. Vogeler 36251. 2d. in goods belonging to Mr. Fortunato." On the 30th of June 1829, Rego did in fact hand over to the agent of the defendants at Bahia the goods mentioned in the declaration, being part of the goods consigned for sale by the bankrupt to Rego as before mentioned, and the agent afterwards, and before the commencement of this action, sold the same by the direction of, and for the defendants, and paid them the proceeds.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the value of the goods sold by the agent of the defendants? The

case was argued in last Trinity term.

Crompton for the plaintiffs. The assinces of Fortunato are entitled to recover the value of the goods which were transferred by his agent to the defendants after he had committed an act of bankruptcy. The onus of shewing that they do not vest in the assignces lies on the defendants, to whom they were transferred after an act of bankruptcy; prima facie they passed by the assignment to the plaintiffs. It will be said that there was an equitable transfer of the property to the defendants before the bankruptcy, and that the letters are evidence of such transfer; they, however, contain nothing more than a promise by the bankrupt to pawn, not any specific property, but some undefined portion of goods to be afterwards selected. Now it has been held in equity, that a general covenant to settle lands on a wife of the value of 601. per annum, without mentioning any lands \*in certain, does not create a specific lien, Freemoult v. Dedire, 1 Peere W. 429. So where A., having borrowed 300l. of J. L., by his note of hand promised to pay to J. L. the sum on demand and to give him a security by mortgage of lands for the same about 15 per lands for the same and to give him a security by mortgage of lands for the same about 15 per lands for the same about 15 p security by mortgage of lands for the same when required, and A., at the time, had no lands nor any real estate, except an advowson and some tithes, and died about a month afterwards; J. L. insisted that this debt was by the said note made a charge on the only real estate which A. had the power of charging, viz. the advowson and tithes: but it was held this case could not be distinguished from Freemoult v. Dedire, and that J. L. was only a simple contract creditor, Williams v. Lucas, Ibid. 430, note (1). In the letter of the 11th of April, containing the order to Rego to transfer the goods, the bankrupt suggests a plan which, if carried into effect before the bankruptcy, might have barred the rights of the assigness; but it did not reach Rego till after the bankruptcy, and never having been communicated to the defendants, cannot constitute any contract between them and the bankrupt. That contract is contained in the letters of the 4th and 9th of April; but in them there is nothing like an assignment of any specific goods, as in Lempriere v. Pasley, 2 T. R. 485. It is a contract executory to pawn some property, and the amount is contingent on the amount of bills unpaid, and of goods in Rego's hands, at the time when the order should arrive. Even if, it were a contract to sell a quantity of chattles out of others, no property would have passed by it to the defendant till they were selected and separated from the rest. The rule is the same as to this, both at law and in equity. \*It would be very dangerous to say that a trader could, by such a contract as is alleged here, mortgage property without any transfer of pos-Assuming that there had been a contract to pawn a specific chattel, in the hands of an agent of the pawnor, it would be very questionable whether that property would pass by it. If the chattel remained in the hands of the party himself, it would clearly pass to his assignees, as being in his apparent possession. If they were in the hands of an agent, that party would continue to be the agent of the pawnor till he received notice and consented to become the agent of the pawnee; till such consent was given, the goods would be considered in the possession of the pawnor, Hunt v. Mortimer, 10 B. & C. 44, Vacher v. Cocks, 1 B. & Ad. 145. In Lempriere v. Pasley, 2 T. R. 485, there was an assignment of specific goods at sea, before the bankruptcy, though the bill of lading was not delivered over till after. But if a contract be sufficient where a chattel is in the hands of the agent, what distance would suffice? Would it transfer the property if the principal lived in London and the agent in Yorkshire? But at all events there is no contract as to any specific property.

Starkie contrà. The bankrupt would have been bound by the order given by him to Rego, and the consequent delivery of the property to the defendants. Now it is a general rule, that the assignees are bound by any contract which would affect the bankrupt, except in cases of reputed ownership and fraudulent preference. If any legal or equitable interest in the goods in question was given \*390] to the defendants, the property in them would \*not pass by the assignment to the assignees, for they take only what the bankrupt could assign. Now here the defendants took at least an equitable interest in the goods. clearly established, that where under the circumstances an actual and immediate delivery is impossible, an agreement to deliver is sufficient to pass the property; as in the case of a ship at sea, or goods at a distance in the hands of a third person; otherwise the right would depend on the mere local situation of the property; and a party, although solvent, would be unable to transfer. But in Lempriere v. Pasley, 2 T. R. 485, an assignment of goods at sea, as a collateral security for a debt, and a subsequent indorsement of a bill of lading, were held good as against the assignees of the assignor, who committed an act of bankruptcy after the assignment of the goods and before the indorsement of the bill of lading. In Bailey v. Culverwell, 8 B. & C. 449, the brokers of B. sold goods in their possession to C., taking in payment a bill accepted by D., and retaining the goods on C.'s account, with instructions to sell, if at a profit; before the bill was due, D. becoming bankrupt, the brokers of their own accord applied to C. for security, who authorized them to sell the goods and apply the proceeds in payment of the bill; but before they were sold, C. also became bankrupt: it was held that C.'s assignees could not maintain trover against the brokers or against B. for the goods, which after the order from C. to the brokers to sell and apply the proceeds, remained in the brokers' hands subject to that charge, although the brokers in requiring such security acted without instructions from B., he having by his conduct subsequently\* ratified their acts, and the brokers being entitled \*391] conduct subsequency, to act for their employer's benefit.

As to the objection that there was no contract for the delivery of specific goods, they are specified by circumstances. The bills were drawn on the faith of, and against, specific consignments, in proportion to the amount of each, and were to be paid out of the proceeds. The defendants did not know what had been sold. The order given by the bankrupt to his agent corresponded with

the request in the defendant's letter of the 9th to transfer all the property which might exist in his hands. The agent of the bankrupt was bound to hold in his hands goods to the amount necessary to cover the bills, especially after the order and agreement by him to act on it. He was then in the nature of a trustee fer the defendants. The letters, therefore, must be taken to apply to the goods of the value of 3800l. which were in the hands of Rego at the time. Dawson, 1 Ves. sen. 331, A. borrowed money of B. and gave him a draft upon a fund due to A. out of the Exchequer, and became bankrupt; and it was held by Lord Hardwicke that that was an equitable assignment thereof to B. for valuable consideration, and that it should prevail against the bankrupt's assignees. In Yeates v. Groves, 1 Ves. jun. 280, the holder of a note gave it up on receiving an order for payment of the amount out of the purchase-money of a house; the purchaser agreed to give notice to attend when the deeds and money were ready, and the holder did so attend, but before the business was over the drawer was arrested, and soon after became bankrupt. The Lord Chancellor held, that the order operated \*as a transfer of the money. The defendants here had an equitable title to be paid out of the proceeds of particular property, before the act of bankruptcy, and if the general assignment has relation to the act of bankruptcy so as to avoid all mesne assignments, why should not the delivery in this case have relation to the time of the agreement and the order given by the bankrupt to Rego? Cur. adv. vult.

LITTLEDALE, J. now delivered the judgment of the Court. This is a special case which was argued in Trinity term last before the late Lord Tenterden, my Brothers Parke, Taunton, and myself. The action was in trover, to recover the value of a quantity of cotton goods, which came to the possession of the defendants on the 30th of June 1829, in the Brazils, and were afterwards sold by On the 20th of May, an act of bankruptcy was committed by the bankrupt Fortunato, and a commission issued on the 23d of June, under which the plaintiffs were appointed assignees. The goods in question were part of some consignments made by the bankrupt at different times to a person of the name of Rego at Bahia; against these consignments the bankrupt drew on Rego bills of exchange, which were negotiated by the defendants indorsing them. No goods appear to have been specifically appropriated, by the bankrupt's directions, to the payment of any particular bill; but the bills were drawn generally, though proportioned in amount in a certain degree to the value of the consignments. In March 1829, information was received by the defendants in London, that some of the drafts were refused acceptance, in consequence of which \*they [\*393 became liable on their indorsement, and being apprehensive that others would meet with the same fate, they called upon the bankrupt to make provision for their re-imbursement; a correspondence followed, and the question in

this case turns mainly upon its meaning and effect. It is quite clear that the assignment vested in the assignees all the personal estate and effects in which the bankrupt was, at the time of the act of bankruptcy, beneficially interested (with the statutory exceptions, 6 G. 4, c. 16, s. 81, 82, 86, 112,); but as the object of the assignment of the bankrupt's property is, that it may be applied to the payment of his debts, it is equally clear that nothing passed by it which the bankrupt then held in trust to others, or in which he had only a mere legal interest, Scott v. Surman, Willis, 400; Winch v. Keeley, 1 T. R. 619; Carpenter v. Marnel, 3 B. & P. 40; Gladstone r. Hadwen, 1 M. & S. 517; but if, at the time of the act of bankruptcy, the bankrupt possessed a possibility of interest, from which a benefit to his creditors might result, (Per Lord Avanley, 3 B. & P. 41,) if he had the legal interest in any property, and it was uncertain whether he would hold any part of that property, or if any, what part, as a trustee for others, the whole would pass by the assignment: it could not remain in the bankrupt subject to be transferred on a future contingency: and if it did pass to the assignees, it could not be divested out of them in whole or in part by the happening of events subsequent to the act of bankruptcy, which might make them hold the whole, or some specific part \*394] as trustees merely; for there is no provision in the statute which \*takes a right out of the assignees, that has once been vested in them.

The whole question then is, not whether the plaintiffs were or were not trustees for the defendants for the whole or part of those goods at the time of the action brought; but whether the property in them, or any part of them, vested in the plaintiffs by virtue of the assignment. To decide this, we must refer to the terms of the bargain between the bankrupt and defendants contained in the

two important letters of the 4th and 9th of April.

The material parts of that of the 4th of April are as follows:—"As indorsers of the bills, they will, of course, come back upon us first; however, we most fervently hope that such an unpleasant event will not take place, and that Mr. Rego will pay them: we have too high an opinion of your honour to suppose for a moment that you would have drawn these bills without having the means necessary for their discharge in the hands of Mr Rego, and therefore we most earnestly request that you will write to Mr. Rego by the first vessel, with orders that in case he does not pay your drafts he will immediately hand over such property as he may have of yours, of an equivalent value to the bills not paid by him, to our agent Mr. Vogeler, of Bahia, whom we have requested to pay the bills for our house," &c. The bankrupt answers on the 9th of April, "Agrecably to your injunctions, I will write to Mr. A. C. Rego, per brig Wavertree, to sail on the 12th of this month, directing him to hand over to Mr. Vogeler property of mine in his hands to cover the amount of bills that eventually may not be paid. I say eventually, because I do still hope that some of them will be accepted; for the cause of Mr. Rego not having done so "395] \*was the impossibility of realizing and collecting debts. I beg to assure you I will do all that is due of me to secure your property, and you shall not be sufferers in the least by this unfortunate transaction beyond some delay."

The proposal by the defendants is, that if Rego does not pay the bankrupt's drafts, he, the bankrupt, should hand over to the defendant's agents so much property in his hands as may be of equivalent amount to the drafts unpaid. The letter of the 9th of April is nothing more than an assent to the defendants' proposal. It does not extend or vary it, and constitutes a binding agreement be-

tween the parties to the same effect.

In this agreement the event upon which the property is to be transferred is uncertain, and the amount to be transferred is also uncertain. If Rego paid the bills, no goods would be in that case subject to delivery to the defendants; if he did not, and had sold the goods previous to the communication from the parties being received in the Brazils, no goods would be capable of being delivered; if the goods existed at that time, the value of the goods to be delivered, and the

specific goods, would be still uncertain and unascertained.

It is therefore quite impossible to contend that the legal property in any part of the goods then in Rego's hands passed by this bargain to the defendants; and it seems to be equally impossible to say that the contract operated as an equitable assignment of the whole or of any specific part at that time or before the act of bankruptcy; for it is clear that the parties to it do not consider that the whole or any specific part is then to be held by the bankrupt for the defendants, or is absolutely, and, at all events, to be assigned to the defendants at \*any future time. Until certain contingencies happen, and until something more is ascertained and done, the equitable as well as the legal interest must be in the bankrupt; and, if so, it must pass to his assignees.

It is not necessary to decide, whether the agreement gave an irrevocable, though contingent, interest in the goods, and whether the assignees, in the events which have since happened, are or are not trustees for the defendants, and bound to repay out of the proceeds of the goods in question the amount which they have paid. The defendants may have an equitable right to be paid out of the

Vol. XXIV.-12

goods or their proceeds; but the question, whether they have such a right, and

the mode of enforcing it, belongs to a court of equity.

We have passed over the letter of the 11th of April without notice, because that letter was not communicated to the defendants, and does not form a part of the contract between them and the bankrupt. Taken alone, it is a mere countermandable authority, which was countermanded by the bankruptcy.

We therefore think, that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

\*The Mayor, Aldermen, and Burgesses of MACCLESFIELD v. PED-LEY.

Quære, if the grantee of a newly created market can, by virtue of such grant merely, maintain an action for disturbance of franchise, against a person selling marketable articles in his own shop, within the franchise, but not within the limits of the market place, on the market day.

But a claim by immemorial custom to exclude others from selling such commodities on

the market day, except in the market place, is valid in law.

And where a market for meat, &c., was proved to have been in existence in the reign of James the First, proof that the grantees of the market had for the last hundred years appointed market-lookers, that no butchers' shops had existed out of the market place until 1810, and that the shops then set up were objected to by the grantees, was held to be sufficient evidence of such immemorial right.

ACTION on the case for an injury to the plaintiffs' market in the borough of Macclesfield. The declaration alleged, that the plaintiffs were "lawfully possessed of" a certain market, and that butchers and other persons selling their flesh-meat on the market days in that town, ought not to sell it in private houses, but in the open public market on the plaintiffs' stalls, or on stalls placed there by their consent, paying stallage; and the breach was, that the defendant sold meat on market days in a private house in the town. Plea, not guilty. At the trial before Bolland B., at the Chester Spring assizes 1832, the plaintiffs produced, first, a charter, dated the 29th of May, in the forty-fifth year of Henry III., whereby Edward Earl of Chester granted and confirmed to the burgesses of Macclesfield, "that the town should be a free borough, and that the burgesses should have a merchant's guild, and that they should be quit of toll, passage, pontage, stallage, and other customs;" secondly, a charter of the 18 Car. 2, reciting, "that the burgesses and inhabitants of that borough had used and enjoyed divers liberties, privileges, jurisdictions, courts, franchises, customs, powers, authorities, immunities, pre-eminences, lands, tenements, possessions, and other hereditaments; and had been endued with the same, as well by force of divers charters, letters-patent, grants, and confirmations \*by King James the First, and by divers other kings and queens of England, as by reason and pretext of divers ancient and laudable customs and prescriptions in the same borough during the whole time aforesaid used and approved. It then ordained, granted, ratified, and confirmed to the mayor, aldermen, and burgesses, and their successors, the incorporation and body corporate aforesaid, and all and singular the liberties, free customs, franchises, immunities, exemptions, acquittances and jurisdictions of the same body corporate; and such lands, tenements, markets, fairs, tolls, customs, liberties, privileges, franchises, immunities, powers, authorities, acquittances, jurisdictions, profits, advantages, emoluments, and hereditaments whatsoever, which the mayor, aldermen, and burgesses, or their predecessors, had lawfully had, held, used or enjoyed, or ought to have, hold, &c., by reason or pretext of any charters or letters-patent by King James the First, or by any kings or queens of England, theretofore made, granted, &c., or by any other lawful mode, right, or custom, use, prescription, or title theretofore used or enjoyed; the same to be had, held, &c., by them in as ample manner as before. The plaintiffs further proved, that from the year 1734 the corporation had appointed market-lookers, whose duty it was to go through the market on market days, and inspect the flesh-meat, and seize it if unwholesome; and that officers so appointed had from time to time seized unwholesome meat. The market days were on Tuesdays and Saturdays. There were eighty butchers' stalls or shambles in the market place: but before 1810 there were no butchers' shops in the town out of the market place, and then they were objected to by the corporation.

\*It was contended, that on this case the plaintiffs ought to be nonsuited; but the learned Judge was of opinion, that there was sufficient evidence that the market was an ancient market for meat, and he thought the appointment of market-lookers by the corporation, and the non-existence of butchers' shops before 1810 were evidence to go to the jury, that the exclusive right contended for existed. The defendant then called some witnesses, who stated that before 1810 there were butchers' shops out of the market place where meat was sold on market days. The jury having found for the plaintiffs, a rule nisi was obtained for a new trial, on the ground, first, that the learned Judge had misdirected the jury, by stating that the right to exclude individuals from selling in private shops resulted from the right to the franchise of a market, unless the defendant could shew the contrary, whereas, by law, such right of exclusion could only exist by immemorial custom; and, secondly, that the question, whether there was any such immemorial custom was not left to the The learned Judge, in his report, stated, that he had not stated to the jury, that the plaintiffs had the right contended for as incident to the franchise of the market, but that he treated the right as one which could exist only by virtue of immemorial custom, and left it to the jury, on the evidence, to say whether such exclusive right existed.

Jervis and Lloyd, in Trinity term, shewed cause.(a) The Judge having left it to the jury on the evidence to find whether there was an immemorial right in \*400] the corporation to prevent persons from selling out of the market \*on market days, the only question now is, whether the verdict was against evidence? Now, first, the grantee of an ancient, though not an immemorial market, may have the right of preventing others from selling on the market days within the limits of his franchise. The king, when he grants the franchise of a market within a given district, may, provided he does not interfere with vested rights, prevent other persons from selling within that district on market days, and where the right is proved to have been exercised from early times, it must be presumed to have been part of the grant, Moseley v. Walker, 7 B. & C. 40. Here the evidence, and especially the fact that there were no butchers' shops out of the market place before 1810, shews that the right did exist.

But, secondly, the grant of a market necessarily confers on the grantee the right of excluding all others from selling on market days in houses within the limits of his franchise. In the Prior of Dunstable's case, (cited in the City of London's case, 8 Co. 127,) where the action was similar to the present, it is laid down, that "if the prior had a market within the town, and is lord of the town, you cannot prescribe to sell meat in your own house on the market day; for the market cannot be but in an open place, and the prior then would lose the benefit of his market, if they might sell their wares in their houses; and also where he has the correction of the market, and to see if the things which shall be sold are lawful and vendible, which cannot be tried by his officer if it be not in open market, and also he would lose his toll of the things sold."

Campbell, Temple, and Tyruhitt contra. There was no evidence to shew \*401] that the market was immemorial, \*and very slight evidence that the corporation had existed from time immemorial. The charter of the

<sup>(</sup>a) Before Lord Tenterden, C. J., Littledale, Parke, and Taunton, Js.

45 Hen. 3, does not mention a market. The charter of Car. 2, reciting that of Jac. 1, does mention a market for the first time. It may be assumed, therefore, that the market commenced within the time of legal memory; and the king cannot make a grant of a market within time of memory, so as to prevent persons from dealing in merchantable commodities in their own houses, though such a right may exist if it be immemorial. That appears to have been the opinion of Holroyd, J. in Moseley v. Walker, 7 B. & C. 40. [LITTLEDALE, J. In Prince v. Lewis, 5 B. & C. 363, it was taken for granted that the market was not immemorial, but no doubt was made that the action would have lain if the lessee had not encumbered the space.] It was not necessary there to take the present objection. [LITTLEDALE, J. In Comyns's Digest, Market, F. 2, it is said that the owner of a house next to a fair or market cannot open his shop for selling in a market without payment of stallage; for if he takes the benefit of the market he ought to pay the duties there, and 2 Roll. Abr. 123, l. 30, is cited. The Prior of Dunstable's case, (cited in 8 Co. 127,) is the only authority to shew that the right of exclusion is incident to the general grant of a market; but there the declaration charged that the defendant sold in his own house secretly, and the judgment went, in a great measure, on that; and the general point was not decided in Moseley v. Walker, 7 B. & C. 40. The jury were not justified by the evidence in finding that there were no shops, out of the marketplace, where meat was \*sold on market days before the time of legal memory. If the charter of Jac. 1 had been produced, it might have thereby appeared whether or not the market was then granted for the first time. At all events, it might have been shewn by the charter itself, that the exclusive right now claimed was thereby granted. No such grant appeared. There is no ground for assuming that the right is generally incident to the grant of a market; and there was no evidence of a market before Jac. 1; if so, it commenced within the time of legal memory, and consequently there could not be an immemorial custom to exclude persons from selling in their own shops,

Cur. adv. vult.

LITTLEDALE, J., in the course of this term, delivered the judgment of the Court.

This case came before the Court on a motion for a new trial, against which cause was shewn in Trinity term. (He then stated the substance of the declaration.)

The cause was tried before my Brother Bolland, at the Chester Spring assizes, 1832, when a verdict was found for the plaintiffs. On the motion for a new trial, it was objected that the learned Judge had misdirected the jury, by stating that the right to exclude individuals from selling in private shops resulted from the right to the franchise of a market, unless the defendant could prove a custom to the contrary, whereas, by law, such right of exclusion could only exist by immemorial custom; and that the learned Judge had not left to the jury the question, whether there was such an immemorial custom with respect to this market.

Upon considering the report, and after conferring with the learned Judge, we are of opinion that the \*objections urged in support of the motion for a [\*405 new trial cannot be sustained. The learned Judge never stated that the plaintiffs had the right contended for as incident to the franchise of the market. He treated this right as one which could exist only by virtue of immemorial usage, and that question, substantially, was left to the jury.

There is no doubt that there was sufficient evidence to prove such a custom; for it clearly appeared upon the testimony of several witnesses, that no butcher's shop existed in the town of Macclesfield until of late years, and when these shops

were first opened, the plaintiffs objected to them.

It was not material, in support of the custom contended for, to prove that this was a corporation by prescription: the question was, whether this was an immemorial market, and whether the custom existed from time immemorial.

for the owner of the market to prevent private individuals from selling in shops out of the market; if it was so, and such custom existed, the market might have come into the hands of the plaintiffs, in modern times, by a grant from the crown or a subject, and the plaintiffs would have a right to enforce the custom.

In this view of the case, it is unnecessary to give any opinion whether the grantee of a newly created market could bring an action for the disturbance of his franchise against a person who did no more than sell, himself, in his own shop, not within the limits of the market-place, marketable articles on the market days. It may, however, be observed, that no case has decided that this act, simply, is an injury to the market in point of law. But it is equally clear, and on the other hand, that a custom \*to exclude all others from selling such commodities on the market day, except in the market, is valid in law. The like custom was supported in the case of the Manchester Market, Mosley v. Walker, 7 B. & C. 40, which much resembles the present case. The abbot of Westminster had formerly a similar privilege by custom, (as appears from the Gravesend case, 2 Brownl. 179, which was sold to the city of London, and many analogous usages are to be found in the books, and exist in different places. Indeed, the validity of such a custom, if established, was not disputed on the argument. The rule must therefore be discharged.

# CLARKE and Others v. FELL and Another, Assignees of MOTT, a Bankrupt. January 12.

A tradesman undertook to do work upon an article delivered to him, for a person to whom he was indebted, and it was agreed that the work should be paid for in ready money. He afterwards became bankrupt: Held, that the act 6 G. 4, c. 16, s. 50, (which provides for the setting off of cross demands where there has been mutual credit between the bankrupt and a party claiming on his estate), did not, in this case, render the assignees liable in trover for refusing to deliver such article to the creditor on his offering to set off the price of the work against his own demand.

TROVER for a stanhope. At the trial before Denman, C. J., at the sittings in London after Michaelmas term, 1832, it appeared that the plaintiffs, in April, 1831, sent the carriage to Mott to be repaired. They were, at that time, holders of a bill accepted by him for 24l., payable on the 19th of June, 1831. Mott afterwards became bankrupt, and the stanhope passed into the hands of his assignees. The repairs were done, and the charge for them was 201. The plaintiffs demanded the stanhope of the assignees, and proposed to strike off the 201. \*from the bill, which they still held, but the assignees refused to \*405] deliver it without actual payment. The case made on their part was, that, by agreement between the plaintiffs and Mott, the repairs were to be paid for in ready money; and that they were completed after the bankruptcy. The plaintiffs disputed these facts, and contended that the two sums of 24l. and 20l. were mutual debts at the time of the bankruptcy, and ought to be set against each other according to 6 G. 4, c. 16, s. 50. Denman, C. J., directed the jury to find for the defendants, if they should be of opinion that the agreement was for ready money, or that the repairs were completed after the bankruptcy: and the jury found for the defendants on both points.

Cleasby now moved for a rule to shew cause why there should not be a new trial, on the ground of misdirection. Even admitting the facts to have been as found by the jury, this was a case of mutual credit within 6 G. 4, c. 16, s. 50; and the effect of that section is to extinguish the debt on each side, except as to the balance, which may then be considered as a new debt: the lien, which attached to one of the original debts, is destroyed with the debt itself. A mutual credit, within the act, exists where there is a debt, or something that will ne-

cessarily end in a debt, from each party to the other, Rose v. Sims, 1 B. & Ad. 521. Here the bankrupt was indebted to the plaintiffs on his acceptance, and had the stanhope in his possession for repairs, which must necessarily have created a debt from the plaintiffs to him. The definition of a mutual credit in Rose v. Sims, 1 B. & Ad. 521, agrees with the \*construction before put upon that term, in cases under the statute 5 G. 2, c. 30, s. 28, French v. Fenn, Cooke's Bankrupt Law, 65, 8th ed., Olive v. Smith, 5 Taunt. 56. In Rose v. Hart, 8 Taunt. 499, where the doctrine was in some degree limited, Gibbs, C. J., nevertheless lays it down, that by mutual credit are meant such transactions as must, from their nature, terminate in debts. The clause there in question, in 5 G. 2, c. 30, does not materially differ from 6 G. 4, c. 16, s. 50, except that in the latter it is said, that one debt or demand may be set against another; in the former the word "debt" only is used. As to the stipulation for ready money, the only effect of that was to make the sum due as soon as the repairs were finished; it does not affect the question of mutual credit: and the plaintiffs did, when the repairs were finished, offer payment by striking off the 201. from the amount of the bill of exchange. Nor is it material that the amount to become due for the repair was not ascertained at the time of the bankruptcy, the work not being then finished. The assignees must either repudiate the contract or affirm it. In the former case, they are without defence to this action; in the latter, as was held by Lord Kenyon in Smith v. Hodson, 4 T. R. 217, they must adopt the transaction with all its consequence, and subject to any defence by the opposite parties which they might have made to an action by the bankrupt himself: those parties, therefore, may set off the debts owing to them by the bankrupt, against the claims of the assignees. The transaction was inchoate before the bankruptcy: the assignees take it up, subject to the rule of mutual credit, which would have attached if the work had been completed by the bankrupt.

\*LITTLEDALE, J. I think, under the circumstances of this case, there was no mutual credit of a nature to exclude the lien insisted upon by the defendants. If there had not been a contract to pay ready money, I should have been of a different opinion; for, although in that case there would still have been a lien on the carriage for the work done by the bankrupt, yet, as the bankrupt was also indebted to the plaintiffs, the question would have been on which side the balance lay, and that was in favour of the plaintiffs. But the agreement to pay ready money makes all the difference; the plaintiffs could not have insisted on a delivery of the stanhope by the bankrupt until the sum due for repairs had been paid by them in hard cash; if they had brought trover, the defence would have been, that they had not paid ready money for the repairs; and it would have been no answer to say that more was due to them from the bankrupt. If, indeed, the defendants had delivered the stanhope without insisting on the agreement for ready money, and afterwards brought an action, the set-off on the other side would have been let in, Cornforth v. Rivett, 2 M. & S. 510. Since, then, the plaintiffs, before they could have insisted upon the delivery of the stanhope, were bound to pay for the repairs, and the bankrupt might, on that ground, have defended an action of trover against them, the assignees, in adopting his contract, are entitled to the same benefit. The other point, therefore, as to the consequence of the work being completed after the bankruptcy, does not arise, though it might be argued from the case of Trewhella v. Rowe, 11 East. 435, that the assignees, under these circumstances, might be considered as having \*taken upon themselves the fulfilment of a contract made before their title accrued, between the bankrupt and the plaintiffs: and that if the [\*408] assignces so adopted it, they must be taken to have done so on the original But it is unnecessary to consider this point. There will be no rule.

TAUNTON, J. I think there was no misdirection in this case. As to one point, which was mentioned incidentally, I am of opinion, that the offer by the plaintiffs to deduct the charge for repairs for the amount due on the bill was

different from an offer of ready money; though if there had been a tender of ready money, the subsequent detaining of the carriage would have been a wrongful conversion. Then as to the more general question. For some purposes there was a mutual credit in this case; if the plaintiffs had gone before the commissioners to prove their demand on the bill, there was so far a mutual credit that the assignees might have said, "There is so much due to the estate for repairs; the commissioners must state the exact balance, and allow that and no more to be proved." And this is for the benefit of the party trusting the bankmpt. But no such proceeding took place: if it had, the right to detain would have been gone, because the assignees would, in this way, have received payment of their demand. The question here, therefore, is, whether the credit was such as, on the bankruptcy of Mott, annulled his bargain with the plaintiffs; that burgain being, in effect, that unless he was paid in ready money, he should be at liberty to detain the carriage. I think the bankruptcy did not annul that bargain, nor deprive the bankrupt's estate of the benefit of that lien. \*409] was \*no payment, for the offer to allow a set-off was not equivalent to one; and the mutual credit was not of such a nature as to destroy the As to Rose v. Hart, 8 Taunt. 499, all that was decided in that case was, that the defendant could not, by virtue of a supposed mutual credit, detain the goods of a party who had become bankrupt for a general balance. claim is to a lien on the particular article for the work done upon it.

PATTESON, J. I am of the same opinion; and I ground it entirely on the finding of the jury as to the agreement for ready money. Suppose there had been no bankruptcy; before the plaintiffs could have obtained the stanhope back, they must have paid the 201., notwithstanding their cross demand, though, according to Cornforth v. Rivett, 2 M. & S. 510, if the bankrupt had delivered up the stanhope, the plaintiffs might have set off their cross demand in an action for the amount due. Then if the plaintiffs could not have set off the debt due to them as against the claim of Mott to be paid ready money pursuant to the agreement; the question is, whether they can, in like manner, avail themselves of that claim as against his estate, under the clause of mutual credit in the bankrupt act? I admit that the law of mutual credit under the bankrupt act goes farther than the ordinary law of set-off: Rose v. Hart, 8 Taunt. 499, Buchanan v. Findlay, 9 B. & C. 738, and Rose v. Sims, 1 B. & Ad. 521, shew this: and I agree with Mr. Cleasby that there is a mutual credit within the act, where a debt, or that which will terminate in a debt, exists on each side; but the question in this case is, whether the bankruptcy of one party does away with an express contract \*establishing a lien for payment of a particular \*410] with an express contract establishing a lieu it can; and I think there is no ground for the rule.

DENMAN, C. J., concurred.

Rule refused.

#### BLOFELD v. PAYNE and Another. Jan. 12.

Declaration stated, that plaintiff, being the inventor and manufacturer of metallic hones, used certain envelopes for the same, denoting them to be his: and that defendants wrongfully made other hones, wrapped them in envelopes resembling the plaintiff's, and sold them as his own, whereby the plaintiff was prevented from selling many of his hones, and they were depreciated in value and reputation, those of the defendants being inferior:

Held, that the plaintiff was entitled to some damages for the invasion of his right by the fraud of the defendants, though he did not prove that their hones were inferior, or that he had sustained any specific damage.

CASE. The declaration stated that the plaintiff was the inventor and manufacturer of a metallic hone for sharpening razors, &c., which hone he was accus-

tomed to wrap up in certain envelopes containing directions for the use of it, and other matters; and that the said envelopes were intended, and served, to distinguish the plaintiff's hones from those of all other persons; that the plaintiff enjoyed great reputation for the good quality of his hones, and made great profit by the sale thereof; that the defendants wrongfully and without his consent caused a quantity of metallic hones to be made and wrapped in envelopes resembling those of the plaintiff, and containing the same words, thereby denoting that they were of his manufacture, which hones the defendants sold so wrapped up as aforesaid, as and for the plaintiff's, for their own gain, whereby the plaintiff was prevented from disposing of a great number of his hones, and they were depreciated in value and injured in reputation, those sold by the defendants being greatly inferior. Plea, the general issue. At the trial before Denman, C. J., at the sittings in London after last term, \*it appeared that the defendants had obtained some of the plaintiff's wrappers, and [\*411 used them as stated in the declaration; but no proof was given of any actual damage to the plaintiff. The questions left by his Lordship to the jury were, first, whether the plaintiff was the inventor or manufacturer? and, secondly, whether the defendants' hones were of inferior quality? but he stated to them that even if the defendants' hones were not inferior, the plaintiff was entitled to some damages, inasmuch as his right had been invaded by the fraudulent act of the defendants. The jury found for the plaintiff, with one farthing damages, but stated that they thought the defendants' hones were not inferior to his. Leave was reserved to move to enter a nonsuit.

Barstow now moved accordingly. The special damage alleged in the declaration was of the very essence of the case, and the plaintiff having failed to prove it, no ground of action remained. The whole struggle between the parties was, whether or not the defendants' hones were inferior to the plaintiff's, and the jury found that they were not. The declaration was not supported.

LITTLEDALE, J. I think enough was proved to entitle the plaintiff to re-

LITTLEDALE, J. I think enough was proved to entitle the plaintiff to recover. The act of the defendants was a fraud against the plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, an injury to

his right. There must be no rule.

TAUNTON, J. I think the verdict ought not to be disturbed. The circumstance of the defendants' having obtained the plaintiff's wrappers, and made

this use of them, entitles the plaintiff to some damages.

\*PATTESON, J. It is clear the verdict ought to stand. The defendants used the plaintiff's envelope, and pretended it was their own: they had no right to do that, and the plaintiff was entitled to recover some damages in consequence.

DENMAN, C. J., concurred.

Rule refused.(a)

## In the Matter of Arbitration between WILLIAM LOWE and WILLIAM HENRY JOHNSON.

The Court will not grant an attachment without personal service, in any case where the party applying has another remedy.

THE parties submitted to arbitration, and the submission was made a rule of Court. The award was against Lowe. Attempts having been made without success to serve him with copies of the award and rule of Court, Kelly, in the last term, moved, on affidavits setting out the special facts, for a rule to shew cause why an attachment should not issue for non-performance of the award. The Court thought that proper exertions had been made, but as the end of the

<sup>(</sup>a) See the judgment of Taunton, J., in Marzetti v. Williams, 1 B. & Ad. 425, and the authorities there cited.

term was near, they recommended that the matter should stand over till this term, and in the mean time further endeavours be used to effect a personal service. In the beginning of this term *Kelly* renewed his motion. There had been no personal service, and it appeared that the party knew it was intended, and avoided it.

PER CURIAM. We have considered this matter, and are of opinion that we \*413] ought not to grant an attachment \*without personal service in any case where the party applying has another remedy. Rule refused.(a)

The party was afterwards served, and shewed cause.

#### SMITH v. GOODWIN and RICHARDS. Jan. 14.

After distress made by a broker, in a case within 57 G. 3, c. 93, the rent and charges may still be tendered to the landlord.

Declaration contained six counts in case; the seventh charged that the defendants took and distrained the goods of the plaintiff for rent, of more than sufficient value to satisfy the rent and costs, and then voluntarily abandoned the same, and afterwards wrongfully, injuriously, and vezatiously again took and distrained the same goods for the same rent, and refused to return the same, and converted them to their own use: Held, on motion in arrest of judgment for misjoinder of case and trespass, that although this second taking of the goods was a trespass, yet the plaintiff might bring case for the conversion, and that the count was an informal one in case, and sufficient after verdict.

THE first six counts of the declaration were in case, for an irregular distress. The seventh count was as follows: That, before the committing of the grievances next mentioned, to wit, on the 31st day of August 1831, the defendants took and distrained certain goods as a distress for rent then alleged to be due from the plaintiff to the defendant Goodwin, for and in respect of certain premises in the possession of the plaintiff, which goods were of more than sufficient value to have satisfied the rent, and the costs and charges attending such distress, and the sale of the goods under such distress, and incidental thereto; that the defendants having so taken and distrained the goods, had and retained possession of the same under such distress for a long space of time, to wit, five days then following, and, afterwards, and at the expiration of the said space of time, the defendants voluntarily abandoned the possession of the said goods, and the said distress thereon, and although the said defendants under the said distress, and by virtue thereof, could and might have satisfied the said arrears of rent, and all reasonable and lawful charges in \*that behalf; nevertheless, the defendants knowing, &c. but contriving, &c., to wit, on the 7th day of September 1831, wrongfully, injuriously, and vexatiously made a second distress upon goods of the plaintiff for the same identical alleged arrears of rent, in respect whereof the distress first-mentioned was made as aforesaid, and again took the said goods as a distress for the same rent so pretended to have been due as aforesaid, and wrongfully and injuriously refused to return the same to, and withheld them from the plaintiff under the said second distress for a long time, to wit, six days then following, and converted and disposed thereof to their own use, although requested to deliver the said goods to the plaintiff; whereby the plaintiff is injured in his credit and circumstances. The eighth count was in trover. Plea, not guilty.

At the trial before Denman, C. J., at the Middlesex sittings after last Michaelmas term, the following appeared to be the facts of the case:—The plaintiff was tenant to Goodwin, at a yearly rent of 25l. Half a year's rent having become due at Midsummer 1831, on the 31st of August the defendant Richards, by Goodwin's order, distrained on the premises. On the 2d of September, Smith,

<sup>(</sup>a) See In the Matter of Bower, 1 B. & C. 264.

the plaintiff, tendered to Goodwin (the landlord) twelve sovereigns and a half for the rent, and thirteen shillings for expenses, which he (Goodwin) refused to accept, saying, that he had left the matter in the hands of Richards, and that Smith must settle with him. On the 3d of September, the plaintiff tendered to one Nash, the man in possession, 13l. 3s. for rent and expenses, and demanded a receipt, which Nash being unable to give, the money was not paid. Nash then abandoned the possession; but Richards, on the 7th of September, by Goodwin's\* command, re-entered. Smith, to prevent his goods from being sold, paid the money under protest; and he brought the present action for the distress of the 7th of September. The Lord Chief Justice was of opinion that the tender to Goodwin was a good tender, and directed the jury to find a verdict for the plaintiff. The jury found for the plaintiff, damages 10l.

Coltman now moved, first, for a new trial, on the ground of misdirection, or, secondly, to arrest the judgment on the ground that there was a misjoinder. the first six counts being in case and the seventh in trespass. Where a party has employed a broker to make a distress, he is the person to whom the tender should be made; he is the agent of the landlord for the purpose of receiving the rent; and having an interest in part of the money to be tendered, viz. the costs of the distress, he is the person with whom the settlement ought to be. The 57 G. 3, c. 93, which regulates the costs of distresses below a certain amount, recognizes the broker as the person who is entitled to receive certain costs from the tenant, and prevents him from taking more than certain specified sums; and, in case he does so, subjects him to pay treble the amount of the moneys unlawfully taken. Section 4, authorizes the justice to give costs to the party complained against, if the complaint be unfounded; and there is a proviso that the act shall not empower the justice to make any order against the landlord for whose benefit any such distress shall have been made, unless such landlord shall have personally levied such distress. The proper tender, therefore, in this case, was to the broker. The landlord was entitled to throw on \*him the burden of fixing the amount of charges, and was right in refusing to accept the tender made to himself personally.

Assuming, however, this to be an insufficient ground for a new trial, the judgment ought to be arrested. The seventh count, if considered a count in case, is bad, as shewing a trespass. If in trespass, it is a misjoinder, and the damages being entire, the judgment must be arrested. Now the second seizure of the goods alleged in that count being one without any right, is a substantive trespass. In Winterbourne v. Morgan, 11 East, 395, a party who had entered under a warrant of distress for rent in arrear continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, and they were afterwards sold under the distress: he was held to be a trespasser for continuing on the premises, and disturbing the plaintiff in the possession of the house after the time allowed by law. So in Wallis r. Saville, 2 Lutw. 1532, the declaration was trespass for taking the plaintiff's cattle at two several times; the defendant pleaded a demise, and 771. 10s. rent in arrear, and that he took the first distress for 621. parcel of the rent, and the second distress for 151 10s. residue of the rent; and judgment was given for the plaintiff, because the second distress was not legal. Here the case is much stronger: for the allegation is, that the defendants voluntarily quitted and abandoned the possession of the goods seized under the first distress, and that they afterwards, on the 2d of December, seized the same goods a second time for the same rent. That second distress was a substantive act of trespass.

\*Denman, C. J. We are all of opinion, that the tender to the landlord was sufficient; but that on the other point there should be a [\*417

rule

LITTLEDALE, J. The tender to the landlord, the party to whom the rent was due, was sufficient in this case. The 57 G. 3, c. 93, has no application to a case like this. It only applies to costs; and it does not supersede the authority

of the landlord to receive the money due to him for the rent, as well as the lawful charges attending the distress.

PATTESON, J. I think the tender to the landlord was sufficient. Independently of the act of parliament, a tender to the landlord of a sum sufficient to cover the rent and charges would be clearly good. The act does not prevent a tenant from tendering his rent to his landlord; but if he tenders it to the broker, and the latter takes more than the sum he is entitled to, then it subjects the broker to a penalty of treble the amount of the sum unlawfully charged.

Rule for a new trial refused.

Scarlett and Platt, in the following Trinity term, shewed cause against the rule for arresting the judgment. The seventh count is in case, and not trespass. Branscomb v. Bridges, 1 B. & C. 145, shews, that where the goods of a tenant are distrained for rent in arrear after the amount has been tendered, the tenant may bring an action on the case for an excessive distress. It was there objected, \*418] that the taking of the plaintiff's goods after the rent had \*been tendered was the subject of an action of trespass. But the Court held, that, assuming that to be so, the plaintiff was at liberty to waive the trespass and bring an action on the case. So, here, assuming that the second seizure of the goods was a trespass, the plaintiff may waive it, and bring an action on the case for taking his goods and converting them.

Column, contrà. In Branscomb v. Bridges, 1 B. & C. 145, the Court held in effect that there were two causes of action, viz. trespass for an illegal entry, and case for an excessive distress taken, and that the plaintiff had his election of either remedy; and it must undoubtedly be conceded that in certain cases a party may have either trespass or case at his election. The principle seems to be correctly stated by Mr. Wedderburn, arguendo in Harker v. Birkbeck, 3 Burr. 1561, that "both actions may lie where there is both an immediate and also a consequential injury done, and the plaintiff therein being entitled to both actions, must have his election to proceed in either." But where the remedy is sought in case, the party must shew a consequential damage on the face of the count, to maintain his action in that form. It will not do to state a bare trespass and join it with case, on the score that there are circumstances not stated which would enable him to maintain case. Suppose the count had stated merely that the defendant broke and entered into the house of the plaintiff and seized and sold his goods, it may be that an action would be maintainable in case, because the selling or appraisement was irregular, or the amount taken \*ex-

sufficient reason for holding that case is maintainable: if a count in trover and a count in trespass were joined, the joinder might be defended on the same ground. But it may be said this is not a count in trespass, but a bad count in case. The test, however, is to consider whether the cause of action stated is a matter for which trespass or case lies. It is not the commencement of the declaration but the statement of the cause of action that determines what the action is. Suppose a count begins in debt, and states a mere trespass, could it be joined with detinue? Here the cause of action stated in the count is the second seizure of the goods, which was without any right, and therefore was a mere trespass. The cases of Winterbourne v. Morgan, 11 East, 395, Etherton. v. Popplewell, 1 East, 139, and Wallis v. Saville, 2 Lutw. 1532, are in point to shew that trespass was the proper form of action.

Denman, C. J. The authorities cited shew that trespass may, not that it must, be brought in such a case as this. In Branscomb v. Bridges, (1 B. & C. 145,) it was contended that the taking of the plaintiff's goods under a distress, after the rent due had been tendered, being without any colour of right, was the subject of an action of trespass only; but the Court held that, though trespass might lie for that act, the plaintiff was at liberty to waive the trespass, and bring an action on the case; and it was there observed by the Court that trover would lie after a wrongful taking, and that that was a stronger case. I think,

therefore, that, though the taking of the plaintiff's \*goods a second time was a trespass, he was at liberty to waive it, and bring case for the consequential injury arising to him from the unlawful detention of his goods; and that the seventh count may be considered a count in case.

LITTLEDALE, J. I also think that the seventh count may be considered a count in case, because it alleges that the defendants vexatiously(a) made the second distress. An action on the case will lie against a man for maliciously

splitting his cause of action.

PARKE, J. I have entertained some doubt upon this case in the course of the argument: but, on the whole, I think the declaration may be supported. I agree that trespass might be maintained in respect of the act there alleged, viz. the second seizure by the landlord. So it might in all cases of a wrongful taking of goods, and yet in many such cases trover, which is a special action on the case, is maintainable; and it seems to me that the seventh count is an informal count in trover, setting forth specially circumstances which it was unnecessary to state, but which are the subject of such an action. That count alleges, in substance, that goods of the plaintiff came to the possession of the defendants, and that they refused to deliver them to the plaintiff, and converted them te their own use. It may then be \*considered an informal count in trover, and after verdict is sufficient.

Patteson, J. The true ground upon which this declaration is to be supported, appears to me to be that stated by my brother Parke, viz., that the seventh count is an informal count in trover.

Rule discharged.

#### KIRK v. STRICKWOOD. Jan. 15.

A defendant, prosecuted by parish officers for disobeying an order of maintenance, was convicted, and sentence deferred by the court, with a view to an arrangement: in the meantime he was committed to prison, and the officers demanded of him a sum considerably exceeding the amount of maintenance due, but part of which was to cover costs. A. paid part, and gave a note for the remainder; he was then brought before the court, fined 1s. and discharged. It did not appear whether or not the particulars of the arrangement were communicated to the court, but A. made no complaint when brought up. In an action afterwards brought upon the note:

Held, that no irregularity appeared in the compromise, and that the note was legal.

ASSUMPSIT on a promissory note for 19l. 18s. 6d., dated 28th of October, 1830, payable to the plaintiff, described in the note as overseer of the poor of the parish of St. Mary, Whitechapel; and on counts for meat and other necessaries furnished to Sarah Maria Strickwood at the defendant's request. Plea, non-assumpsit. At the trial before Denman, C. J., at the sittings in London after last Michaelmas term, the facts appeared to be as follows:—On the 30th of August, 1830, at the instance of the parish officers of St. Mary, Whitechapel, an order was made by two justices in petty sessions, adjudging that the said Sarah Maria Strickwood, therein stated to be the defendant's daughter, was unable to maintain herself, and was chargeable to the said parish, and that the defendant was able to maintain her, and requiring him forthwith to pay the parish officers 15l. 8s. for her maintenance down to the \*time of making [\*422 the order, and 11s. 6d. weekly, so long as she should be chargeable, or [\*122 the order, he was indicted for the disobedience at the Middlesex sessions in October

<sup>(</sup>a) In Comyn's Digest, Action upon the Case for a Deceipt, (A. 4,) it is said, that case lies if a man procure a vexatious suit; as, if a man sue a capias upon a ferged statute, and Fitzherbert, N. B. 96, B. is cited. So if a man procure another to commence an action in any court against A. to vex him. F. N. B. 98, N. So if a man sue vexatiously, as if he sue in an inferior court, and has judgment and execution, when the defendant knew nothing of the suit. Lut. 67.

following, and convicted; but the Court deferred passing sentence, with a view to an arrangement, and in the mean time he was committed to prison. It was there communicated to him on behalf of the overseers, that 40*l*. would be required to settle the matter: his wife raised 20*l*., which was paid, and, while still in prison, he gave the note in question for the rest of the demand. Part of the payment, but it did not clearly appear what, was intended to cover costs. The defendant was afterwards brought before the Court, fined a shilling, and discharged, it being understood that an arrangement had taken place. On the defendant's part it was insisted that a note given under these circumstances was void. A verdict having been found for the plaintiff,

Kelly, by leave reserved, now moved for a rule to show cause why a nonsuit should not be entered. The question will be, whether the present case is or is not distinguishable from Beeley v. Wingfield, 11 East, 46, where a compromise of this kind was allowed after conviction; but Lord Ellenborough said there, "If we had seen any ground for suspecting that the authority of the Court had been used as an instrument of oppression or extortion, we should have watched the case very jealously." The difference between that case and this is, that the \*423] terms there were dictated by the Court. No other party \*is competent to prescribe them,(a) for the Court only knows what the punishment would be. If the sum taken from the defendant here had been merely that charged in the order of justices, or if the precise grounds of the agreement had been laid before the sessions, there might have been more reason for contending that Beeley v. Wingfield, 11 East, 46, applied: but under the circumstances proved, the proceeding was irregular, and is not sanctioned by that case.

DENMAN, C. J. I think the distinction relied upon does not take this case out of the authority of Beeley v. Wingfield, 11 East, 46. The defendant, when he was brought up for sentence, had an opportunity of applying to the Court if he thought the sum proposed to be taken from him was too large. There will

be no rule.

LITTLEDALE, J. The note is prima facie good. It has not been shewn that the sum taken was excessive: and the defendants might have urged his objections, if he had any, when he was brought up for judgment at the sessions.

TAUNTON, J. The case is within the principle of Beeley v. Wingfield, 11 East, 46. When the defendant was brought up for sentence, I should appresent that the terms of the \*arrangement must have been communicated to the Court and received their sanction.

Patteson, J. The defendant seeks, at a great distance of time, to set aside an agreement which he had an opportunity of objecting to when it was first made. We must presume, now, that it was a fair and satisfactory agreement, or else the defendant would have applied to the Court at the time. Rule refused.

### KEMP v. THOMAS BURT, Gentleman, and WILLIAM CURTIS BURT, Gentleman. Jan. 16.

In an action against attorneys for negligence, it appeared that the plaintiff employed the defendants to conduct an action for him against a surveyor of turnpike roads, for alleged trespasses. The surveyor had seized and impounded plaintiff's sheep, as having been found straying on the road: the plaintiff regained possession of them, by promising the pound keeper to pay the proper charges, and drove them home; on the same day the surveyor retook the sheep in the plaintiff's field, and again impounded them. The first and second taking were in Surrey, but on an intermediate day the sheep had

<sup>(</sup>a) See Baker v. Townshend, 1 B. Moore, 120, where an assault, with various other matters in dispute, and costs, were referred to arbitration by the sessions, after conviction; and the Court of Common Pleas held it right. Secus, where a misdemeanor wholly of a public nature was compromised by consent of the committing magistrates, without trial. Edgcombe v. Rodd, 5 East, 294. See 4 Bl. Comm. 363, 364.

escaped and been impounded in Sussex. The turnpike act, 4 G. 4, c. 95, s. 75, only authorizes surveyors to impound sheep found on a turnpike road. The general turnpike act, 3 G. 4, c. 126, s. 147, (incorporated in the above statute by reference) requires that actions against any person for any thing done in pursuance of the act, shall be commenced within three months, and the venue laid in the county where the cause of action arose.

The attorneys commenced the action within three months, and had a declaration drawn by counsel, who returned it with an observation indorsed, that it would have been prudent to join two other parties. The attorneys thereupon (with the plaintiff's assent) discontinued the action, and brought another after the expiration of the three months, laying the venue in Sussex. The declaration was settled by counsel, and the case afterwards submitted to a special pleader, who gave as his opinion, that the protecting clause of 3 G. 4, c. 126, did not apply to the trespass in seizing the sheep in the plaintiff's field. The plaintiff went to trial, and was nonsuited on account of the action being out of time and the venue improper, with leave to move, which was done without success:

Held, that this was not a case of actionable negligence in the attorneys.

Quære, Whether the surveyor, in making the second seizure, was within the protection of 3 G. 4, c. 126, as acting in pursuance of that statute, or 4 G. 4, c. 95: Held, that at all events there was so much doubt on this point, that the attorneys, if mistaken upon it, were not therefore culpably negligent.

Case against attorneys for negligence. The declaration stated that the plaintiff retained the defendants to commence and prosecute an action for him \*against one Silvester, for having seized certain sheep and cattle of the plaintiff on a turnpike road in Surrey, and impounded the same, Silvester being at the time surveyor of the said road, and acting as such surveyor, and the sheep, &c., being alleged to have been found straying on such road; that it was the duty of the defendants to bring the action within three months of the seizure and impounding, and lay the venue in Surrey; but that they, having commenced an action, improperly discontinued the same without the plaintiff's leave, and brought another action not within three months, and laid the venue in Sussex, by reason whereof the plaintiff was nonsuited, and had 108% levied upon him for costs, &c. Plea, the general issue. At the trial before Tindal, C. J., at the Spring assizes for Surrey, 1832, the facts appeared to be as follows:—

The sheep and cattle were taken, as above stated, by Silvester, who was surveyor of the Horley and Cuckfield turnpike roads, on the 26th of April 1828, in Surrey (near the borders of Sussex), and impounded at Horley in the former county. They afterwards escaped; the cows returned home, and the sheep, being retaken, were again impounded at Worth in Sussex. The poundkeeper there, on the 29th of April, allowed the plaintiff to take them away, on his promise to pay what was claimed for them, and the plaintiff drove them back into Surrey, where, on the same day, Silvester retook them in a field belonging to the plaintiff, and again put them in the pound. Two persons, named Town and Mercer, assisted him in both seizures. The plaintiff afterwards employed Messrs. Burt, the present defendants, to bring an action for the alleged trespasses, and they sued out a writ, against Silvester only, on the 2d of May 1828. \*Instructions for a declaration were laid before counsel, indorsed with the words Sussex latitat, and the names of the parties; there was also a reference to the statutes 3 G. 4, c. 126, s. 123; 4 G. 4, c. 95, s. 75,(a) written

(a) By 4 G. 4, c. 95, s. 75, it is enacted, that "If any horse, ass, sheep, swine, or other beast or cattle of any kind, shall at any time be found tethered, or wandering, straying, or lying about any turnpike road, or on any part thereof, (except on such parts of any road as lead or pass through or over any common or waste or uninclosed ground,) it shall and may be lawful for any surveyor of the road where the same shall be found, or any other person or persons whomsoever, to seize and impound every such horse, ass, sheep, swine, or other beast or cattle, in the common pound (if any) of the parish, township, tithing, or place where the same shall be found, or in such other place as the trustees or commissioners of the road where the same shall be found shall have provided, or shall provide for that purpose; and the said horse, ass, sheep, &c., there to detain until the

upon the instructions by one of the Messrs. Burt. The learned counsel drew the declaration, containing two counts, one for the original taking in the road, the other for the retaking on the plaintiff's premises; and he returned the declaration (in November 1828) with the following observations indersed:—"I have confined the declaration to the two occasions on which the cattle were taken away. It would have been prudent to have issued the writ against Silvester's two associates, and joined them in the action, as they were clearly co-trespassers with him, and their evidence therefore must be anticipated in his favour, and will be likely to be extremely prejudicial to the plaintiff." Messrs. Burt then wrote to the plaintiff, stating that counsel recommended the two accomplices to be joined, and asking what he, the plaintiff, said to it: and it was determined, with the assent of the plaintiff, that the action should be discontinued, and \*427] \*another commenced against all the parties. A writ was accordingly sued out, in November 1828, against Silvester, Town, and Mercer, and the declaration was amended by counsel, the names of the two latter parties being introduced. When the cause was at issue, the trustees of the turnpike roads made an offer of compromise, which the defendants advised the plaintiff to accept, being then doubtful as to the result of a trial; but the plaintiff refused, not being satisfied with the terms. A case was afterwards laid before a special pleader, with a copy of the declaration; the question proposed being, whether or not the defendants could avail themselves of the protection of the general turnpike act.(a) The gentleman consulted gave as his opinion that, in respect of the latter seizure, the defendants could not avail themselves of that protection either as to the venue or the limitation of the action. On the trial at Lewes, at the Summer assizes 1829, it was objected that the action was commenced too late, and the venue improper, and the learned Judge who tried the cause directed a nonsuit on both points, giving leave to move that the nonsuit should be set aside; which motion was made in the following term without success, and the defendants had execution for their costs.

Upon these facts, Tindal, C. J. was of opinion that \*the case was one in which Messrs. Burt, the defendants, might reasonably doubt whether that which had been done by the surveyor, was done in pursuance of the statute, (b) and he directed a nonsuit, with liberty to move to enter a verdict for 108l., the amount of costs levied. A rule having been obtained for this

purpose,

Platt and Channell now shewed cause. The nonsuit was right, there being no evidence to go to the jury of that crassa negligentia without which an attorney cannot be subjected to an action of this nature. If he has shewn care, skill, and integrity, it is not every inadvertence or error of judgment that will render him liable to an action. In the present case instructions were in the first instance laid before counsel, with an indorsement calling his attention to the statutes; and he returned the declaration with a suggestion that the other trespassers should have been joined, but not warning the parties that a new

owner thereof shall for every and each horse, ass, sheep, &c., so impounded, pay the sum of 2s., together with reasonable charges and expenses, &c., to the surveyor," 3 G. 4, c. 126, s. 123, is not material to this case.

(b) During the trial it was urged on behalf of the defendants, that the second taking was not an act so done, and therefore that the limitations as to time and venue did not apply; but the Lord Chief Justice held that he could not nonsuit, because he could not say that the former nonsuit was wrong on the very ground on which it proceeded.

<sup>(</sup>a) 3 G. 4, c. 126, s. 147, which enacts, "That if any action shall be commenced against any person, for any thing done in pursuance of this act, then and in every such case such action or suit shall be commenced or prosecuted within three months after the fact committed, and not afterwards; and the same and every such action or suit shall be brought in the county or place where the cause of action shall have arisen, and not elsewhere:" and if the action be otherwise brought, the jury shall find for the defendant; and if the plaintiff shall become nonsuit or have a verdict against him, the defendant shall have treble costs. These provisions are kept in force as if re-enacted, by 4 G. 4, c. 95, s. 88.

action would be too late. Upon that suggestion the defendants acted. suit being commenced anew, the declaration was again laid before counsel to be amended. When a doubt afterwards arose of the plaintiff's ultimate success, the defendants recommended his acceptance of a compromise, which he refused; and the case was then laid before a special pleader, who encouraged the parties to go on. Lord Mansfield said, in Pitt v. Yalden, 4 Burr. 2061, that an attorney \*ought not to be liable in cases of reasonable doubt. Here a reasonable doubt did exist, first, whether there was not such a continued [\*429] detention as made the surveyor liable for a trespass in Sussex; and then, whether the last taking of the sheep in Surrey was "a thing done in pursuance of the act" 3 G. 4, c. 126, or whether, on the contrary, it was not altogether irregular and unprotected by that statute; for the sheep were seized, not on the highway, but on the plaintiff's land; and if the seizure was to be considered as a retaking, that ought to be on fresh pursuit, which was not the case here. At all events, this question, whether there was sufficient doubt upon the second taking to excuse the present defendants, was a point of law, and it was for the Judge who tried the present cause to decide it, and not to leave it to the jury: as in actions for malicious prosecution, if no fact is disputed, the Judge determines the question of probable cause, Taylor v. Willans, 2 B. & Ad. 845. Judge at least thought that point doubtful, for he directed a nonsuit, reserving leave to move; and the question, arising upon two turnpike acts, which it was necessary to couple together, was one upon which doubt might well arise. The Court here called upon

An attorney is not bound to know all the clauses of any Thesiger contrà. particular act or acts of parliament; but here it is plain that the attention of the defendants had been called to the particular sections on which the case turned, and they should have been masters of those. They themselves gave a direction to counsel by the words "Sussex latitat;" the facts of the \*case on which the venue depended, being well known to them when they did so. 147th section of 3 G. 4, c. 126, is perfectly clear as to the limitation of time, and the first action was brought sufficiently soon: the observation of counsel indorsed on the declaration, was not advice to withdraw one action and begin another. [Denman, C. J. It was a good reason for doing so, if the law allowed But not for doing it at all hazards, upon their own authority, and that was the negligence. It was at least unsafe to do it, and they were apprised of the enactment which made it so. This is not a case, like Baikie v. Chandless, 3 Camp. 17, turning upon a doubtful construction of a statute, only established by decisions long subsequent to the passing of the act. Assuming that the defendants had had the specific advice of counsel to discontinue and bring a new action, they ought not to shelter themselves under that irresponsible authority. On such a point as this they ought to have known whether or not the advice they received was correct, Godefroy v. Dalton, 6 Bingh. 460: they were answerable to their client for the propriety of the suggestions on which they acted.

Denman, C. J. I think there was in this case no proof of gross negligence. I entertain the greatest doubt whether the second action was not properly brought. The first clearly was, but the defendants were induced to discontinue that by the very reasonable doubt which counsel suggested to them, whether certain parties who had not then been made defendants, ought not to have been joined: the omission of them, however,\* in the first instance was clearly not an act of gross negligence. As to the second action, it occurs to me that, 1\*431 under the circumstances, the defendant, Silvester, was not protected by the statute; and if that were so, the action was rightly brought. I think, then, that here was, at all events, no case of culpable negligence. There is a difficulty in saying, if there is any case of negligence, that it shall not be submitted to a jury, but I think here it could not have gone to them.

LITTLEDALE, J. It has been taken for granted by the plaintiff's counsel that the defendant in the former action was protected by the 3 G. 4, c. 126, s. 147,

and 4 G. 4, c. 95, s. 75, and 88. But as upon the second occasion the sheep were not taken upon the highway, according to the seventy-fifth section of the latter statute, it is clear that he would not have been within the letter of the 3 G. 4, c. 126, s. 147, as a person sued "for any thing done in pursuance of that act;" though he might have been entitled to the benefit of that liberal construction which the Courts have sometimes, but not always, given to clauses so worded. There are cases where officers have been held to be within the protection of such clauses, though they have not acted strictly under the authority of the statutes; (a) and others where such a construction has not been admitted. as where actions have been brought to recover back money improperly taken.(b) But an attorney is not liable for gross negligence, if, looking at the express \*1207 \*words of the statutes in question here, he has supposed that they would be literally followed; he is not bound to know in what cases the Court would put a more liberal construction upon them. The Lord Chief Justice, who tried the present cause, appears to have had some doubt: on the former trial, the point was reserved: and it appears that in the course of that cause the present defendants were advised by a special pleader that the parties against whom they were proceeding were not within the protection of the general turn-pike act. I am therefore of opinion that an action for negligence was not maintainable, and that the present rule must be discharged.

TAUNTON, J. concurred.

PATTESON, J. I am of the same opinion. The only doubt I had was, whether the defendants ought to have discontinued the former action without further advice. But that only brings it to the question whether the limitation as to time in the general turnpike act applied, so as to bar the second action.

Rule discharged.

### \*433 ] \*JOHN PRICE v. EASTON. Jan. 17.

Declaration stated that W. P. owed the plaintiff 13L, and that in consideration thereof, and that W. P., at the defendant's request, had promised defendant to work for him at certain wages, and also, in consideration of W. P. leaving the amount which might be earned by him in the defendant's hands, he, the defendant, undertook and promised to pay the plaintiff the said sum of 13L. Averment, that W. P. performed his part of the agreement.

Judgment arrested, because the plaintiff was a stranger to the consideration.

Declaration stated that one William Price was indebted to the plaintiff in the sum of 13L, being the balance of a larger sum due for the price of a certain timber carriage sold and delivered to him; and that the defendant, in consideration thereof, and in consideration that the said William Price, at the request of the defendant, had undertaken and faithfully promised the defendant to work for him, the defendant, at certain wages agreed upon between them, and in consideration of William Price leaving the amount which might be earned by him in the defendant's hands, he, the defendant, undertook and promised to pay the plaintiff the sum of 13L. Averment that William Price did work for the defendant, and earned a large sum of money, and left the same in his, defendant's, hands. Breach, non-payment to the plaintiff of 13L. Plea, non-assumpsit. The plaintiff having obtained a verdict, a rule nisi was obtained by Campbell for arresting the judgment, on the ground that the plaintiff was a mere stranger to the consideration; and he cited Bourne v. Mason, 1 Vent. 6, and Crow v. Rogers, 1 Str. 592; and distinguished the case from Dutton v. Poole, 2 Lev. 210, where tenant in fee-simple being about to cut down timber for his daughter's portion,

Vol. XXIV.—13

<sup>(</sup>c) See Coke v. Leonard, 6 B. & C. 351, where several are cited by Bayley J. (b) See Irving v. Wilson, 4 T. R. 485. Morgan v. Palmer, 2 B. & C. 729.

the defendant, his heir at law, in consideration of his forbearing so to do, promised to pay a sum of money to the daughter, and the action by the husband of the daughter was held to be well brought; but there, it \*was said, there was privity by blood, and the daughter was prejudiced by loss of her [\*434

portion.

Justice now shewed cause. After verdict, it will be intended that every thing necessary to support the action was proved. An act from which the defendant receives a benefit, and from which inconvenience arises to the plaintiff, is a sufficient consideration to support an assumpsit. Here there was an advantage to the defendant, for he had the benefit of the labour of William Price, and was not bound to pay for it until the 31st of March. Starkey v. Mylne, 1 Roll. Abr. 32, pl. 13, Disborne v. Denabie, 1 Roll. Abr. 31, pl. 5, and Wilson r. Coupland, 5 B. & A. 228, shew, that where there is a privity between the three parties, assumpsit is maintainable without an immediate consideration from the plaintiff to the defendant. In Dutton v. Poole, 2 Lev. 210, and Curtis v. Collingwood, 1 Ventr. 297, there was no such consideration proceeding immediately from the plaintiff to the defendant. [PATTESON, J. No promise to the plaintiff is alleged; but merely a promise to pay the plaintiff.]

Campbell, Solicitor General, (and Talfourd was with him,) contra, was stop-

ped by the Court.

DENMAN, C. J. I think the declaration cannot be supported, as it does not shew any consideration for the promise moving from the plaintiff to the defendant.

LATTLEDALE, J. No privity is shewn between the plaintiff and defendant. This case is precisely like Crow v. Rogers, 1 Str. 592, and must be governed by it.

\*TAUNTON, J. It is consistent with all the matter alleged in the declaration, that the plaintiff may have been entirely ignorant of the ar-

rangement between William Price and the defendant.

PATTESON, J. After verdict, the Court can only intend that all matters were proved which were requisite to support the allegations in the declaration, or what is necessarily to be implied from them. Now it is quite clear that the allegations in this declaration are not sufficient to shew a right of action in the plaintiff. There is no promise to the plaintiff alleged. The rule for arresting the judgment must be made absolute. Rule absolute.

#### DOE dem. BAGGALEY v. HARES. Jan. 17.

By the general turnpike act, 3 G. 4, c. 126, s. 134, it is enacted, "that where any action shall be brought by or against any trustee of a road, evidence of the trustee having acted as such, together with the act of parliament by which he was appointed, or the order, or a copy of the order for his appointment or election, in case he was appointed or

elected by the trustees, shall be sufficient proof of his being a trustee:"

Held, that the words in case he was elected or appointed by the trustees, applied to cases where there was an appointment or election de facto by the trustees, in contra-distinction to an appointment by the road act; and, therefore, proof of a party having acted as trustee, and of an order made by the trustees for his appointment or election, was sufficient; and that even under a local act, whereby the appointment of new trustees, on death or removal, was required to be under the hands and seals of five of the old trustees, and although it was shewn that the order for such appointment was not so made.

EJECTMENT by mortgages of tolls and toll-houses against the lessee. At the trial before Littledale, J., at the Stafford Spring assizes, 1832, the plaintiff proved by the attesting witness, the execution of the mortgage-deed of the tolls, toll-houses, and toll-gates on the 27th of October, 1829, by five trustees, Mr. R. Haywood being one of them; and further, that he and the other four had acted as such for eight or nine years. The defence was, that Haywood was not

\*436] duly appointed a trustee. \*By the local acts for making and repairing the road from Lawton in Cheshire, to Burslem and Newcastle-under-Lyne in the county of Stafford, the trustees, or any five or more of them, on the death or refusal to act of a trustee, had power to appoint or elect by writing under their hands and seals any other person qualified as therein mentioned, and these (which were declared to be public) acts required that all securities on the tolls, toll-houses, or toll-gates should be executed by five trustees. To shew that Haywood had not been appointed under the hands and seals of the trustees, their books were offered in evidence by the defendants. They were objected to on the ground that the trustees were estopped by their own deed from disputing its validity. Littledale, J., was of opinion that although an individual might be estopped, yet as the mortgage was the creature of the act of parliament, and the trustees acted not for their own benefit, but for that of the public, they were not estopped; he therefore admitted the evidence, and the following entry was read:-"At a meeting held the 14th of August, 1821, duly convened, it was ordered that certain persons therein named (Mr. R. Haywood being one of them) be elected trustees for putting in execution the powers of the several acts of parliament relating to the road, in the room of" several persons therein named, who were dead, or refused to act. This order was not under the hands and seals of the trustees, but was signed by their clerk. The learned Judge was of opinion that there was no legal appointment of Haywood by this entry, and consequently that the mortgage-deed was not executed by five trustees, as required by the act; and Campbell then contended that the jury might presume an appointment \*137] under seal. \*The learned Judge thought that there was no ground for making such presumption, and nonsuited the plaintiff. A rule nis having been obtained for setting aside the nonsuit,

Talfourd now shewed cause. Haywood was not legally appointed trustee, and if that be so, then the other trustees are not, by reason of their having been parties to the mortgage-deed, estopped from insisting on the illegality of their deed, for the general principle that a party is estopped by his own deed, does not apply to a case where he is a trustee, acting not for his own benefit, but for that of the public, Fairtitle dem. Mytton v. Gilbert, 2 T. R. 169. if Haywood was not a trustee, it follows that the mortgage was by four instead of five trustees, and consequently that it is void. It will be said that evidence of Haywood's having acted, and of the order made for his appointment, was sufficient, and the 3 G. 4, c. 126, s. 134, will be relied on. It enacts, that in all cases where any action shall be brought against any trustee or trustees of a turnpike road, evidence of such trustee or trustees having acted as such, together with the act of parliament by which he or they was or were appointed, or the order or a copy of the order for his or their appointment or election, in case he or they was or were appointed or elected by the trustees, shall be sufficient proof of his or their being a trustee or trustees. That section, therefore, makes the order, or a copy of the order, evidence of a party's being a trustee, in case \*438] he were appointed or elected by the other trustees. Here Haywood never was appointed by the trustees, because the local act requires that such appointment, to be valid, should have been under their hands and seals. provision not having been complied with, the plaintiff is not aided in this case by the 134th section of the general turnpike act.

Campbell, Solicitor-General, and Richards contra. The manifest intention of the legislature was, that wherever a trustee was appointed by surviving trustees, his having acted as such, and the order for his appointment, should be sufficient evidence of his being a trustee. The local act says that the appointment, not the order for it, shall be under seal. The general turnpike act 3 G. 4, c. 126, s. 66, authorizes the surviving trustees, upon the death, bankruptcy, or insolvency of a trustee, to elect and appoint another; and that every person who shall be elected and appointed a trustee pursuant to the directions of the act, shall act with the surviving trustees in execution thereof to all intents and

purposes as if he had been therein named and appointed a trustee. [Talfourd. The order for the appointment of Haywood was made before the 6th of August, 1822, when that act passed. Section 4, after reciting that it is of great importance that one uniform system should be adhered to in the laws for regulating turnpike roads throughout the kingdom, enacts, "that all the provisions in this act contained shall be construed to extend to all acts of parliament now in force or which shall hereafter be passed for making or maintaining any turnpike road." In Pritchard v. Walker, 3 Car. & P. 212, which \*was an action gagainst the trustee of a turnpike road, an order of trustees which ought to have been signed by five being produced, the plaintiff proposed to shew that one of the five who signed the order was not trustee, because he had not qualified himself to act by taking the oath prescribed by the 3 G. 4, c. 126, s. 62; but Vaughan, B. refused to receive such evidence. The 134th section provides that the modes of proof there pointed out shall be sufficient in two cases: the first where the party is named a trustee in the local act, and the second, where he is appointed or elected by the other trustees. The words in case he or they were appointed or elected, refer to an appointment or election de facto, and not to a regular legal appointment. If that were not so, the latter provision would be wholly nugatory, for it would be necessary in every case to prove, besides the order, a legal appointment. But, secondly, the defendants, who claim under the trustees, are estopped by their deed (which treats those who executed as trustees) from saying that Haywood was not a trustee. Fairtitle dem. Mytton v. Gilbert, 2 T. R. 169, only shews that trustees cannot by their acts annul an act of parliament; but, although the trustees may say that the act which they had done as trustees was not authorized by the act of parliament, the defendants, are estopped from saying that those who acted as such were not duly appointed. Further, the fact of Haywood having acted as a trustee for so many years was evidence from which the jury might presume, if necessary, that an order under seal had been made.

\*Denman, C. J. The rule for setting aside the non-suit must be [\*440 made absolute, and I am happy that we can come to that conclusion on legal grounds, for it would be extremely mischievous as affecting the value of these securities if an objection like the present could prevail. I think that, according to the true construction of the 134th section of the general turnpike act, proof of Haywood's having acted as a trustee, and of the order made by the other trustees for his appointment or election, was sufficient evidence of his being a trustee; and, consequently, that he was a trustee at the time when he executed the mortgage deed. The only doubt suggested arises upon the words "in case he or they was or were appointed or elected by the trustees;" but I think those words may be taken to refer to all cases when an order has in fact been made by the remaining trustees for the appointment or election of a new one.

LITTLEDALE, J. I am inclined to think the trustees, acting in the execution of a public trust under an act of parliament, are not estopped from saying that this deed is not their own act.(a) It is unnecessary, however, to decide that point, because it seems to me that the 134th section of the general turnpike act puts an end to the case. One question is, whether the clause has a retrospective effect. I think it has, and that it applies to an order or appointment made before that act passed. Another question is, whether it was intended to apply to all cases where an order was made by the trustees for the appointment or election of a new trustee, or only to \*cases where there was an actual valid appointment of such trustee. If it applied to the latter case only, [\*441 valid appointment, it would also be necessary to prove a regular, valid appointment. I think it is manifest that the legislature intended to make the order of

<sup>(</sup>z) See The Stratford and Moreton Railway Company v. Stratton, 2 B. & Ad. 511. Hill z. The Proprietors of the Manchester Water Works. Ibid, 544.

the trustees evidence, and consequently that the latter provision in the 134th section applies to all cases where an order has been made by the trustees for the appointment or election of a trustee. 'Consequently, evidence of Haywood's having acted as a trustee, and of the order, or a copy of the order for his ap-

pointment, was sufficient proof his being a trustee.

TAUNTON, J. I also think that the rule should be made absolute, and my opinion proceeds simply upon the construction of the 134th section of the general turnpike act. I abstain from giving any opinion on the point of estoppel, in consequence of what fell from the Court in Fairtitle dem. Mytton v. Gilbert, 2 T. R. 169. I think that the 134th section was intended to make the different modes of proof there pointed out sufficient evidence of the party's being a trustee, and to render unnecessary any ulterior inquiry as to his qualification. cording to the argument for the defendant, after the proof stated in the latter part of that clause were given, it would be necessary to shew a regular appointment. If that were so, the clause would be a dead letter. The words "in case he or they was or were appointed or elected by the trustees," may be construed to apply to a case where there \*has been an appointment or election \*142] to apply to a case where there has been an orrelated de facto. Then Haywood's having acted for nine years was prima facie evidence of his having been appointed a trustee, and the having been so appointed and elected will satisfy the words of the clause: and there was sufficient proof of his having been appointed de facto.

Patteson, J. The words "in case he or they was or were appointed or elected by the trustees," apply to the case where the party is not named trustee in the local act, but appointed after the passing of it. The order for appointment is, in the very clause, distinguished by the legislature from the appointment itself. If the local act, in this case, had said that the order for the appointment of a trustee should be under the hands and seals of five trustees, there would

be more weight in the argument for the defendant.

DENMAN, C. J. If the meaning of the words were that contended for by the defendant, the proof of an actual legal appointment could never be dispensed with. The construction would be most rigid, whereas I think it ought to be liberal, in order to further the manifest intention of the legislature to dispense with the formal proof which might otherwise be required. Rule absolute.

#### \*4437

#### \*BIRD v. BOULTER. Jan. 17.

In assumpsit by an auctioneer against a purchaser, for goods sold, an entry in the sale book by the auctioneer's clerk, who attended the sale, and, as each lot was knocked down, named the purchaser aloud, and on a sign of assent from him, made a note accordingly in the book, is a memorandum in writing by an agent lawfully authorized, within sect. 17, of the statute of frauds. For the clerk is not identified with the auctioneer, (who sues,) and in the business which he performs, of entering the names, &c., he is impliedly authorized by the persons attending the sale, to be their agent.

Assumpsit for goods sold and delivered, and goods bargained and sold. Plea, the general issue. At the trial before Littledale, J. at the Hereford Spring assizes, 1832, it appeared that the goods in question (wheat, the property of one Smith) were a lot sold at an auction, and knocked down to the defendant by the plaintiff, who was the auctioneer, at a price exceeding 10%. The course pursued at this sale was, that the parties as usual signified their biddings to the auctioneer, who repeated them aloud; and when the hammer fell, one Pitt, who attended as the auctioneer's clerk, called out the name of the purchaser, and, if the party assented, made an entry accordingly in the sale-book. In the present instance, the auctioneer having named the defendant as the purchaser, Pitt said to him, "Mr. Boulter, it is your wheat;" the defendant nodded, and Pitt made the entry in his sight, he being then within the distance of three yards. The question was, whether a note or memorandum of the bargain had been made, pursuant to 29 Car. 2, e. 3, s. 17, by the party to be charged, or his agent thereunto lawfully author-

ized. A verdict was taken for the plaintiff, and leave given to move to enter a

nonsuit. A rule nisi having been obtained for that purpose.

The Solicitor General (with whom was Whateley) now shewed cause. It is still, perhaps, vexata quæstio, whether sales by auction are within the seventeenth \*section of the statute of frauds at all;(a) but it is not necessary [\*444 to discuss that point. The objection taken on the other side was, that, under the seventeeth section, one contracting party cannot constitute the other his agent, to sign the memorandum (which, it was said, was the effect of the present transaction;) and Wright v. Dannah, 2 Campb. 203, and Farebrother v. Simmons, 5 B. & A. 333, were cited. In the first of those cases, Lord Ellenborough held, that the agent who signed the memorandum must be a third person, and not one of the contracting parties; and, in the other, Abbott, C. J. referring to Wright v. Dannah, held, that an auctioneer's signature was not sufficient, where he sued as one of the parties to the contract. But the doctrine of these cases is not borne out by the words of the statute; and, at common law, there is nothing to prevent one contracting party from being the agent of the other; an obligor, for instance, from giving an obligee a power of attorney to execute a bond for him; a lessee from executing a lease, as attorney of the lessor; a party from accepting a bill by procuration, payable to his own order; assuming the authority in each case to be complete, which would be matter of evidence. It was admitted here, that Smith, the owner of the goods, might have maintained the action. But the defendant is either bound by the contract originally, or not bound: if he is bound, it does not matter by whom the action is brought, so that it is a party entitled to enforce the contract by action; and this was the view taken by the learned Judge at the trial. But there is no need to contest the cases cited. Here the memorandum was not signed by the auctioneer, who sues, but by another party, \*Pitt, who signed the contract by the defendant's immediate authority. If it is rightly held, that a contracting party cannot be the agent to sign under section 17, that restriction will surely not be extended to his clerk. The Court here called upon

Ludlow, Serjt. and Justice, contra. To decide in favour of the plaintiff, the Court must overrule Farebrother v. Simmons, 5 B. & A. 333. It is not disputed, that, if Smith had sued, an entry by the auctioneer would have been a sufficient memorandum to bind the purchaser; so also would an entry by his clerk. In Henderson v. Barnewall, 1 Y. & J. 389, Hullock, B. observed, that "an auctioneer's clerk, who writes down the name of the buyer in his presence, is the agent of both parties." But then, whether the auctioneer or the clerk sign, the same objection arises, that the memorandum is signed by one of the contracting parties, who is plaintiff in the suit; for the clerk's signature is that of his master. [LITTLEDALE, J. Then you would say, that an auctioneer can, in no case, bring an action like this in his own name.] He is not obliged to sue; the vendor may. If the auctioneer makes himself the plaintiff, he must take the consequent disadvantages. [TAUNTON, J. May not the vendor have two agents; one to extol the commodity, the other to do the mechanical work of making the memorandum in the sale-book?] The latter is an essential part of the auctioneer's duty; the clerk, in doing it, represents him; and it was proved in this case, that Pitt was the clerk and servant of Bird. His receipt for money would have been that of Bird, and \*would have charged Bird and not Pitt himself, Edden v. Read, 3 Camp. 339. The auctioneer, in this case, on knocking down the lot, says, "It is Mr. Boulter's" (the defendant); and the clerk writes; that is, in effect, that the auctioneer writes by the hand of his clerk. If not, where is the memorandum by an agent lawfully authorized? for there was no attempt at the trial to establish a distinct agency in the clerk. And if the signature is to be made available as that of the auctioneer given by the hand of his clerk, Wright v. Dannah, 2 Camp, 203, and Farebrother v.

<sup>(</sup>a) But see Kenworthy v. Schofield, 2 B. & C. 945.

Simmons, 5 B. & A. 333, apply. [Patteson, J. In Blore v. Sutton, 3 Mer. 237; (see Coles v. Trecothick, 9 Ves. jun. 235); the signature of an agent's clerk acting for and under the direction of the agent, in a case within sect. 4 of the statute, was held not to be a memorandum by the authorized agent of the principal.] The dictum of Hullock B. in Henderson v. Barnewall, 1 Y. & J. 389, contradicts this. [Patteson, J. That was not called for by the case before the Court.] In a sale by auction the knocking down constitutes the contract; the entry is a requisite superadded by the statute, but it is not a distinct transaction. [Littledale, J. May it not be said that the clerk is constituted a deputy by all the room?] He goes to the sale in a definite character, hired to act for a particular master; he could not sue any other person for work and labour; and the auctioneer might sue for labour done by his clerk. The clerk acts as a mere automaton under the direction of the auctioneer.

DENMAN, C. J. I think this case is distinguishable from Wright v. Dannah, \*447] 2 Camp. 203, and Farebrother v. Simmons, \*5 B. & A. 333; and it appears to me that the clerk was not acting merely as an automaton, but as a person known to all engaged in the sale, and employed by any who told him to put down his name. Without, therefore, interfering with the cases that have

been cited, I think this rule must be discharged.

LITTLEDALE, J. With respect to the case relied upon in support of the rule, there is certainly a difficulty in saying that a purchaser shall be bound by a contract or not, as the action is brought by one party or another. It is, indeed, irregular that the real buyer or real seller should make the other party his agent to sign a memorandum under the statute; but when that is done through a third person the objection is removed. An auctioneer is enabled by law to sue the purchaser, but, according to the rule insisted upon for the defendant, an action of this kind could not be maintained by the auctioneer. I think that a clerk employed as Pitt was in this case, must, in an action brought by the auctioneer, be considered as his agent for the purpose of taking down the names, and also as the agent of the several persons in the room for the same purpose, and to prevent the necessity of each purchaser coming to the table to make the entry for himself.

TAUNTON, J. I very much agree with my Brother Littledale as to the difficulty in Farebrother v. Simmons, 5 B. & A. 333. But there is no necessity to overrule that case. The Chief Justice there says, in the close of his judgment, "Wright v. Dannah fortifies the conclusion at which I have arrived, vis., that the agent contemplated \*by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party on the record." It is a sufficient distinction between that case and this, that in the former the auctioneer, whose signature was relied upon, was the party suing; here the signature is by a third person. I would, however, go farther than this. Under the circumstances, I think Pitt may be considered to have been the agent of the vendor. It is not necessary to suppose that the vendor rested a particular confidence in the auctioneer for the purpose of putting down the names in the sale-book. He may be taken to have constituted that person his agent for the making of such entries, whom the auctioneer might choose to appoint. If so, Pitt was agent for the vendor, and also for the persons in the room who saw him acting as he did under the auctioneer, and by their acquiescence constituted him their agent for the business which they saw him performing. At all events he is a third person, and not a contracting party on the record.

Patteson, J. It is not necessary here to overrule Farebrother v. Simmons, 5 B. & A. 333. It may be correct to say, as there laid down, that the signature must be by a third person, and not by a contracting party on the record. Here it was so. According to the evidence, Pitt was seen by all the parties at the sale making the entries in the sale-book; it was inconvenient that each purchaser

should come to the table for that purpose, and, by nodding as the names were called, they authorized him to act as he did.

Rule discharged.

### \*HENSWORTH v. FOWKES. Jan. 22.

[\*449

Declaration ("in a plea of trespass on the case,") stated that the defendant, intending to injure the plaintiff in his good name, and to cause his dwelling-house to be searched for stolen goods, and to procure him to be imprisoned, went before a justice, and falsely, maliciously, and without probable cause, charged that certain specified goods of defendant had been feloniously stolen, and that he suspected that the said goods were concealed in the plaintiff's dwelling-house; and upon such charge the defendant procured the justice to grant a warrant, authorizing a constable, with necessary assistance, to enter the plaintiff's house to search for the said goods; and the defendant, with other persons, caused and procured the dwelling-house of the plaintiff to be searched and rummaged for the said goods by such persons, and the door of such house and a panty there to be broken to pieces, and the plaintiff and his family to be disturbed in possession, and his goods to be carried away. The general conclusion was, that by means of the premises, the plaintiff was injured in his good name and trade, put to expense, and hindered in his business. A count in trover was added:

hindered in his business. A count in trover was added:

Held, on general demurrer, by Taunton and Patteson, Js., Littledale, J., dissentiente, that
the acts of violence alleged to have been committed in the house, appeared sufficiently
by the declaration to have been acts done in pursuance of the wrrant, and in consequence of the charge made by the defendant, and that they were stated as mere matter
of aggravation; and consequently that the whole count containing this statement

was in case.

DECLARATION stated that the plaintiff complained of the defendant being in the custody, &c., of a plea of trespass on the case; it then alleged that the plaintiff had not ever been guilty, or until, &c., been suspected, of felony, or of having stolen goods concealed upon his premises, by means whereof he had deservedly obtained the good opinion, &c., and was acquiring great profits in his trade of a butcher, yet the defendant contriving and maliciously intending to injure the plaintiff in his good name, &c., and to cause his dwelling-house to be searched for stolen goods, and also to cause him to be imprisoned and detained in prison for a long time, and to oppress and ruin him in his business and otherwise, theretofore, to wit on the 3d of May, 1832, at, &c., went and appeared before one C. G. M., a justice of the peace for the county of Leicester, and falsely and maliciously, and without any reasonable or probable cause whatsoever, charged and alleged that certain cart-wheels, the property of the defendant, had by some person or persons unknown been feloniously stolen, and that he, the \*defendant, had probable cause to suspect, and did suspect, that the said goods were concealed in the dwelling-house of the plaintiff, and upon such charge the defendant then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said justice to make and grant his warrant under his hand and seal, thereby authorizing and requiring a certain constable, to whom the warrant was directed, with necessary assistance, to enter in the day time into the said dwelling-house of the plaintiff, there to search for the said goods, and if the same should be found on such search, to bring them, and also the body of the plaintiff, before the said C. G. M., &c.; and the said defendant, with other persons, then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the dwelling-house of the plaintiff to be searched and rummaged for the said goods by the said defendant(a) and the said other persons, and the door of the said dwelling-house, of great value, to wit, &c., to be with force and arms, &c., broken to pieces, damaged, and spoiled, and also a certain pantry of and belonging to the said dwelling-house, of great value, to wit, &c., to be demolished

<sup>(</sup>a) So in the declaration: see p. 459, post.

and broken; and also then and there caused and procured the plaintiff and his family to be greatly disturbed and disquieted in the possession of his said dwelling-house, and divers goods and chattels, to wit, certain cart wheels of the plaintiff, of the value, &c., to be taken and carried away therefrom; and the said defendant further contriving, &c., on the 5th of May, 1832, falsely and maliciously, and without any reasonable or probable cause, procured the said warrant to be \*indorsed by G. B. H., a justice of the borough of Leicester, and thereby caused and procured the said G. B. H. to authorise the execution of the warrant in the said borough, and falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be arrested and kept in custody, and to be afterwards carried and conveyed in custody before two justices of the borough, to be examined touching the said supposed crime; whereas, in truth and in fact, there were no stolen goods whatsoever in or upon the said premises of the plaintiff, nor was the plaintiff guilty of any such supposed offence; and the said last-mentioned justices, having heard and considered all that the defendant could say against the plaintiff touching the said supposed offence, adjudged that the plaintiff was not guilty thereof, and caused him to be acquitted and discharged of the same, and the defendant had not further prosecuted his said complaint, but had abandoned the same, and the said prosecution was wholly determined. There were other counts not materially varying from the first, and there was the following general conclusion:-"By means of which said several premises the plaintiff hath been and is greatly injured in his said credit and reputation, and brought into public scandal, &c., with and amongst all his neighbours and other good and worthy subjects of this kingdom, and divers of those neighbours and subjects to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed that he has been and is guilty of felony, and of having had stolen goods concealed on his promises, and also the plaintiff has by means of the premises, suffered great anxiety and pain of body and mind, and \*has laid out 100%. in defending himself in the premises, and in the manifestation of his innocence, and has been hindered from following his lawful business for the space of two days, and has been injured in his trade and otherwise." There was also a count in trover. To this declaration the defendant demurred generally.

White in support of the demurrer. The allegations in the first count of the declaration, that the defendant caused and procured the dwelling-house of the plaintiff to be searched, the door to be broken, &c., and a pantry to be demolished, and the plaintiff to be disturbed and disquieted in his possession, and the goods and chattels of the plaintiff to be taken and carried away, and that he caused the plaintiff to be arrested and kept in custody, are substantive charges of direct and immediate acts of trespass committed by the defendant; they are improperly joined with the rest of the first count, which is in case, and with the count in Trespass and case cannot be joined. The distinction between case for a malicious prosecution, and trespass for false imprisonment, is pointed out by Lord Mansfield and Lord Loughborough in Johnstone v. Sutton, 1 T. R. 544, and Ashhurst and Buller, Js., in Morgan v. Hughes, 2. T. R. 231. declaration here does not allege that when the defendant caused the plaintiff's dwelling-house to be entered and searched, the parties entering and searching The several acts there charged acted under or in obedience to the warrant. are wholly unconnected with the preceding matter. It is not even alleged that the constable was present, or that the acts were done in his aid. That being so, the \*injuries alleged to have been committed after the application for a warrant, are manifestly trespasses. Bracegirdle v. Orford, 2 M. & S. 77, shows, that trespass for breaking and entering the plaintiff's dwelling-house, may be well laid to have been done under a false charge and assertion that the plaintiff had stolen property in her house, per quod she was injured in her credit, &c.; for then the false charge is laid only as matter of aggravation; and the jury may give damages for the trespass as aggravated by such false charge.

a consequent injury, the party might adopt this course, and so entitle himself to costs if he recovered only one shilling damages. (See 2 Vin. Abr. Actions, M. c. 6. Bourden v. Alloway, 11 Mod. 180.) But here, at all events, there is no cause of action independent of the proceedings subsequent to obtaining the warrant; the mere complaint before the magistrate, as here alleged, would not be sufficient; and the subsequent proceedings, not being connected with the warrant, are the subject of an action of trespass, not case. There can be no

doubt that misjoinder of action is a good ground of general demurrer. TAUNTON, J. I have entertained some doubt during the argument, but on the whole I think that the allegations as to causing the plaintiff's house to be searched and rummaged for the said goods, breaking the door and pantry, &c., though sounding in trespass, may, by reason of the words upon such charge, which occur a few lines before, be considered as importing that the acts alleged to have been done, were done in pursuance of the warrant previously stated to have issued at the \*instance of the defendant; and, then, the whole cause of action set forth in the first count is in case. The count alleges "that [\*459] the defendant went before a justice, and, without any reasonable or probable cause, charged that he suspected that goods feloniously stolen were concealed in the plaintiff's house, and, upon such charge, caused the justice to grant a warrant." Now it cannot be denied that, so far, the count is properly framed in Then, after setting out the warrant, it proceeds in continuation of the same sentence thus:--" And the defendant maliciously, &c., caused the plaintiff's dwelling-house to be searched and rummaged for the said goods by the defendant" (probably a mistake for constable) "and the said other persons." The words "maliciously and without probable cause," are improperly introduced here, and may be rejected. The words said goods clearly import the goods mentioned in the warrant, and I consider the words upon such charge to apply to this latter part of the sentence, which is to be read as if they were repeated in it. If the searching and rummaging for the said goods, breaking the door and pantry, &c., were acts bona fide done in the course of executing the warrant, they clearly are not the subject of an action of trespass. Proof that the parties did those acts in execution of the warrant, bona fide believing them necessary for that purpose, would be an answer to such an action. Those acts, however, may be properly laid as matter of aggravation in an action on the case for maliciously and without probable cause procuring the warrant to be granted. The same observation applies to the arrest. The count alleges that the defendant caused the warrant to be indorsed by a borough magistrate, so as to authorize its execution within the borough of Leicester, and caused the plaintiff to be \*arrested there. Putting all the allegations together, I consider the words "upon such charge," as applying not only to the defendant's causing a justice to grant a warrant, but to his causing the plaintiff's dwelling-house to be searched and rummaged for the said goods, and also to what followed. The count gives the history of the proceedings which took place upon the defendant's application for a warrant, and I think it no overstrained construction to say, that every thing stated after the words "upon such charge," may be taken to have been done in pursuance of the charge. It is also material that the plaintiff, by the general conclusion of the count, claims damages not merely in respect of the improper violence committed in his house, but of the injury done to his reputation. This is the opinion which I have formed upon hearing the argument, but I give it with diffidence, after the doubts expressed by my brother Littledale. It is perfectly clear that a misjoinder may be taken advantage of, either on error or in arrest of judgment, and, a fortiori, on general demurrer. I do not agree to the general position stated in argument, that wherever there is a substantive trespass, and also a consequential injury arising from it, the party may waive the trespuss. and bring case. If that doctrine be pushed to the extent contended for, it will be impossible to keep up a distinct boundary, which it is very important to preserve, between those forms of action.

PATTESON, J. I have had some doubts on this point, but on the whole I think there is no misjoinder. If there were, there is no question that it might be taken advantage of, either on error, in arrest of judgment, or on general de-\*461] murrer.(a) In Orton v. Butler, 5 B. & A. 652, all the \*counts were in tort, and one only was demurred to, the ground being that there was a novel attempt in it, to declare, substantially, for money had and received, in a count in tort. But if that count had been framed in assumpsit, the others being in tort, the misjoinder must have been taken advantage of by demurrer to the declaration generally. The whole case here turns on the point of misjoinder; and in considering that question, we must look to the whole count, and not to particular expressions contained in it, to see what really is charged. The charge substantially is, that the defendant maliciously, &c. procured a warrant, and under and in virtue of that warrant (though that is not expressly alleged) caused the house to be entered and searched. I do not mean to say that the count would not have been bad on special demurrer, for not alleging that the acts were done in virtue of the warrant; but I think, on general demurrer, the whole statement must be considered as referable to the proceedings on the warrant, and all the acts done must be taken to have been done under and by virtue of that warrant; and if so, they are a consequence of the false charge, and properly the subject of an action on the case. It has been said that, even if the declaration had averred that the defendant and others committed the acts in the house in obedience to the warrant, they would not have been justified in demo-lishing the door and the pantry. I apprehend, however, they would, provided such acts of demolition were necessary in order to search for the goods alleged to have been stolen; and here it does not appear that they were unnecessary. Judgment for the plaintiff.

\*402] \*BURTON v. HAWORTH and KING. Jan. 24.

The Court will interfere to discharge a party from arrest, or set aside the bail-bond, where it appears plainly, on the face of the matter, that the arrest was groundless, but not where it would become necessary to try the merits of the case on detailed and contradictory statements in several affidavits.

It is not sufficient ground for such inference, that the defendant, denying that he is indebted, and advancing a number of facts in support of such denial, alleges his belief that the action is brought for the purpose of obtaining from him by intimidation, a release of certain covenants; and states, that the plaintiff, or his attorney in his presence, on being refused such release, a week before the arrest, declared that some strong

measure must be adopted against the defendant.

THE plaintiff held the defendants to bail on an affidavit alleging them to be indebted to him in the sum of 6700l., for money paid by him to their use and at their request, and for money lent to them by him. Rules were obtained in the last and present term, calling upon him to shew cause in the case of Haworth, why the bail-bond should not be delivered up to be cancelled, on common bail being filed; and in that of King, why an exoneretur should not be entered on the bail-piece.

The plaintiff, in February 1813, was discharged under the then existing insolvent debtors' act, and the defendants were two of his assignees; none of the others survive. Before and at the time of his insolvency he was possessed of estates in Canada, which, in consequence of the particular tenure under which they were held, were considered not to pass with the rest of his property under the act. He had, also before his insolvency, commenced actions, and obtained judgments, in the Canadian courts, for injuries to those estates; and at the time

of his discharge in 1813, appeals against the judgments were depending before the Privy Council, which were followed by a long course of dispute and litigation in the subsequent years.

It was stated on behalf of the defendants that, in pursuance of the opinion of counsel, and in order to facilitate the sale of the Canadian estates for the benefit \*of the creditors, the assignees, in 1816, executed a deed of disclaimer of their interest in those estates, the insolvent at the same time executing a declaration of trust, by which it was provided that he should stand possessed of the moneys arising from the said sale for the benefit of his creditors, and that until the sale, his agent in Canada should receive the rents and profits, which, after certain deductions made, were to be applied for the benefit of the

said creditors. No sale ever yet took place.

The 6700*l*., for which the defendants were held to bail, was money advanced by the plaintiff and his agent out of these rents and profits, for the expenses of litigation arising from the above-mentioned judgments, after the insolvency of the plaintiff. He contended that, notwithstanding the declaration of trust, the assignees were answerable to him for these advances; inasmuch as, having taken to the judgments for the benefit of the creditors, they were bound to adopt them with their incumbrances, which he was not legally obliged to provide for after his insolvency, and from the produce of estate not operated upon by the insolvent act: and he maintained that so long as the assignees did not repay him the expenses incurred in respect of these judgments, he had a right to take the proceeds, and reimburse himself. The defendants, on the other hand, insisted, that the said sum of 6700*l*. had been received by the plaintiff as trustee for them and his other creditors, pursuant to the declaration of trust; and consequently that the above application of it could not form any ground for a claim of debt against the defendants.

It was further stated on behalf of King, that at a \*meeting of the creditors in November, 1832, about a week before the defendants were held to bail, the plaintiff was present with his attorney, and proposed to abandon the claim which he alleged he had upon the proceeds of the judgments, if the assignees would release him from the covenants in the trust-deed, which being refused, the plaintiff's attorney intimated that some strong measure would be adopted against the two assignees. The defendant, King, in his affidavit, stated his belief that the action was brought with a view of inducing the assignees, by intimidation, to give such release. The plaintiff, in answer, denied having made

the above proposal.

Both the defendants denied being indebted to the plaintiff. King alleged, on the contrary, that a balance of 200l. was due to him; and Haworth, that the plaintiff's debt to him at the time of the insolvency was 7000l., none of which had been recovered. The affidavits in which the case on behalf of each party in the two suits was stated, went into much detail, and were of considerable

length.

Sir James Scarlett, F. Pollock, and Hutchinson, now shewed cause. This is not a case for the summary interference of the Court. The estates in Canada did not pass by the assignment of 1813, and the defendants had disclaimed any interest in them: the insolvent acts in force when the plaintiff was discharged, (52 G. 3, c. 165, 53 G. 3, c. 6,) did not vest his after-acquired property in the assignees: and, consequently, there is nothing unreasonable in supposing that they may have become indebted to the plaintiff after his insolvency, in the \*manner alleged. The merits of the two causes must be tried in the [\*465 ordinary way. In Chambers v. Bernasconi, 6 Bingh. 498, which will be relied upon on the other side, an uncertificated bankrupt held his assignees to bail; he could have no property as against them if the commission was valid, and Tindal, C. J., held it to be unreasonable and injurious that the validity of a commission should be thus brought in question by the single affidavit of the bankrupt. That case differs widely from the present.

The Solicitor-General for Haworth, and Holt and Follett, for King, contra. This is the case of an insolvent who is a cestui que trust, attempting to hold his trustees (the assignees) to bail for money which they have received from the proceeds of the estate and laid out for its benefit, one of the defendants being at this time creditor of the plaintiff for a larger sum that that which he claims. [TAUNTON, J. The assignees were not trustees of the future estate of the insolvent, though they were of that which had been vested in the clerk of the peace under statutes. LITTLEDALE, J. By the acts of 52 & 53 G. 3, the future estate was liable to the insolvent's creditors; it ought, under those acts, to have gone into his hands for the purpose of paying them, not into the hands of the assignees.] The right formerly vested in the insolvent, of carrying the judgments into effect, came to the defendants by the assignment; the produce, if recovered, would not reckon as part of the future, but present, estate. The title of the assignees appears from the affidavits. [PATTESON, J. It is not admitted. The whole is matter for a jury.] This is an arrest for the \*purpose of extorting a release of covenants in a trust-deed; and where process is abused the Court will interfere. In Chambers v. Bernasconi, 6 Bingh. 498, Tindal, C. J., fully recognizes the power of the Courts to control the right of holding to bail; and they will exercise that power where it appears even on the plaintiff's own statement, that he, and not the defendant, is the debtor, Nizetich r. Bonacich, 5 B. & A. 904. Here it is evident from the affidavits, without any long deduction, that the plaintiff had no claim against the defendants for money advanced by him, as sworn in his affidavit to hold to bail, and that he remained debtor to the defendants. At all events this is a case in which process has been manifestly used by the plaintiff for an oppressive purpose, and to obtain an undue advantage.

LITTLEDALE, J. This case comes ultimately to depend on the question, whether or not the process of the Court has been abused in a manner which calls for summary interference. I think that has not been sufficiently shewn. A belief is, indeed, stated, that the action is brought for the purpose of intimidation; but the facts only come to this, that on the assignees refusing to release the covenants in the deed of trust, the plaintiff or his attorney said that some strong measure would be adopted against them. Perhaps they may have said so; and they might think themselves authorized to adopt such measures. That does not shew that the process of the Court has been abused. As to the allegation that the defendants were not indebted to the plaintiffs, but the contrary, that fact ought to appear palpably, on the \*very face of the matter, and not by a long detail collected from several affidavits. If there had been a letter of the plaintiff himself acknowledging the fact, as in Nizetich v. Bonacich, 5 B. & A. 904, the case would have been different. The rules must be

discharged.

TAUNTON, J. The arrest may have proceeded on improper motives, but we cannot try the merits of a cause on affidavits. This is not one of those clear cases, of which Chambers v. Bernasconi, 6 Bing. 498, is an instance, where the Court, unless they shut their eyes, cannot but see that the process has been improperly used, and where, therefore, they are justified in interfering summarily. In Nizetick v. Bonacich, 5 B. & A. 904, there was a letter of the plaintiff, acknowledging in one line that the defendant was his creditor. The case lay in a

nut-shell. Here it is very different.

Patteson, J. In exercising this power of summary interference, the Court must keep clear of cases where the merits are to be inquired into on complicated affidavits. It is suggested here that the action was brought because the defendants had refused to release certain covenants. Supposing it to be so, I do not know that, if there were a real demand, the Court would set aside proceedings because they originated in a malicious motive. In an action for a malicious arrest, under similar circumstances, the existence of such a motive would clearly not be sufficient.

Rule discharged.

#### \*LYALL and Another v. LAMB. Jan. 24.

An undertaking to indemnify an execution creditor, if he will allow the sheriff to delay selling, cannot be made a rule of court, even by consent, where the person who so undertakes is neither party nor attorney in the suit.

THE defendant's goods having been taken in execution, another party, in consideration that the plaintiffs would allow the sheriff to continue in possession fourteen days, undertook, if the defendant did not pay the debt and costs within that time, and the plaintiffs were obliged to sell, and the goods proved insufficient, to pay the plaintiffs whatever sum should be wanting on such sale: and he consented that such undertaking should be made a rule of Court.

Heaton now moved that the undertaking should be made a rule of Court, but admitted that it was doubtful whether such a rule could be granted, the person who entered into this agreement being neither attorney nor party in the cause

depending.

LITTLEDALE, J. It is not within the practice of the Court. We have no jurisdiction to make the rule. If the person undertaking had been the attorney it would have been different.

TAUNTON, J. concurred.

PATTESON, J. If such a rule could be made, to bind persons who are not parties to a cause in Court, there would have been no necessity for the statute 9 & 10 W. 3, c. 15, which enables merchants and traders to make their submismission to arbitration a rule of court without action brought.

Rule refused.

#### \*WARDLE v. NICHOLSON. Jan. 25.

**[\*469** 

An attorney's bill for business done in the county court, is within the statute 2 G. 2, c. 23, s. 23, and must be delivered to the client one month before action brought.

A charge for attesting a replevin bond, is a charge relating to a suit in that court.

An attorney not having delivered any bill to his client before action brought, but particulars of demand, containing some taxable items, after action brought, cannot recover for an item not taxable if such item be in respect of business done, or money paid to his client's use, in his character of attorney.

Action upon an attorney's bill. At the trial before Alderson, J. at the Spring assizes for Westmoreland, 1832, the following appeared to be the facts of the case. The goods of one Barrow having been distrained for rent, the plaintiff had prepared an assignment of his personal estates and effects to the defendant, in trust for the benefit of his creditors, and by the plaintiff's advice the defendant replevied. The goods remained in the possession of the defendant three weeks; they were advertised for sale, and the plaintiff paid for the printing and posting of the handbills. The plaintiff did not deliver any signed bill to the defendant before action brought. After action hrought, he delivered a bill of particulars, which contained, after various charges for preparing the assignment and attesting the execution of it, and one for printing and posting handbills, the following items:—

	£	s.	d.
"The landlord having distrained illegally, attending you and Mr.			
Graham when it was agreed upon to replevy the goods, and at-		•	
tending for notice of distress	0	6	8
Attending Mr. Heeles, (the under sheriff,) and giving instructions	0	3	4
Attending and attesting bond	0	6	8
Paid Mr. Heeles's charges	2	2	0
Attending to deliver discharge to the officer in possession -	0	3	4

409] 4 BARNEWALL & ADOLPHUS.							209			
Paid his fees -	-	-	-	-	-	-	0	7	6	
*Instructions for	notice o	of sale	-	-	-	-	0	3	4	
*470] *Instructions for Drawing a fair c	opy adve	ertisemei	at	-	-	-	0	5	0	
Attending printer there	with, and	d afterwa	ards to	correct	press	-	0	3	4	
Paid for printing and po	osting	-	-	-	-	-	2	0	0	
Attending and advising	you seve	eral time	s as t	o Mr. Ba	rrow's b	eing				
made a bankrupt	· •	-	-	-	-	-	0	13	4	
Attending at the house,	at your	request,	when	a messe	nger ent	ered				

It was contended for the defendant, that the charge for attesting the bond conditioned to prosecute the suit in replevin, was a charge for business done at law, and therefore was a taxable item; that, one item being taxable, they all were so; and, consequently, that a bill ought to have been delivered, and, for want of such delivery, the plaintiff was not entitled to recover. The learned Judge was of opinion that there was no taxable item in the bill, and directed the jury to find for the plaintiff, if they thought he gave credit to the defendant, and not to Barrow. The jury found for the plaintiff for the amount of the bill,

131. 8s. A rule nisi having been obtained for entering a nonsuit,

Courtency now shewed cause. Attesting the execution of the replevin bond was not business done in any court of law. It was a step preliminary to a suit. In Barton v. Chatterton, 3 B. & A. 486, a charge for preparing an affidavit of the petitioning creditor's debt, and bond to the Chancellor, in order to obtain a commission of bankruptcy, was held not to be a taxable item. Supposing the item in question to be taxable, the county court is \*not a court of record, and the statute 2 G. 2, c. 23, s. 23, applies only to bills of costs for business done in courts of record. It enacts, "that no attorney or solicitor of any of the courts aforesaid shall commence any suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month after he shall have delivered a bill." By reference to section 1, the courts aforesaid are the King's Bench, Common Pleas, Exchequer, the courts of the Duchy of Lancaster, of Great Secsions in Wales, of the counties palatine, or any other court of record in England, wherein attorneys have been accustomably admitted and SWOTH. [LITTLEDALE, J. In Reynal v. Smith, 2 B. & Ad. 469, the clause of 3 Jac. 1, c. 7, requiring attorneys to deliver a bill to their clients before charging them with any of the "fees or charges," in that act mentioned, was held to be confined to business done in the king's courts of record at Westminster.] Supposing that some items are taxable, and others not, the plaintiff, who has not delivered any bill before action brought, but merely particulars of demand after action brought, is entitled to recover in respect of the items not taxable. The distinction established by the cases, is this: where there has been a defective delivery of a bill containing some taxable items, and others not, the plaintiff cannot recover; but where there has been no delivery of a bill, the plaintiff may recover in respect of items which are not taxable. Lloyd v. Mead, (cited in Hill v. Humphreys, 2 B. & P. 344,) Miller v. Towers, Peake's N. P. C. 102, Hill v. Humphreys, 2 Bos. & P. 343. In Benton v. Garcia, 3 Esq. N. P. C. 149, (see 11 East, 286, note (a)) the \*bill was in part taxable, and all the items were for business done by the plaintiff as an attorney. Winter v. Payne, 6 T. R. 645, will be relied on by the other side, but that case was decided before Hill v. Humphreys.

Blukburne contra. As to the point last made, the true distinction is that established by Mowbray v. Fleming, 11 East, 285, that where an attorney has delivered no bill to his client before action brought, but a bill of particulars only after action brought, he is entitled to recover items of charge for money paid to his client's use, having no reference to his business of an attorney, although other items in the bill of particulars may be taxable. In Smith v. Tay-

Vol XXIV .-- 14

1007

under the warrant of seizure.

lor, 7 Bingh. 259, no bill had been delivered by the attorney before action brought. The principal question there was, whether certain items for attendance and advice in a suit, were taxable or not; but the plaintiff had advanced 31. to the defendant, to discharge costs in that suit, and it was contended that at all events he was entitled to recover the 31. There was a difference of opinion on the bench whether the former items were taxable or not, but all the Court thought that, if they were, the statute applied, and that the 3L could not be separated from the rest of the demand. Secondly, it is not necessary that the business in respect of which the charges are made should have been done in any court of record. The statute 2 G. 2, c. 23, s. 23, enacts that no attorney, &c. shall commence any suit for the recovery of fees, charges, or disbursements at law or in equity until, &c. Now, business done in the county court is clearly business at law. It has been held that \*an attorney's bill for business done at the quarter sessions, is within the statute, Ex parte Williams, 4 [\*473] T. R. 496, Clarke v. Donovan, 5 T. R. 694. In Balme v. Paver, Jacob's Rep. 307, Lord Elden said, there is nothing that ought be guarded with so much jealousy as the right of the suitors to have their bills of cost taxed. Thirdly, there were taxable items in this bill. The charge for attesting the replevin bond was, at all events, one. The replevin bond must have been executed after plaint levied, and therefore after a suit in the county court had commenced. A charge for preparing a warrant of attorney has been held to be taxable, Sandom v. Bourne, 4 Campb. 68, and that, although no warrant of attorney was ever executed, Weld v. Crawford, 2 Stark. N. P. C. 538. So a charge for a dedimus potestatem, Ex parte Prichett, 1 N. R. 266. Charges for drawing and engrossing an affidavit of debt to hold to bail, and attending to get the party sworn, were held to be the charges for business done in court, Winter v. Payne, 6 T. R. 645. So, for attending the defendants' bail, and examining them as to their competency to justify, Watt v. Collins, 1 Ry. & Moody, 284. In Ex parte Flint, 1 B. & C. 254, an attorney who entered a plaint and sued out process in the county court while in prison, was held to be within the meaning of the 12 G. 2, c. 13, s. 9, which enacts, that no attorney, who shall be in gaol, shall sue out any writ or process, or commence or prosecute any action or suit, in any courts of law or equity.

\*LITTLEDALE, J. The rule for entering a nonsuit must be made absolute. The 2 G. 2, c. 23, s. 1, enacts, that no person shall be permitted to act as an attorney in the Court of King's Bench, Common Pleas, or Exchequer, or duchy of Lancaster, or in any of his Majesty's courts of great sessions in Wales, or in any of the courts of the counties palatine of Chester, Lancaster, and Durham, or in any other court of record in England wherein attorneys have been accustomably admitted and sworn, unless he shall have been admitted and sworn as therein mentioned. That clause is confined to the courts therein mentioned; but section 23, enacts, "that no attorney of any of the courts aforesaid shall commence any action or suit for the recovery of any feet, charges, or disbursements at law or in equity, until the expiration of one month or more after the delivery of a bill, &c." That section is not confined to business done in the courts mentioned in the first section; but extends to all fees, charges, &c., either at law or in equity. It has been held to apply to proceedings at quarter sessions. One question here is, whether fees or business done in the county court are to be considered fees, charges, &c., "at law," recoverable by an "attorney of any of the courts aforesaid" within the statute? My brother Patteson has referred to the 12 G. 2, c. 13, s. 7, which subjects to a penalty any person who shall commence or defend any action, &c., in the court called the county court, who is not legally admitted an attorney according to the 2 G. 2, c. 23, s. 1. Then, coupling the two enactments together, an attorney who practises in the county court must be an attorney of one of the courts referred to in the 2 G. 2, c. 23, s. 23; and an attorney seeking to recover

\*175] \*for business done in that court must deliver his bill one month before he commences an action.

Then, was any business done in the county court so as to make the bill taxable? The first charge is:-"The landlord having distrained illegally, attending you, when it was agreed upon to replevy, and attending for notice of distress." Then "attending Mr. Heeles, and giving instructions," that probably was to enter a plaint. Then, "attending and attesting bond." Then follows a charge, "attending at the delivery of the goods." Now, according to the statute of Marlbridge (52 II. 3, c. 21,) before the goods are delivered a plaint must be entered. Here, then, the replevin suit must have been commenced, for otherwise the goods would not have been delivered; and this being so, I have no doubt these are charges for business done at law, requiring the delivery of a bill. But, then it is contended that, as no bill was delivered in this case, the plaintiff is entitled to recover in respect of those charges contained in the particulars of demand, which are not the subject of taxation. The distinction upon that subject I take to be this: if it appears by the particulars of demand that all the items are in respect of business done or money advanced by the plaintiff in his character of attorney, all would have been taxable, and the whole bill should have been delivered; but if there be any item for business done, or money advanced by the plaintiff not in that character; (as, if the plaintiff were a banker as well as an attorney, and had advanced money to the defendant in his former character only;) that, not being a taxable item, may be sued for though no bill has been If, therefore, I could have seen here any charge wholly unconnected \*476] with the plaintiff's character of attorney, I \*should have thought him entitled to recover in respect of that, but not of other charges. It has ben said, that the charge for hand-bills is not connected with his professional character; but, looking to the other parts of the bill, the printing and posting of hand-bills appears manifestly to have been with a view to the sale of the goods for the benefit of the creditors; and, therefore, the money paid for such printing and posting was paid by the plaintiff in his character of attorney. appears to me, that all the charges may fairly be referred to the plantiff's employment as attorney, and, consequently, that, not having delivered a bill before action brought, he cannot recover.

TAUNTON, J. I am of the same opinion. I entertained a doubt, at one time, whether the items contained in this bill of particulars were charges or disbursements in any court of law or equity within the meaning of the act. I did not then bear in mind the order of proceeding by which a party distrained upon recovers the possession of his goods in a replevin suit. The first step is to levy the plaint, and then the sheriff takes the replevin bond, which is conditioned for the plaintiff to appear at the next county court, and prosecute his suit. The language there used, strongly implies that at the time when such bond is given the suit is in existence; and if a plaint was levied in the county court, that was a proceeding at law, and attesting the bond was a matter connected with, and relating to, a suit previously commenced. I cannot distinguish the present case from those where the charge for filling up a bail bond, or engrossing an affidavit to hold to bail, was held to be a taxable item. I therefore think the charge for \*477] attesting the replevin bond was a proceeding \*at law within the meaning of the 2 G. 2, c. 23, s. 23. It has been said, that that statute is confined to the courts of record mentioned in the first section; but it has been decided that a bill for business done in the courts of quarter sessions, or in the insolvent Reynal v. Smith, 2 B. & Ad. 469, was determined on the court, is within it. particular language of the 3 Jac. 1, c. 7, which applies only to business done in the courts at Westminster. In Burton v. Chatterton, 3 B. & A. 486, the affidavit was never sworn; no docket was struck; no proceeding at law or in equity took place. Then, with respect to another point, Mowbray v. Fleming, 11 East, 285, shews that where an attorney has not delivered any bill to his

client before action brought, he is entitled to recover for money paid by him for his client's use, where such payment has no reference whatever to his business of an attorney. Here all the charges have reference to the plaintiff's business

of an attorney.

PATTESON, J. I am of the same opinion. There are two questions; first, whether the charge for attesting the replevin bond related to proceedings commenced in the county court. Looking at the course of proceeding in replevin, I think it did. A replevin may be by a writ at common law, or by plaint, by the statute of Marlbridge, which enacts that if the beasts of any person are taken and unjustly detained, the sheriff, after complaint made to him, may deliver them without the hindrance or refusal of the person who shall have taken them. Then the statute Westminster 2, (13 Ed. 1, ) c. 2, requires the sheriff, before he makes deliverance of the distress, to take from the plaintiff pledges not only to prosecute the suit, but also for the return of the beasts, if return be awarded. \*And by the statute 1 & 2 Ph. & M. c. 12, s. 3, the sheriff is to appoint four deputies with authority to make replevins and deliverance of distresses. The 11 G. 2, c. 19, s. 23, directs how replevin bonds shall be taken, but does not alter the course of the proceeding in a replevin suit. By the statute of Marlbridge, therefore, the sheriff was to deliver the goods, after complaint made to him; but, before such delivery, he was required by the statute Westminster, 2, to take pledges from the plaintiff, and by the statute 11 G. 2, o. 19, s. 23, a bond from the plaintiff and two sureties, in their own names, to prosecute the suit with effect. It is clear then, that, before the bond was given, there must have been a complaint made to the sheriff; and, if so, the charge for attesting the bond was an item relating to a step in the cause in the county court. Then, does the statute 2G. 2, c. 23, s. 23, apply to proceedings in that court? In Reynal v. Smith, 2 B. & Ad. 469, the decision turned on the peculiar language, of 3 Jac. 1, c. 7, s. 1; but it seems to me, that the 2 G. 2, c. 23, is not limited to practitioners doing business in courts of record. The words are general, "no attorney or solicitor of the courts aforesaid shall commence any action for fees, charges, &c. at law or in equity." If a man might practice in a county court without being an attorney of a court of record, there might be some ground for the limitation; but the 12 G. 2, c. 13, s. 7, shews that he cannot. On the other point, I also think that, to recover in respect of the items relied on as not taxable, the plaintiff ought to have shown that they were unconnected with his character of an attorney. The rule must therefore be absolute. Rule absolute for entering a nonsuit.

### \*LAMEY v. BISHOP.

F\*479

Declaration stated, that in consideration that the plaintiff would sell goods to the defendant for 600l. to be paid for by approved bills, falling due before the 15th of February 1832, the defendant undertook to pay plaintiff said sum, by approved bills falling due before the said, &c. At the trial the plaintiff proved a written contract corresponding with that set out in the declaration, except that the payment was to be in approved bills, falling due by the 15th of February: Held, that although the declaration did not profess to set forth any contract in writing, this variance was amendable by the Judge at Nisi Prius, under the statute 9 G. 4, c. 15, s. 1.

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff would sell the defendant certain stock of the plaintiff, for 600l., to be paid for by approved bills falling due before the 15th of February 1832; he, defendant, undertook to pay the plaintiff the said sum by approved bills falling due before that day.

At the trial before Denman, C. J. at the sittings after last term, the plaintiff gave in evidence a memorandum in writing signed by the defendant, correspond-

ing with the contract set out in the declaration, except that it stated that the payment was to be by approved bills falling due "by" (and not before) the 15th of February. It was objected, that this was a variance. The Lord Chief Justice was of opinion, that it was a variance which he had power to amend by the statute 9 G. 4, c. 15, and directed the declaration to be amended, by substituting the word by for before. A verdict was found for the plaintiff for 104l. damages, but leave was given to move to enter a nonsuit if the Court should think the amendment not warranted.

Biggs Andrews now moved accordingly. This is not a case within 9 G. 4, c. 15, s. 1. That clause enacts, "that it shall be lawful for any judge sitting at Nisi Prius, if he shall see fit so to do, to cause the record on which any trial may be pending before him, when any variance shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof upon the record, to be forthwith amended \*in such particular." Here the variance was not of this kind, for there was no recital or setting forth upon the record of any matter in writing or print. Ryder v. Malbon, 3 Car. & P. 595, the avowries did not profess to set out any instrument in writing: and a lease was given in evidence to show that the terms of the holding were different from those alleged on the record: and Park, J. would not permit the avowries to be amended, saying, that, in his opinion, the statute only applied to cases "where some particular written instrument is professed to be set out or recited in the pleading." [TAUNTON, J. If the plaintiff had declared upon a contract in writing the act would apply. Then is it not absurd to say that it does not apply because the plaintiff has omitted the words "by agreement in writing," which, in pleading, are unnecessary?] The act in terms applies only to cases where a matter in writing is set forth or recited upon the record. Cur. adv. vult.

DENMAN, C. J. in the course of the term said: In Masterman v. Judson, 8 Bingh. 224, which was an action for not obeying a subpœna, the Court of Common Pleas after time taken to consider, held, that a Judge at Nisi Prius, under the statute, might amend the declaration by inserting, instead of "a copy of the writ of subpœna," "a copy of so much of the writ of subpœna as related to the defendant." We think that case decides the present, and consequently there must be no rule. Rule refused.

#### \*4817 \*The KING v. MATTHIAS ATTWOOD, Esquire. Jan. 26.

On motion for a mandamus to the master and wardens of an incorporated mercantile company of the city of London, to call a meeting of the company on the next annual day of election, for the purpose of electing a master and wardens according to the charters, it being suggested as the ground of motion, that the said officers were at present improperly elected by a part only of the company, instead of the whole body; the

Court refused the writ.

On motion afterwards for a quo warranto against the master elected in the manner complained of, it appeared that the practice, as far as it could be traced, from the year 1488, had been for the master, wardens, and a body called the court of assistants (which had varied in number, from twenty-four to forty,) to elect the master; and that he had usually been elected out of the court of assistants, and not out of the general The assistants, besides belonging to the court, had the same qualifications for being elected as the other members of the company. In some instances, but it was not stated how many or when, persons had been elected who were not of the court. The company had existed from time immemorial; by a charter of Rich. 2, they were empowered to elect a master de seipsis when and as they should please; and by a charter of 18 Hen. 7, (1502) all their liberties, franchises, and customs, were confirmed:

Held, that if one entire by-law were to be presumed, for the master, wardens, &c. to elect, and to elect out of a restricted body, the latter part of such by-law would be bad, and vitiate the whole, but that no ground was laid for presuming such by-law, inasmuch as the election from the particular body might have been made in every instance by choice, and not under any rule; and further, it appeared that there were exceptions, although these were not specifically stated; and that even the practice of electing by a limited body was not necessarily to be presumed part of a by-law, as it might have been a custom, incorporated by reference in the charter of Hen. 7.

Quære, Whether a quo warranto information lies at the instance of a private relator, against a person claiming to hold an office in one of the incorporated mercantile com-

panies of the city of London?

A RULE was obtained in Trinity term 1832, calling upon the master and wardens of the Merchant Tailors' Company, to shew cause why a mandamus should not issue, commanding them to call a meeting or assembly of the company on the 24th of June next ensuing, for the purpose of electing the master and wardens for the subsequent year according to the charters. The application was grounded on affidavits of certain liverymen of the company, who stated that according to the charters, (as they were advised and believed) the whole of the members of the company had the right of electing one master and four wardens thereof from among themselves as often as they should please or as should be needful, in manner as they should think best; but that nevertheless the whole government of the company was exercised by a master, wardens, and court of assistants, \*not elected by the fraternity, but usurping those offices: that the master and wardens were not elected by the general body, but by the said master, wardens, and assistants: and that they, when requested by the present applicants and other liverymen, had refused to point out to them, or allow them to inspect, the by law, if any, by which the present mode of election was established; or to call a meeting of the fraternity for the purpose of inquiring into the existence of such regulation, and considering the propriety of repealing it if extant. Affidavits in answer were put in, one of which was by the clerk of the company, stating that he had examined the records of the election of master and wardens of the company which are extant from 1488 to 1493, from 1562 to 1663, and from 1672 to the present time; and that during all those periods the master and wardens had been elected by the master, wardens, and court of assistants.(a) In the same term (Trinity, 1832,)

Sir James Scarlett, Campbell, Coleridge, and Follett, shewed cause. application is well founded, the last elections are void, and the proper remedy is But the Court will not decide, upon what is now alleged, by quo warranto. that a practice of 340 years' standing is invalid: they will rather presume that it is founded on a by-law no longer extant. In Rex v. The Mayor and Citizens of Chester, 1 M. & S. 101, a case resembling this, the Court refused a mandamus, observing that another remedy was open: and there were there two instances of elections varying from the long usage relied upon in opposition to An application like this was made in the \*case of the Pattern Makers' Company, previously to the motion for a quo warranto to the

master,(b) and the Court immediately discharged the rule.

Denman, Attorney-General, F. Pollock, and Hoggins, contrà. A by-law may be presumed, but there must be facts to raise that presumption. The matters here stated have, upon the whole, the contrary effect. It is true there would have been no difficulty in applying for a quo warranto; but as the parties, in consequence of the delay in furnishing information, could not proceed till the offices were near expiring, it was more convenient to ask the Court for a mandamus, than put the officer to defend rights which had so short a time to exist. In the Patten Makers' case, the objection to a mandamus was, that the application was made many months before-hand, and it was possible that the parties

<sup>(</sup>a) See Rex v. The Merchant Tailors' Company, 2 B. & Ad. 115. (b) As to the latter motion, see Rex v. Bumstead, 2 B. & Ad. 699.

might proceed to election in a regular manner. Here they have been called

upon and refuse to do so, and the time is at hand.

Lord TENTERDEN, C. J. If the master and wardens have been improperly elected, the proper and reasonable course is an application for a quo warranto. The Court refused a mandamus in Rex v. The Mayor of Chester, 1 M. & S. 101, and in the Patten Makers' case; and there is no instance mentioned in which the writ has been granted under such circumstances. We think, therefore, we ought to discharge the rule, leaving it to the parties, if they think proper, to \*484] apply for a quo warranto. \*We had doubts when we granted the rule, and perhaps ought not to have done so.

PARKE, J.(a) There are two objections to this rule, assuming the application to be well founded; first, we do not know that the parties will not proceed regularly on the day of election; and, secondly, the mandamus, if granted, must be

addressed to persons who are not really officers.

TAUNTON, J., concurred. Rule discharged.

In the ensuing Michaelmas term a rule was obtained calling upon Mutthias Attwood, Esq., to shew cause why a quo warranto information should not be exhibited requiring him to shew by what authority he claimed to be master of the Merchant Tailors' Company. The grounds stated were, that he was not legally elected, agreeably to the charters; nor according to any legal by-law; nor according to any legal uniform usage; nor according to law. being shewn against the motion in this term (January 15th), the Court held that the grounds of the application were not sufficiently stated in the rule, but leave was given to amend; and the grounds, as stated in the amended rule,

1. That the said M. A. was not legally elected, agreeably to the existing charters of King Henry VII., and those therein recited, which direct that the whole fraternity shall elect a master from amongst themselves.

2. That he was not elected by the fraternity from \*amongst themselves. but by a portion or committee of the whole from themselves, who are

self-elected and fluctuating and uncertain in their number.

3. That this mode of electing a master is repugnant to and inconsistent with the directions of the said charters, and narrows the electors by an unreasonable restriction.

4. That the persons eligible are thereby narrowed.

5. That the said M. A. was elected master according to a usage observed by the said company, that a portion of the whole fraternity, called the Court of Assistants, shall elect the master from themselves, which is inconsistent with the directions of the said charters.

6 and 7. That no by-law, or legal usage, authorizes the mode of election by

which the defendant was nominated master.

8. That the nomination of the defendant is inconsistent with the spirit and direction of the said charters, which intended the appointment to that office to vest in all the members of the company from out of themselves.

9. That the nomination is illegal and void, as made by a portion or committee of the whole fraternity, indefinite, and regulated by no by-law or uniform

10. That the said M. A. was not elected according to the charters, having been elected by a select body out of a select body; that, in point of fact, there is no by-law which directs and sanctions such a mode of election; and if there be such a by-law in fact, it is illegal.

The affidavits in support of the rule set forth the same matter as before, respecting the right of election under the charters: they then stated that the Court of Assistants consisted, at that time, of thirty-nine persons only, including the master and wardens; that the master and wardens were elected by the

<sup>(</sup>a) Littledale, J., was in the bail court. Patteson, J., at Guildhall.

Court from amongst \*themselves, without reference to the rest of the fraternity;(a) that their number was uncertain and varying; that the other members of the company were not permitted to see the accounts, records, and ordinances of the said company; that the oath administered to a liveryman on his admission required that he should not (being in London, and in good health) absent himself from the feast holden yearly about Midsummer, because he would not bear the office, room, and charge of a master or warden; that the master and wardens levied fines upon the freemen on admission to their livery, and increased them at their pleasure; that the said M. A. was elected out of the Court of Assistants; that the liverymen are never called together for any purpose connected with the election of the master and officers, or the administration of, or examination into, the funds and affairs of the company; and that certain freemen and liverymen had \*applied to the master and wardens [\*487 refused.

In opposition to the rule, Mr. De Mole, the clerk of the company, stated as before, that he had examined the records of the company during the periods mentioned in his former affidavit, as to the election of master, and that it nowhere appeared in those records that the fraternity at large, or any members, being merely freemen or liverymen, were ever summoned to, or took part in, or were present at, such election, but that the master, wardens, and courts of assistants were the only person who appeared to have attended and taken part in the same; that the Court of Assistants is a body elected from the freemen and liverymen, the members continuing freemen and liverymen after their election: and that the court appears to have existed from the earliest times; that during the periods aforesaid the master and wardens have always, at the time of their election, been freemen of the company, and members of the fraternity at large, but not always members of the Court of Assistants-it appearing by the said records that freemen have been elected to the office of master who were not at the time, and do not appear to have been, and were not (as deponent believed), at any time before such their election, members of that court; that the said M. A. was a freemen and liveryman at the time of his election, and was duly elected by the master, wardens, and assistants (being past-masters) of the said company, according to the custom which had existed, as the deponent believed, for 340 years and upwards; that the company was a corporation, both by prescription and by charters; and that by a charter of 18 H. 7, that king \*confirmed to the then master and wardens of the company all their then existing privileges and franchises, as their predecessors had been reasonably accustomed to use and enjoy the same; and deponent believed that the present custom, as to the election of master, had been lawfully established before, and existed at the time of granting that charter; that the present number of freemen, as nearly

"That he (R. H. Franks) has made considerable inquiry and investigation, and that during the said period of 340 years, the usage has been for the master, wardens, and assistants to elect the master from out of the Court of Assistants, and not out of the frater-

nity at large."

<sup>(</sup>a) In the affidavit of one of the applicants, Mr. R. H. Franks, the statement on this head was as follows:—"That in an affidavit of J. B. De Mole, clerk to the said master and wardens, sworn on the 3d of January, 1831, and filed in this Honourable Court on opposing a rule for a mandamus to inspect the records of the said company," (see 2 B. & Ad. 115.) "the said J. B. De Mole hath sworn, that from the date of the earliest documents in the possession of the said master and wardens, down to the present time, a period of 340 years and upwards, there appears to have existed in the said company a certain body, varying in number, but not falling below twenty-four, called assistants or councillors, the members of which appear to have been from the earliest period, and still are past-masters and others, elected from the liverymen or freemen of the said fraternity: and that the right of election of the said master and wardens appears from the earliest period in which any evidence can be procured on the subject, to have been for 340 years last past and upwards, and still is, in the said corporation of master and wardens and the said assistants so elected as above mentioned.

as the deponent could calculate, was from 1000 to 1100, of whom from 320 to 340 were also liverymen; that a large number of the freemen were very indigent, many of them receiving pensions or occasional relief from the company, and that a meeting of the whole, for the purpose of electing a master and wardeas (if they could be summoned) would produce much inconvenience, without corresponding benefit; that the charities and trusts under the management of the master and wardens, which were numerous and important, had been entrusted to them, as deponent believed, by persons acquainted with the constitution and mode of government of the company, as it had existed for the last three centuries and upwards, and, in some instances at least, upon the faith thereof; that the number of the Court of Assistants is limited to forty, and has not, during the last 340 years (as is believed), fallen below twenty-four; that when the number is below forty, wardens are elected from the body of the freemen, and are shortly afterwards chosen members of the court; but when the court is full, the wardens are elected from among its members, to avoid increasing the number; that the said M. A. was elected master by the master, wardens, and assistants of the company, being past-masters, according, as the deponent believed, to immemorial usage, and that on no occasion, during the last 340 years, as the deponent \*believed, had any other persons taken part in such elections. There were other affidavits on the same side; and a verified copy of the charter of 18 H. 7, (the governing charter of the company) was also put in, referring, by inspeximus, to previous charters of 1 Edw. 3, 14 Rich. 2, 9 H. 4,

18 H. 6, and 5 Edw. 4.

The charter of 1 Edward III., (exemplified under the great seal in 15 Edw. III.) after reciting that the Tailors and Linen Armourers of London had petitioned the king and his council in parliament for the confirmation of a certain annual guild immemorially held by them for the regulation of their trade, confirmed such guild accordingly, with authority to the men of the said mysteries, and their successors, to order and regulate the same, and to correct the faults of their servants of the same mysteries, by the view of the mayor of the said city for the time, &c., et per probiores et magis sufficientes homines de misteris illis; "and that no one should hold a counter or shop of the said mysteries within the liberty of the city aforesaid, unless he be of the freedom of that city; nor shall any one be admitted to the said freedom, unless it shall be testified by the honest and lawful men of the said mysteries that he is honest, faithful, and fit for the same." Richard II. confirmed the above charter, and the good customs and usages touching the said guild, not expressed in the said charter, and which they had used in the said city from time immemorial; and he further granted to the said tailors and linen armourers that they and their successors "habere, tenere et exercere possint gildam prædictam et fraternitatem dictorum scissorum, &c., aliarumque personarum quas ipsi recipere voluerint in fraternitatem prædictam, ac eligere, luibere et facere possint unum magistrum et quatuor custodes de scipsis \*quotiens eis placuerit vel opus fuerit pro gubernatione, custodia et regimine fraternitatis pradictà in perpetuum, prout melius sibi placuerit," &c. And that the said master and wardens "adventus et congregationes suos in locis civitatis prædictæ eis pertinentibus facere possint," and might there in an honest manner keep their feast on the festival of St. John the Baptist, "et ibidem facere ordinationes inter ipsos, prout sibi viderint magis necessarias et opportunas, pro meliori gubernatione fraternitatis prædictæ in perpetuum, prout ipsi ante hace à longo tempore facere consueverunt." By the charter of Henry IV., the former charters were confirmed to the then master and wardens by name, and it was further granted, on the petition of the said master and wardens, that they and their successors should be perpetui et capaces, and that the fraternity should be solida, perpetua et incorporata; that the fraternity should be called the Fraternity of Tailors and Linen Armourers of St. John the Baptist in the City of London; and that the said master and wardens should be called the Master and Wardens of the said Fraternity of tailors, &c.: and the said master and wardens and their successors, and also the fraternity aforesaid, were, by the said charter, incorporated for ever and made as one body; and they were to have a common seal, and to plead and be impleaded by the name of the Master and Wardens of the Fraternity of, &c. And the King further granted to the said master and wardens to have and hold to them and their successors for ever all the lands, tenements, annuities, and other possessions whatsoever, acquired by them or their predecessors, or by any others, before that time, by the name of the tailors and linen armourers, &c., or by the name of the fraternity, or of the master and wardens of the fraternity, of St. \*John the Baptist, &c., or taged by any other name whatsoever, to the use (ad opus) of the tailors and taged to take the taged taged to the tailors and taged to take taged to take the tailors and taged to take taged taged to take taged taged taged to take taged tag linen armourers, or of the fraternity: and the King ratified and confirmed the possession of the same to the said master and wardens and their successors, the statute of Mortmain, &c., or any forfeiture notwithstanding. Henry VI. confirmed the above charters to the then master and wardens by name, by the advice of the lords spiritual and temporal in parliament, and added other privileges which it is not material to state. Edward IV., on the petition of the then master and wardens, ratified and confirmed the above charters to them by name.

Henry VII., by the advice and consent of the lords spiritual and temporal in parliament holden in the first year of his reign, confirmed the above charters to the then muster and wardens by name, and their successors, "prout iidem magister et custodes eis uti debent et solent, ipsique et prædecessores sui libertatibus et franchesiis illis a tempore confectionis literarum prædictarum semper hactenus rationabiliter uti et gaudere consueverunt:" and by charter in the eighteenth year of his reign, that king confirmed the preceeding charters to the then master and wardens and their successors, by name, prout, &c. (as before:) and, being informed that the men of the said mysteries, or at least sanior pars eorundem, had from time whereof, &c., traded, and still did trade, in various parts of the world, to the honour of the realm, &c., and especially had used the buying and selling of woollen cloths throughout the realm and particularly in London, the king transferred and changed the said guild or fraternity into the name of the guild of Merchant Tailors of the fraternity of St. John the Baptist in the city of London; \*and the master and wardens, and their successors into the name of Master and wardens of the guild of, &c., and incorporated the said guild, and the said master and wardens and their successors, by the said new names respectively; and gave power to the said master and wardens to augment the said fraternity and receive persons into the same: "Et quod dicti magister et gardiani, &c., et successores sui, habeant, teneant, possideant et gaudeant eis et successoribus suis omnia et omnimoda terras, &c., et alia hereditamenta et alias possessiones quascunque ac bona et catalla quæcunque, necuon omnia et omnimoda libertates, franchesias, privilegia et consuctudines que et quas magister et custodes dictæ gildæ sive fraternitatis scissorum et linearum armaturarum armurarorium, &c., tempore confectionis præsentium haberunt, out ipsi vel prædecessores sui, sive homines prædictarum misterarum, ante hac tempora habucrunt, possederunt sive tenuerunt, seu eis, vel eorum alicui, aut dietz gildæ sive fraternitati, ante hæe tempora concessa seu indulta fuerunt." The master and wardens were further empowered to make and execute statutes and ordinances for the government, &c., of the said mysteries, and of the men of the said fraternity and mysteries, according to the exigency, as often as need should be, so that they were not contrary to the laws and customs of England, or in prejudice of the mayor of London. No one was to use the art or mystery of the Merchant Tailors, Ac. in the city, unless admitted thereto by the master and wardens. Other privileges were given, which it is unnecessary to state.

The Solicitor-General, Sir James Scarlett, Coleridge Scrit. and Folicit shewed cause in the present term. \*In the first place, this being an office in in a private company, is not one of those for which by the statute 9 Ann. [\*493 c. 20, an information in the nature of a quo warranto lies at the instance of a private relator. The master of the Merchant Tailor's Company does not, if im-

properly appointed, usurp any right of the crown. He is merely the head of a voluntary association, and his office relates only to the administering of charities belonging to that society, and to the regulating of the trade with which their It is no more the subject of a quo warranto than an office body is connected. in the College of Physicians, or in one of the inns of court. It does not concern the administration of justice, the protection of the peace, or the acquisition or exercise of any political right. It is true that members of this company admitted to their livery are entitled to vote for the city of London; but that is not a right communicated by the master in that capacity. Apprenticeship entitles to freedom, but the right is not communicated by the master to the apprentice nor does his situation relatively to the apprentice make him liable to a quo warranto. If, indeed, an information were moved for to oblige Mr. Attwood to shew why he claimed to act as a liveryman of London, the case would be different. Many chambers which now confer a vote for the city of London, are at the disposal of the societies of the Inner and Middle Temple; but could a quo warranto information be on that account exhibited against an officer, the treasurer for instance, of one of those societies, even supposing it were a body corporate? The title and preamble of the statute 9 Anne. c. 20, as well as the words of sect. 4, shew that the enactment in that section giving power to private persons to \*194] exhibit quo warranto informations for \*the usurping of effices, relates only to offices in cities, towns corporate, boroughs, "and places" of a like description: and this is confirmed by the language of 32 G. 3, c. 58, s. 1, which enables the defendant to any such information for the exercise of an office or franchise "in any city, borough, or town corporate" to plead that he has held such office six years. It was decided in Rex v. Wallis, 5 T. R. 375, that "places" in the former act must mean places ejusdem generis with those previously named: and in Horn v. The Cutlers Company, 2 Selw. N. P. 1152, note,(k) that the powers given by that statute did not extend to the case of a private company. [TAUNTON, J. referred to Rex v. Highmore, 5 B. & A. 711.] That case is explained by Rex v. M. Kuy, 5 B. & C. 640, where it was held that the statute of Anne applied only to corporate offices in corporate places. TESON, J. In Rex v. The Duke of Bedford, 1 Barnard. K. B. 242, 280, the Court made a rule absolute for a quo warranto information against the duke as claiming to be governor of the company of conservators of Bedford Level. however, was at common law, before the statute of Anne. In Rex v. Bumstead 2 B. & Ad. 699, such an information was granted against an individual claiming to be master of the Pattern Makers' Company, but the present objection was not [PATTESON, J. It was in Rex v. The Duke of Bedford, 1 Barnard. K. B. 242, 280, without success]. An information of this kind could not be filed independently of the statute of Anne, by a private relator. In 2 Selw. N. P. p. 1152, 8th edit., it is stated, that before the statute a private person could not interpose in quo warranto, the Crown only by the Attorney-General being \*competent to do so; and authority is given in support of that position; though, on the other hand, Mr. Tancred in his work on quo warranto, p. 15, states it to be beyond a doubt (and assigns grounds for that opinion) that before the statute of Anne the coroner did exhibit such informations at the suggestion of private persons. But at all events, if this case is unquestionably not within the statute, the Court will not refer to any supposed common law right, but will leave the matter to the Attorney-General, who, if an office of this kind is abused, or its trusts, charitable or otherwise, unfulfilled, may proceed against the party in this Court or in Chancery.

Then passing by this objection, the words of the charter of Rich. 2, are, that the fraternity of tailors and linen armourers and their successors "eligere, habere et facere possint unum magistrum, &c., de seipsis, quotiens eis placuerit, vel opus fuerit, pro gubernatione, &c., prout melius sibi placuerit." Now, in Rex v. The Mayor of Chester, 1 M. & S. 101, where there was a similar latitude in the words of the charter ("singulis annis successivis eligere possint") and the usage had

not been to elect annually, Lord Ellenborough said that the Court would not interfere againt a long continued usage upon words of a charter which were in any degree doubtful. The usage here called in question has existed, at all events, ever since 1488; and where the words of a charter admit of doubt, usuage is a proper guide to the construction, Gape v. Handley, 3 T. R. 288, n. (a). The next charter, that of Hen. 4, grants to the then master and wardens to be perpetui et capaces, gives them a distinct incorporation, \*and vests in them and their successors all the lands, tenements, annuities, and possessions which they or the fraternity, by whatsoever name, ever before had. The charter of Hen. 7, is granted by the advice and consent of the lords spiritual and temporal in parliament, and is, therefore, in effect, a statute of the realm, The Prince's Case, 8 Rep. 20: the omission of the Commons is no proof to the contrary in a private act, if it be found on the parliament roll, as may be proved by many instances. This charter incorporates the company by a new name, still keeping separate the master and wardens from the body at large, and it confers on the master and wardens, and their successors, all their former possessions and rights, and the liberties, franchises, privileges, and customs, which the master and wardens of the said fraternity of tailors or linen armourers, or their predecessors, or the men of the said mysteries before then had. Now it is quite clear that the custom, as to the election of master, subsisted long before the date of this charter; whatever, therefore, its commencement may have been, the charter confirms it.

Supposing even that the charter of Rich. 2, gave the right of election to all the fraternity, liverymen and freemen, it is settled by many cases that the members of a corporation may, by a by-law, vest that right in a more limited number, if they do not exclude any integral part of the body, or introduce any stranger, Case of Corporations, 4 Rep. 776, Rex v. Ashwell, 12 East, 22, Rex v. Westwood, 7 Bingh. 1. Though the number of the select body be indefinite or varying, that is not, of itself, any objection, Golding v. Fenn, 7 B. & C. 765. \*And if such a by-law may legally be made, its existence at a former period may be presumed, where records are defective, and the usage has been very long established, though the by-law itself may have been lost by time, Rex v. Head, 4 Burr. 2515, Rex v. Ashwell, 12 East, 22, Rex v. Bird, 13 East, 367. Even sixty years' usuage has been considered evidence of a by-law, Perkin v. The Master, &c. of the Cutlers' Company, 2 Selw. N. P. 1172. (8th edit.) from Serjt. Hill's MSS.

But an attempt is made to shew that the by-law, supposing it to exist, narrows not only the number of electors, but that of the persons eligible; in which case, according to a distinction perhaps of modern origin, but which cannot now be contested, the whole by-law (taking it to be one and entire) would be invalid. But the affidavit on the other side, in which a former affidavit of Mr. De Mole is cited, does not establish this. It appears that the court of assistants elect, but not that they are necessarily the body elected from. On the contrary, it is And if it had, stated that the practice in this respect has not been invariable. it does not follow that any by-law has limited the number of persons eligible. All may be eligible, and yet in practice it may uniformly have been found most convenient to choose from a certain class, who were likely to be most eminent in the fraternity, and best acquainted with its affairs. The court of assistants are all freemen, and need no by-law to render them eligible. Mr. Attwood is 2 member of the body at large, as well as of the court of assistants; he has all the qualifications which would entitle him to be chosen if the election were made from among the whole. It will not, therefore, be presumed that he is \*elected by reason of something vicious in a by-law otherwise good. The affiliavits on the other side do not state that any person has ever been rejected as ineligible because he was not a member of the court. All, therefore, that is justly to be presumed with respect to a by-law is, that it reduced, as it legally might, the body of electors; but not that it went the length of restricting, contrary to the general law, the number of persons eligible.

The oath taken by the liverymen, not to absent themselves from the annual feast for the purpose of avoiding the office and charge of a master and warden, can make no difference; because every freeman is eligible to the office of warden, and may, therefore, in any view of the case, become master. No substantial ground, therefore, is laid for this application, supposing it admissible in point of law; and, as was said by Abbott, C. J. in Rex v. Haythorne, 5 B. & C. 429, if there be no reasonable doubt, the court will not, on trivial grounds, set on foot a proceeding which may disturb a very great and important corporation.

F. Pollock and Hoggins, contra. First, as to the power of the court to grant a quo warranto in this case, that point is decided, not only by Rex v. Bumstead, 2 B. & Ad. 699, but by Rex v. Wakelin, 1 B. & Ad. 50, where the Court made a rule absolute for an information calling on a party to show by what authority he claimed to be a member of the Company of Tailors in Lichfield. In Rex v. Jolliffe, 2 B. & C. 54, there was a quo warranto information for claiming to exercise the office of mayor of Petersfield, which is not a corporate town. It is no answer to say that in those \*cases the objection now urged was not taken; and it is to be observed, that the motion for a mandamus in the present case was resisted, and disposed of, on the ground that an applica-

tion to the Court for a quo warranto was the proper course.

The question then is, what is the true effect of the charters by which this corporation is governed. And it is to be wished that in former cases the Court had paid less regard to usage, and considered more what was required by the language of charters, and the rights which the subject derived from them. language of the charter of Rich. 2, is perfectly plain: that the said tailors and linen armourers and their successors "shall be enabled to exercise the guild and fraternity of the said tailors and armourers of linen armoury, and of other persons whom they may be willing to receive into the aforesaid fraternity, and shall be able to elect, have, and make, one master and four wardens from amongst themselves so often as they shall please," &c. But it is said, that a usage has prevailed from which the Court must presume a by-law, narrowing the rights of election; and that that by-law is not now to be called in question; in support of which latter proposition Rex v. The Mayor of Chester, 1 M. & S. 101, was There, however, the application for a mandamus was refused mainly on the ground that another remedy was open, namely, by quo warranto. In Rex v. Ashwell, 12 East, 22, the alleged by-law was submitted to a jury, who found in favour of it. Lord Ellenborough observed there, that long continuance of a by-law would not legalize it if it were in itself illegal. In Rex v. Westwood. 4 B. & C. 781, 7 Bingh. 1, a quo warranto was \*granted, and the by-law came in question on demurrer; the Judges of this Court differed in opinion respecting it, and on error brought, it was only after a considerable lapse of time that the House of Lords declared it valid, some of the Judges being still of a different opinion. In Rex v. Bird, 13 East, 367, the information was granted in the first instance. These cases shew that the disposition of the Court in late times has not been to preclude inquiry into such by-laws and usages by refusing informations: and in the present case, if any doubt arises, the question ought to be submitted to a jury.

It is essential to the validity of a by-law that it be not contradictory or repugnant to the charter, 2 Selw. N. P. 1170, 8th edit., which it clearly is if it limit the number of persons eligible; or if it vary the description of such persons, Lee v. Wallis, 1 Lord Kenyon's Notes, 292. Even where this is not the case, the Court may inquire whether the practice which prevails is founded on a just construction of the charter. The body making by-laws cannot unreasonably narrow the number of electors, nor impose a qualification unwarranted by the charter, Rex v. Spencer, 5 Burr. 1827. Here both objections arise. As was

said in Rex v. Spencer, the select body "have restrained the electors, not generally, but with such a distinction as in effect places the election in themselves." 3 Burr. 1835. The number of electors is narrowed here from 1100 to at most forty, and that a fluctuating and indefinite body: and the qualification is added, of being a past master. The charter directs that the fraternity shall elect de seipsis; the by-law establishes a select body, who elect themselves and elect out of themselves.

\*It is said, that the election by the limited body out of themselves is not part of the by-law, and that, in fact, masters have been elected who were not at the time members of the court of assistants. But the affidavit does not specify the instances, their number, or date: they may even have been before the making of the supposed by-law. It stands, therefore, without any substantial contradiction, that the usage has been for this body to elect, and also to elect from among themselves: if a by-law is to be inferred from usage, it must be collected from the whole usage—the vicious part as well as the sound; they have no right to separate one from the other; or if any question arises whether or not the practice has in fact been vicious, or whether the by-law is to be connected with that vicious practice, or only with so much of the custom as is valid, those points ought to be submitted to a jury, and not decided by the Court

on this application.

DENMAN, C. J. I, for one, should be very sorry to withdraw from the consideration of a jury any case that was properly a subject for their inquiry: and whenever a proper doubt is raised upon any material fact regarding the title of a public officer, this Court, I think, will not hesitate to refer it to the proper But, here, I am of opinion that no sufficient case is made out: for, without going into nice distinctions, it ought, at least, to be shewn to the Court, before they allow parties to be subjected to the trouble and expense of such a proceeding as this, that there is some reasonable ground for doubting the title that is called in question. In the present case two objections are raised: first, that the number of electors is improperly limited; secondly, that \*the body of persons eligible is also narrowed by the by-law on which, as it is assumed, the practice, with regard to these elections, must be grounded. am not sure that, in this case, the party against whom the application is made would rely on such by-law, or need do so. The first objection is certainly not a valid one in point of law, unless clear grounds can be shewn for saying that the limitation of the electing body was unreasonable. In Rex v. Spencer, 3 Burr. 1827, it did so appear; but the present case is not brought within that; and it is perfectly understood as law, that a mere limitation of the number of electors is not in itself any objection to a by-law. The other point taken, namely, that the body elected from is narrowed, would undoubtedly be fatal to any by-law, though found by a jury to have existed; but it does not strike me that the objection is raised, even by the affidavit of Mr. Franks, when that is properly sifted. It is stated by him that the elections have, for a great length of time, been made out of a certain class; but the distinction is so obvious between a limitation of the known number of electors, and a practice of electing out of a limited class, the motives for which election cannot in each instance be known, that it does not appear how any mistake can arise between one and the other. It is sworn, also, that there have been exceptions to the latter practice; and, under these circumstances, I should think it most unreasonable to presume the existence of a by-law corresponding with that practice. This was the only doubt upon which the Court would have been inclined to pause; and as we all think, on examining the affidavits, that this doubt \*is not sufficiently raised, there is no prima facie case to warrant us in calling these gentlemen to further question.

LITTLEDALE, J. The charter of Rich. 2 empowers the fraternity to elect a master and warden de seipsis, but does not prescribe the mode. For that we must refer to the usage. Now the usage, as far back as 1488, appears to have

been for the master, wardens, and assistants who had served the office of master, to elect the master. The charter of 18 Hen. 7, confirms former usages, and therefore the question is, whether this usage was valid. That the number of electors may be restrained by usage or by-law, was fully admitted in Rex v. Westwood, 7 Bingh. 1; but it is said that the present usage is invalid, because it must be taken altogether as shown by the practice stated on affidavit, and the effect of the practice is to restrain the number of persons eligible, and prevent the choice from being made out of the general body of freemen. There is no doubt that a usage or by-law having this effect would be bad: the reason given for narrowing the number of electors, namely, the avoiding of confusion, does not apply to it. But here, although the choice has generally been made out of the limited body, it does not follow that the belonging to that body was a necessary qualification. It may be that the master has usually been chosen out of the court of assistants, the members of that body having more experience and knowledge of the affairs of the company than any other persons; but there is \*504] not enough on the affidavits to shew that this was part of the same \*usage which narrowed the number of electors, that both practices commenced at the same time, or that they are to be connected with one and the same bylaw.

TAUNTON, J. Since the Case of Corporations, 4 Rep. 77 b, it has almost universally been considered, that a by-law narrowing the number of electors might be supported: but a by-law restricting the number of persons eligible has been always held bad. The Court must not, in the present case, be understood as suggesting even an inclination of opinion that such a by-law could be maintained. But, for the purpose of inducing the Court to grant this rule, an ingenious mode of putting the case has been adopted. It is said that if a doubt exists the question should be sent to a jury: and here, as the affidavits state a uniform practice of electing the master from the court of assistants, which is represented to be a narrowing of the body of persons eligible, an attempt is made to couple this with the practice by which the number of electors has been restrained, and to represent both as one solid, compact body of usage from which the Court is to presume one entire by-law; and it is contended that as this supposed by-law, if bad in one respect, would be bad altogether, sufficient doubt is raised to require the intervention of a jury. But I agree with my Lord and my brother Littledale, that the circumstances here do not lead to a necessary inference of any one and entire usage or any by-law of the nature suggested. to the part which is supposed to limit the persons eligible, the practice in that respect does not appear to be uniform. It is stated \*(though the affidavit on this subject might possibly have been more explicit), that there have been some exceptions, though it is not said when or in what instances; but upon this statement there is not the same ground for presuming a usage narrowing the numbers of the eligible, as for referring a like usage in the case of the electors.

It appears to me, however, that this case may very fairly be decided without reference to any presumed by-law. It may be that, if the case turned upon such a by-law, sufficient uncertainty might exist (such by-law not appearing on the corporation books) to send the question to a jury: though I do not mean to say that in every case where the circumstances raise a strong presumption, the matter must necessarily be sent to a jury. The argument, however, would be forcible, in such a case, in favour of the rule. But in the present case, it appears from the charter of 15 Edw. 3, that this guild existed before the time of legal memory. That dates from a period in the reign of Rich. 1, which was from 1189 to 1199. The next charter, of Rich. 2, confirms not only the charters of Edw. 3, but also the good customs of the guild not therein expressed, and which they have used and enjoyed from time immenorial. So that the company, at these periods, was governed not only by charters, but by customs which had obtained contemporaneously with them. The charter of Rich. 2,

goes on to confer upon them the liberty of choosing a master and wardens de scipsis, quotiens eis placuerit, &c., prout melius sibi placuerit. The mode of election is not prescribed, nor the persons by whom it is to be; in the absence of such direction the common law right of election would be in the whole body; and if \*there be a custom to the contrary, confirmed afterwards by a charter, such custom is not in derogation of the previous charter, but only of the The next important charter is that of 18 Hen. 7, which corcommon law right. responds to the year 1502, 3. Now, it is admitted that the mode of election in dispute here had prevailed from the year 1488; and this, which is an inspeximus charter, comprehending within itself all the previous ones, confirms them, and grants, among other things, that the master and wardens there named, and their successors, shall have and enjoy all the liberties, franchises, privileges, and customs which the master and wardens of the fraternity of tailors and linen armourers had at the time of making these presents, or which they or their predecessors have, before this time, possessed or held, or which have been granted to the said guild or fraternity. If, therefore, the usuage of electing a master by the master, wardens, and assistants had prevailed before the granting of this charter, it is thereby expressly confirmed. I do not go so far as to say, that this charter, because made with the assent of the lords spiritual and temporal, has the force of an act of parliament. Lord Coke, indeed, lays it down that nothing can be so considered unless it appear to have received the triple assent of king, lords, and commons.(a) I will not say that this grant of Ilen. 7, wanting the assent of the commons, is to be looked upon as a statute, but if not a more binding, it is a more solemn and considered instrument than a charter granted ex mero motu regis: and as the custom in question existed when it was granted, it may be regarded as incorporating that \*custom, and regulating the mode in which the election of master was thereafter to be carried on.

PATTESON, J. I agree with my Lord and the rest of the Court, that this rule ought to he discharged. The first objection, that the practice in question narrows the number of electors, is answered by shewing that it has prevailed ever since the year 1488; and whether such usage be referable to a by-law, or to immemorial custom, it is clear that it may have had a legal commencement. I do not agree in the observation which has been made, that it would have been better if this Court had looked more at the terms of charters, and less at the usages that have prevailed. I have always understood the practice of our predecessors to have been to look carefully at usages which have existed for a great length of time, and to refer them to a legal origin if they can have had one; I do not think the reflection upon that practice well founded, and I certainly should not think myself authorized to break through it. As to the second objection, the mere circumstance that the master has been elected from the court of assistants is of no importance, unless it appear that such election is governed by some regulation or by-law which prevents a choice from the body at large; for a member of the Court is not the less a member of the general body. The whole question then is, if there be any such usage? If there were, it is not contended that it would be good: and if there were a reasonable doubt as to its existence, the question ought to go to a jury. But is there any reasonable doubt? I am convinced that there is not, principally upon the grounds already stated by my Lord. The circumstance of a particular body \*always electing [\*508 is clear and notorious, being in derogation of the general right; it cannot have escaped notice, and must be referred to some known by-law or custom. But the practice of electing from a particular body is not necessarily referable to any such law or usage. The parties may have chosen so to elect; but no inference arises that they are bound to do so. I do not think, therefore, that the affidavit of the relator lays sufficient ground for sending this case to a just;

<sup>(</sup>a) Co. Litt. 159 b. 4 Inst. 25. The Prince's Case, 8 Rep. 40.

and the affidavits on the other side shew that persons have, in fact, been elected who were not members of the court of assistants. As the Court gives its judgment on these grounds, it is unnecessary to state any opinion on the other point raised, whether or not a quo warranto lies in a case of this description.

Rule discharged, without costs.

## MARSHALL, Assignee of DAVIS, a Bankrupt, v. BARKWORTH. Jan. 28.

The act 1 & 2 W. 4, c. 53, s. 42, does not give validity to commissions of bankrupt founded on concerted acts of bankruptcy; and, therefore, the execution of a deed, whereby a trader assigns all his property to a trustee for the benefit of all his creditors, is not an act of bankruptcy sufficient to support a commission founded on the petition of a creditor who was either party or privy to such deed.

TROVER. Plea not guilty. At the trial before Alderson, J., at the Spring assizes for the county of York, 1832, it appeared that the bankrupt, being indebted to Messrs. Raikes and Co., had given them a warrant of attorney, upon which judgment had been entered up by nil dicit, and a fi. fa. indorsed to levy 10361. issued on the 3d of June 1831; and on that day the defendant, the sheriff of Hull, seized the goods of the \*bankrupt. At the time when the sheriff's officer entered, Davis, the bankrupt, observed that it would be better for him to commit an act of bankruptcy, to secure the property to his general creditors. Woolley, the bankrupt's attorney, who was present, objected to this, saying that he should suffer by it. On the 6th of June, however, Davis executed an assignment of all his property to a trustee, for the benefit of his creditors. It was proved that, between the 3d and 6th, Woolley had been seen in London, in company with the plaintiff, who was afterwards the petitioning creditor; and the case for the defendant was, that Woolley had been induced by the plaintiff to forego his objection, and concur in Davis's becoming bankrupt. The assignment was the act of bankruptcy relied upon in support of the commission, which issued on the 9th of June. The goods were sold by the sheriff between the 9th and the 20th.

The learned Judge told the jury to find for the defendant, if, upon the evidence, they thought that the act of bankruptcy was concerted with the petitioning creditor; otherwise for the plaintiff. The jury having found for the defendant, a rule nisi was obtained for a new trial, on the ground of misdirection.

F. Pollock, Archbold, and Cresswell now shewed cause. The question is, whether an assignment by a trader of all his goods, made for the purpose of founding a commission on it, be an act of bankruptcy. The concert between the petitioning creditor and the bankrupt is a fraud upon the policy of the bankrupt law, and makes the assignment void. The statute 6 G. 4, c. 16, s. 8, enacts, that if any trader there mentioned shall make "any fraudulent grant or convey-\*510] ance of any of his lands, tenements,\* goods, &c., or any fraudulent gift of any of his goods, with intent to defeat or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy." Here the assignment was not made with an intent to defeat or delay the creditors of the bankrupt, but that it might be used for the purpose of procuring a commission to be issued. It is not, therefore, an act of bankruptcy within the words of the statute. The fact of the act of bankruptcy having been concerted between the petitioning creditor and the bankrupt, is not only a ground upon which the Court of Review would supersede the commission, but it makes a commission founded on such act of bankruptcy bad in a court of law. In Shaw v. Williams, Ryan & Moody, 19, Lord Tenterden, C. J. said such an act was no act of bankruptcy. Where such an assignment constitutes an act of bankruptcy, it is because it is fraudulent; but a party who assents to it is estopped from saying that it is so.

Vol. XXIV.—15

The validity of the commission depends on the right of the creditor to petition: and a party who has signed such a deed cannot, as petitioning creditor, set it up as an act of bankruptcy: Bach v. Gooch, 4 Camp. 232, Bamford v. Baron, 2 T. R. 594, n. a., Prosser v. Smith, Holt N. P. C. 442, Ex parte Harcourt, 2 Rose, 213, Tope v. Hockin, 7 B. & C. 101, Ex parte Gane, 1 Mont. & M'Arthur, 399, Tappenden v. Burgess, 4 East, P. of Crown. Then, the only act of bankruptcy proved in this case being one concerted between the bankrupt and petitioning creditor, the commission cannot be supported. It may be said the law has been altered by 1 & 2 W. 4, c. 56, s. 42, which enacts, that from and after the passing of that act, no commission of bankrupt shall be superseded, nor \*any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor and the bankrupt, except where any petition to supercede a commission for any such cause shall have been already presented, and shall be then pending. But that clearly applies only to cases where the commission, fiat, or adjudication has been concerted between the petitioning creditor and the bankrupt. It leaves the law, as to concerted acts of bankruptcy, just as it was before.

Wightman, contrà. Davis committed an act of bankruptcy by assigning all his effects, because he thereby deprived himself of the means of carrying on his trade. Such an assignment by a trader may be either fraudulent upon the creditors, or may be fraudulent only as contravening the policy of the bankrupt statutes. A person who is privy to a fraudulent assignment of the first description cannot set it up as an act of bankruptcy; but if a party procure an assignment of the latter description, he may. In Back v. Gooch (as reported in Holt's N. P. C. 13), the assignment appears to have been to trustees, for creditors whose debts respectively amounted to 30%. In Tope v. Hockin, 7 B. & C. 101, it does not appear what the trusts were. Here the assignment was made for the purpose of causing an equal distribution of the bankrupt's effects among all his creditors. It is therefore to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved; as was laid down by Lord Ellenborough, in Pickstock v. Lyster, 3 M. & S. 371. Then the 1 & 2 W. 4, c. 56, s. 42, applies in terms to \*concerted commissions only, but, by construction, must [\*512] extend to all things necessary to support the commission. Construing it liberally, it must mean that, in all cases where the commission was formerly liable to be superseded on the ground of concert, it should no longer continue so.

DENMAN, C. J. Before the late statute 1 and 2 W. 4, c. 56, s. 42, the act of bankruptcy relied upon in this case could not have been set up by the petitioning creditor, or by any other creditor who was a party, or privy to the deed of assignment. The question is, whether that act has made any difference in the law. It appears to me that it has studiously avoided doing so, and that it leaves concerted acts of bankruptcy as they were before. I take it to be clear, that where the thing done as an act of bankruptcy is done by concert with a particular creditor, he cannot afterwards come into court and set that up as an act of bankruptcy. The fraud is not as to him, but as to the creditors generally; the intent to delay them gives it the character of fraud. The stat. 6 G. 4, c. 16, ss. 6 & 7, as to concerted declarations of insolvency, raises a strong inference that all other concerted acts of bankruptcy were at that time considered as rendering a commission invalid.

LITTLEDALE, J. A party colluding with a bankrupt, who commits an act of bankruptcy for the purpose of founding a commission upon it, does it with some view of benefit to himself, and the law will not allow him to ground a commission on such an act of bankruptcy. The 6 G. 4, c. 16, s. 6, enacts, that a declaration of insolvency left at the Bankrupt Office and duly advertised, \*shall to be an act of bankruptcy; and s. 7, provides, "that no commission under the adjudication shall be grounded on the act of bankruptcy, being the filing of such declaration, shall be deemed invalid by reason of such declaration

having been concerted or agreed upon between the bankrupt and any creditor or other person." I think it is fairly to be inferred from that enactment, that every other act of bankruptcy so concerted or agreed upon was to be invalid; and I am therefore of opinion that in this case, the act of bankruptcy, having been concerted between the bankrupt and petitioning creditor, will not support the commission.

TAUNTON, J. I am of the same opinion. This deed of assignment purports to be executed for one purpose, and a party to it endeavours to make it enure to another. He cannot so avail himself of his own fraud.

Independently of the bankrupt act, an assignment for the benefit of all the creditors would not have been fraudulent; Pickstock v. Lyster, 3 M. & S. 371. But Bamford v. Baron, 2 T. R. 594, n., and Back v. Gooch, 4 Camp. 232, S. C. Holt's N. P. C. 13, decide that such a deed, though intended for the benefit of the creditors at large, cannot be used by one who is party or privy to it, as an act of bankruptcy whereon to found a commission. In both those cases the deeds were for the benefit of all the creditors, and not The stat. 1 & 2 W. 4, c. 56, s. 42, applies only to fraudulent in themselves. concerted commissions, flats, or adjudications. If the legislature had intended to include concerted acts of bankruptcy, it would have referred to them in \*express words, as it has in the 6 G. 4, c. 16, s. 7, which renders valid one species of act of bankruptcy, viz. a declaration of insolvency, though concerted between the bankrupt and a creditor. The rule for a new trial must be discharged. Rule discharged.

## SAVILLE, and JOYCE, his Wife, v. SWEENY. Jan. 28.

Declaration, by husband and wife, stated that the wife lived separate from the husband, and kept a boarding-house, and enjoyed good credit, and was supplied with necessaries upon credit by tradesmen, both for her own support and for carrying on her said business; that defendant spoke certain words of her, and of and concerning her manner of carrying on her business, imputing to her insolvency, adultery, and prostitution; by reason whereof divers persons left off boarding with her, and tradesmen ceased to supply her on credit, whereby she was injured in her said business, and impoverished,

Held, that the wife ought not to have been joined in this action, the words being only actionable in respect of damage to the business, and that damage being solely the hus-

Whether or not he could have maintained an action under the circumstances, quære.

Case by husband and wife, for words spoken of the wife. The declaration, after averments of good conduct and repute, went on to state, that whereas the said Joyce, before and at the time of the committing of the grievances aftermentioned, did live separate and apart from her husband, and carry on the trade and business of a boarding-house-keeper, and, for the purpose of carrying on the same, did occupy a certain boarding-house for the board and lodging of divers persons, at a great annual rent, to wit, 100%, payable to one Charles Pardy, to wit, at Southampton, which boarding-house before and at the time, &c. had been and was frequented by many good and worthy subjects, &c., for their lodging and boarding: and whereas the said Joyce, by her honesty and good conduct had acquired great credit among her neighbours and tradesmen with whom she had any dealings, to wit, one John Hewitt and others, and had \*515] been and was from time to time supplied by them \*upon credit with meat, drink clothes and other research meat, drink, clothes, and other necessaries, as well for her own support and maintainance as for carrying on said boarding-house, by means of which several premises she acquired great gains, and lived in comfort and affluence: Jet the defendant, well knowing, &c., but contriving, &c., in a certain conver-

sation which he had with Charles Pardy, in the presence of divers other subjects of this realm, of and concerning the said Joyce, and of and concerning the said trade and business so carried on and conducted by her as aforesaid, and of and concerning her in the way of her carrying on and conducting the same, spoke and published to the said Charles Pardy, in the presence and hearing of the said last mentioned subjects, of and concerning &c. (as above), these false, malicious, scandalous, and defamatory words following, of and concerning, &c., that is to say: "Oh that vile woman, (meaning the said Joyce,) her passionate temper and general conduct are so disgusting, she has driven all the ladies out of the house (meaning certain ladies then and there residing, boarding and lodging in the said boarding-house); you had better get rid of her; I have always paid the rent" (meaning the rent so payable to C. Pardy as aforesaid). There were other counts in which different words were set out, imputing to the plaintiff Joyce adultery, prostitution, and insolvency; and in some counts the defendant was stated to have said to the above-mentioned John Hewitt, of and concerning, &c. "You will never get your money (meaning money due to him from the plaintiff Joyce for goods); she left London and has not paid her tradespeople there, not even her servant; you are very foolish to trust her." The general conclusion was, that by means thereof the plaintiff \*Joyce was [\*516] injured in her good name, &c., and the said Hewitt and other persons who had from time to time supplied her with necessaries upon credit, had refused any longer to do so, and she had been prevented from carrying on her said business, and living in comfort and affluence as aforesaid, and had been brought to great penury and want. There was a second set of counts, (with a like inducement,) at the end of which it was averred as a special damage, that certain persons named, who would otherwise have used and frequented the boarding-house, had declined to do so. A third series applied solely to the loss of credit with tradesmen, whereby she had been prevented both from carrying on her business, and from obtaining necessary sustenance. In the fourth the words were not stated to have been spoken of the plaintiff Joyce in her business, nor was she alleged to be living apart from her husband, and the damage laid was that divers persons, named, who had associated with her, and gratuitously entertained her in their houses, to the great reduction of her living and maintenance, had refused any longer to do so.(a) Plea, not guilty. At the Hampshire Spring assizes, 1832, the plaintiff had a vedict, and in the next term Follett obtained a rule to show cause why a nonsuit should not be entered or the judgment arrested. As nothing ultimately turned upon the first point, it is unnecessary to notice it further: the ground for arresting the judgment was, that the gist of the action being pecuniary damage, the husband ought to have sued alone.

Bompas, Serjt. and Sewell, now shewed cause. This is a case in which the wife was properly joined as a \*plaintiff, since the whole cause of action [\*517] was a wrong suffered by her. If it could be said that the business in question was in any sense the husband's, it was still, in point of fact, so far the wife's as to bring the case within that class in which the wife has been held rightly joined, as being the meritorious cause of action. Prat v. Taylor, Cro. Eliz. 61, Brashford v. Buckingham, Cro. Jac. 77, Fountain v. Smith, 2 Sid. 128, Philliskirk v. Pluckwell, 2 M. & S. 393. And where there is an immediate interest of the wife, to which injury is done, the husband and she ought to join in the action to assert her right, Dunstan v. Burwell, 1 Wils. 224, Weller r. Baker, 2 Wils. 414. The rule in cases of tort, where the suffering of the wife is, in fact, the cause of action, is, that the husband may sue alone for the damage resulting to himself, but he may also allege the wrong done to her as the sole cause, and join her as a plaintiff. In Coleman et Ux. v. Harcourt, 1 Lev. 140, which may be relied upon on the other side, it is stated, that the action being

case for saying to the wife, they (the husband and wife) keeping a victuallinghouse, "thou art a bawd," &c., by reason whereof J. S. forebore the house, to the damage of both, judgment for the plaintiffs was arrested, "because the words are not actionable, except in respect of the special loss, which is the husband's only." There the special damage (for which alone the action lay) was in respect of a business which was the husband's; as appears also by the mention of the same case in 2 Ld. Ray. 1032, and the report in 1 Keb. 791. Here the trade is, in fact, the wife's only. In Russell et Ux. v. Corne, 2 Ld. Raym. 1031, one \*518] \*count was for beating the wife, per quod the business of the husband remained undone; and the objection taken to that count was, that the wife could not join for damage accruing to the husband from the loss and delay of business in which she had no interest. But here the wife, in fact, has the whole immediate interest; and her loss of business is the gist of the action. was held at one time, that a wife separated from her husband by deed might be made bankrupt, Ex parte Preston, Cooke's Bankrupt Law, p. 40, 8th edit.; and sued for goods sold, Ringstead v. Lady Lanesborough, Cooke's Bankrupt Law, p. 41, 8th edit.; and these cases are even now available to shew that a wife living separate may have such an interest in a business carried on by her, as entitles her to be joined in an action brought by the husband for slandering her in such business. The personal wrong and suffering of the wife are the gist of this action, apart from any ultimate loss which may result to the husband, and which would never be taken into consideration by a jury, in an action brought by him alone, while living separate from his wife. In the case of the dippers at Tunbridge Wells, Weller v. Baker, 2 Wils. 414, the injury was held to be one affecting the right and interest of the wives, with which the husbands had nothing to do, and it was said that both must join. Now in that case, if the wives had been slandered in their occupation, it cannot be said that they ought not to have joined; yet the profits of the business belonged to the husbands. servant, beaten and disabled, might maintain an action for his own personal suffering, and the master might also sue for the loss of service. So in this case, there is a distinct personal suffering of the \*wife, for which, indeed, she cannot, as the servant could, maintain an action in her own name, but the husband may sue, joining her in the action for that personal suffering, without regard to the ulterior damage accruing to him in consequence. On this view of the case, it is necessary that the wife should join: the husband would else be without remedy, for he could not sue alone. And words, like those in question, when spoken of a person carrying on a business or profession, with reference to such business, will support an action, independently of any specific, consequential damage. Seaman v. Bigg, Cro. Car. 480, Terry v. Hooper, 1 Lev. 115, Wharton v. Brook, 1 Ventr. 21; (and see Whittington v. Gladwin, 5 B. & C. 180.)

Follett, contrà. It is unnecessary to say whether or not the husband could sue alone in this case. Possibly there may be no legal remedy. The argument on the other side is, that the whole injury complained of here is personal to the wife. Now the words in themselves are not actionable. It is said, however, that they are so here, simply because spoken of her in a trade or business. words affecting any one in a trade are not actionable on account of the pecuniary injury they occasion; and if no special damage is laid, it is because the pecuniary injury is to be presumed without being stated. That injury, however, in a case like this, must be the husband's. Even as to the loss of sustenance, the injury is his; for he is bound to maintain his wife, at least where there is no regular divorce, or separation by deed. In the cases where it has been said that the \*520] wife was the meritorious cause (a term of which it would be \*difficult to give a satisfactory explanation) there has been either a direct contract with the wife, or a consideration proceeding from her, or an instrument under seal executed to her: but here the circumstances are entirely different. The doctrine as to joining the wife as the meritorious cause, and cases on that subject, are stated in 1 Selw. N. P. 285, note (6), 8th edit.; but this observation is added: "Care, however, must be taken that the declaration does not embrace any other cause of action, accruing to the husband alone; for if it does, it will be bad. Holmes et Ux. v. Wood, cited by the Court in Weller v. Baker, 2 Wils. 424." In Coleman et Ux. v. Harcourt, 1 Lev. 140, the declaration was held bad, because the damage was wholly to the husband. In Russel et Ux. v. Corne, 2 Ld. Raym. 1031, 1 Salk. 119, the action was brought by husband and wife for false imprisonment of the wife, per quod the husband's business remained undone, and it was objected that there being a special damage laid to the husband, he only should have brought the action; but it was held sufficient, because the action for false imprisonment lay at the suit of both, and the adding of matter in aggravation, affecting the husband only, did not render the declara-A like rule may be deduced from other cases on this subject, many of which are collected in a note on Russel et Ux. v. Corne, in 1 Salk. 119. But in the present case there is no injury at all in respect of which the wife can be joined; the words are not actionable in themselves, and the special damage to the husband is the sole ground of complaint. "Where the action is brought for words in themselves actionable, and no special damage laid, there such conclusion" (ad damnum ipsorum) "is right, for the \*action survives. Grove et Ux. v. Hart, T. 25, G. 2," Bull. N. P. 7: but here the reverse [\*521] is the case. If the actual damage in this case had been stated in express terms, it would have appeared clearly to be a pecuniary loss to the husband. In 1 Bac. Abr. 733, tit. Baron and Feme (K.), 6th ed., where several cases on this subject are collected, it is observed, in a marginal note, that "where an action is brought for words spoken of, or other tort done, to the wife, and founded upon the special damage of the husband, she must not join." The case of Marshall v. Mary Rutton, 8 T. R. 545, is an answer to the authorities cited for the purpose of shewing that the wife, in this case, because living alone, has a pecuniary interest in respect of which she can maintain an action; and it is not even alleged here, that the wife is separated by deed, as she was in all those cases. In Boggett v. Frier, 11 East, 301, it was held that the husband's desertion of the wife, and absence beyond the seas for four years, during which time she had traded as a feme sole, did not entitle her to maintain trespass for breaking her shop and taking her goods; and Lewis v. Lee, 3 B & C. 291, establishes that even a divorce a mensa et thoro does not place a married woman in the condition of a feme sole, for the purpose of being sued.

LITTLEDALE J. I am of opinion that the judgment must be arrested; it is therefore unnecessary to say anything on the question as to entering a nonsuit. The declaration states that the female plaintiff was living separate from her husband, and carrying on the business of a boarding-house-keeper, and was supplied with necessaries\* by divers persons, as well for carrying on such business as for her support; that by such business she acquired great gains; and that the defendant spoke the words in question of and concerning her in her business; (a) and the declaration alleges special damage resulting in various ways from the speaking of these words. Now, in the first place, although the wife was a boarding-house-keeper, and the words spoken might affect her in the way of her business, yet they are not in themselves applicable to her in respect of the business. The imputation they convey is of general misconduct. The only ground upon which it could be alleged that an action was maintainable in respect of them would be a special damage; but that accrues to the husband, not the wife; for although it is alleged that she lived apart from him, it is not stated that there was any separation by deed, or any fund provided for the separate maintenance of the wife. But further, I think a married woman, even if divorced a mensa et thoro, is not capable of receiving special damage by words spoken of her; such damage is the husband's The present case is, in this respect, like Coleman v. Harcourt, 1 Lev. 140, only

<sup>(</sup>a) In one set of counts the words were not so laid. See p. 516, ante.

it is stated here that the wife was living separate and apart from her husband, but that averment makes no difference in point of law. If a trespasser had broken into her house, the damage would have been the husband's. That was held in Boggett v. Frier, 11 East, 301. Here, upon the statement in the pleadings, it must be considered that the wife is merely allowed, as matter of arrangement between her and her husband, to carry on a business as his agent, \*523] and receive \*the profits. If, therefore, there was a damage in respect of the business, it accrued to him alone. The wife was incapable of trading. As to a wife being the meritorious cause of action, there are many cases where she is the groundwork of the action, and yet not properly the meritorious cause. In an action for recompense due to her, for instance, as a nurse, she is so: but it is different in a case like that of the dippers at Tunbridge Wells, Weller v. Banker, 2 Wils. 414, where the action was in respect of a vested interest in the wife. The damage, however, and right of action, stated in the present declaration accrue to the husband alone: the judgment must therefore be arrested.

TAUNTON, J. I am of the same opinion. The distinction in cases of this kind is, that if there be a personal wrong or violence done to the wife, so that an action would survive to her, she ought to be joined, and not the less because the husband puts into the declaration some special damage accruing to himself. So it was held in Russel et Ux. v. Corne; 1 Salk. 119, but where the injury is not of that kind, and no action would survive to the wife, the only cause being a special damage to the husband, the wife cannot be joined, having no legal interest in that which forms the gist of the action. For that reason the judgment was arrested in Coleman v. Harcourt, 1 Lev. 140. Now, here the declaration states, in substance, that the wife lived separate from her husband, and kept a boarding-house on her own account. But a married woman is incapable of carry-\*521] ing on business, or having property of her own, except through \*trustees. The declaration then complains, that by reason of the words, the female plaintiff lost her credit and custom: but, if the business was the husband's, as in point of law it was, the loss occasioned by the words was a pecuniary loss to him, and not to the wife. She, therefore, had no substantive ground of complaint, and the declaration is bad, as stating a defective cause of action. It is unnecessary to say whether or not the husband could have sued under these circumstances: it is sufficient that the husband and wife cannot.

Patteson, J. The declaration contains no counts on words actionable in themselves; they are only so in respect of special damage in the strict sense, or as being spoken in relation to a trade. If there had been evidence at the trial of the special damage complained of in the last set of counts, I think it is possible they might have been supported, because the damage complained of there is personal to the wife. But the other counts relate wholly to the trade, which is the trade of the husband, and in which he alone is injured. It is not necessary to determine whether or not he could have maintained the action under the circumstances stated, at all events the husband and wife could not.

Denman, C. J. was not present during the whole argument, but he now intimated his opinion to be that the declaration was bad, as alleging a damage which was clearly the husband's, and in respect of which the wife ought not to have been joined.

Rule absolute for arresting the judgment.

## \*525] \*VAUX v. VOLLANS, Clerk. Jan. 28.

One calendar month before the commencement of an action for penalties against a clergy-man for non-residence, a notice in writing of the intended writ and cause of action was delivered to the bishop's deputy registrar at his own house, and carried by him the next morning to the registry office, and there left: Held, that that was not sufficient to satisfy the 57 G. 3, c. 99, s. 40, which requires such notice to be delivered to the bishop of the diocese, by leaving the same at the registry of his diocese.

DEBT for penalties on the 57th G. 3, c. 99, against the defendant, the rector of Hensworth, in the West Riding of Yorkshire, for wilfully absenting himself from his benefice, without license or exemption. Plea, nil debet. At the trial, before Alderson, J., at the Spring assizes for the county of York, 1832, it was proved, by the agent of the plaintiff's attorney, that he, on the 3d of April, served a notice of the cause of action, signed by the attorney, on the deputy registrar of the archbishop of York, personally, at his residence at Monkgate in that city, the public registry being kept in a different place, namely, the office in the Minster-yard. The agent went first to the registry, but it was shut. The deputy registrar stated that he took the notice to the registry office on the fol-lowing morning, and placed it on his desk there. The writ was sued out on the 5th of May. It was objected, that this service was insufficient; the statute 57 G. 3, c. 99, s. 40,(a) requiring the \*notice of the cause of action to be delivered to the bishop of the diocese, by leaving the same at the registry of his diocese. The learned Judge thought that, as the registrar had carried the notice on the 4th of April to the registry office, and left it there, the statute was complied with; but he reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that it was necessary that the notice should be left at the registry of the diocese.

It was further objected that the notice served on the deputy registrar was not served by the person whose name was indorsed on the process, as required by the act of parliament. The learned Judge thought that the name of the plaintiff's attorney being indorsed on it was sufficient, but reserved liberty to the

defendant to move to enter a nonsuit on that point.

The plaintiff then proved that the defendant was absent from his benefice during the years 1829 and 1830, but that during a great part of that period he was confined for debt within the rules of the King's Bench Prison. It was contended that the defendant could not be considered as having been wilfully absent during the period of his imprisonment. The learned Judge told the jury that the absence was wilful, unless the defendant proved some reasonable cause for it, and that confinement \*in prison for debts contracted by himself, was [\*527 not a reasonable cause of absence.

The jury found that the defendant had been wilfully absent for a year, unless the period of his confinement in prison made a difference, and a verdict was entered for the plaintiff for 5321. 10s., three-fourths of the annual value; but liberty was reserved to reduce it to two-thirds, if the absence during imprison-

ment was not to be deemed wilful.

A rule nisi was obtained for entering a nonsuit, or reducing the damages, but as the judgment of the Court proceeded on one point only, it has been deemed unnecessary to state the arguments on the others.

F. Pollock and Tomlinson now shewed cause. The service of the notice on the deputy registrar was sufficient, because that notice was deposited in the re-

(a) After reciting, that notwithstanding the regulations contained in that act, spiritual persons may through inadvertence, and in many cases through unavoidable circumstances and causes, become subject to penalties and forfeitures, and vexatious prosecutions, unless provision is made for the prevention thereof; it enacts, "that no writ shall be sued out against, nor any copy of any process at the suit of any informer, be served upon, any spiritual person, for any penalty or forfeiture incurred under any of the provisions of this act, until a notice in writing of such intended writ or process shall have been delivered to him, or left at the usual or last place of his abode, and also to the bishop of the discre, by leaving the same at the registry of his diocese, by the attorney or agent for the party who is tends to sue, or cause the same to be sued out or served, one calendar month at least before the suing or serving the same; in which notice shall be clearly and explicitly contained the cause of action which such party hath, and the penalties for which such person intends to sue; and on the back of which notices respectively shall be indorsed the name of the attorney or agent, together with the place of his abode.

Sect. 41, enacts, "that no plaintiff shall recover against any spiritual person for any penalty or forfeiture under the provisions of this act, unless it is proved upon the trial that such notices were respectively given as aforesaid."

gistry office in due time. The deputy registrar may be considered as the agent of the plaintiff's attorney, for the purpose of taking the notice to the office.

Blackburne contra. The object of s. 40, as appears from the preamble, was to protect clergymen from vexatious proceedings, and the forms acquired by that clause ought to be strictly pursued. It points out, in express terms, the mode of serving the notice of action on the bishop; viz., by leaving the same at the registry of his diocese. The party employed is bound to do this, and not what he considers equivalent.

LITTLEDALE, J. I am of opinion that a nonsuit ought to be entered in this case, because there has not been a proper service of the notice of the action on the bishop of \*the diocese, as required by the 57 G. 3, c. 99, s. 40. The preamble of that clause is important, as shewing the intention of the legislature to protect spiritual persons from vexatious prosecutions. It is then, in the body of the clause, enacted, "that no writ shall be sued out against any spiritual person for any penalty incurred under that act, until a notice in writing, &c., shall have been delivered to him, or left at the usual or last place of his abode, and also to the bishop of the diocese, by leaving the same at the registry of his diocese." The statute therefore distinguishes between service on clergymen personally, and service at his dwelling-house, and makes either sufficient. But if it had said that delivery to him should be at his residence, delivery to him personally would not have sufficed; although the object of the legislature in requiring that it should be left in a place where it would come to the view of the clergymen would be as well attained by personal delivery. The statute does require that the delivery to the bishop shall be by leaving the notice at the registry of his diocese. The object that it shall be left in a place where it is likely to be attended to by the bishop or his officer, may have been attained by its having been first delivered to the deputy registrar, and afterwards carried by him to the registry office; but that is not the specific mode of delivery required by the statute. If we hold that a personal service on the deputy registrar was sufficient, it might then be said that a delivery to a clerk or porter, elsewhere than at the registry office, might suffice. I think that the safest course is to adhere to the words of the legislature. The rule for entering a nonsuit must be made absolute.

\*529] \*TAUNTON, J. I am of the same opinion. We must give effect, if possible, to all the words used by the legislature. Here the words are "that the notice shall be delivered to the bishop of the diocese, by leaving the same at the registry of his diocese." If there were not such words, a constructive delivery might do; but to give effect to those words, we must hold that the only service on the bishop must be by leaving the notice at the registry. If we were to construct the statute otherwise, other cases might occur still less conformable to the words of the act, and, at last, any service might be deemed sufficient. The safer course is to adhere to the very words of the act.

PATTESON, J. I think we must abide by the words of the statute, though I have come to that conclusion with some difficulty. The words of the act (for what purpose introduced I cannot say) are, "by leaving the same at the registry of his diocese." Now suppose the attorney had gone to the bishop's residence, and put the notice into his hand, it would be impossible to say that he had not had notice; yet, that would not be sufficient, because the notice was not delivered to him in the specific mode required by the act of parliament. It is indeed stated in evidence that the notice came to the deputy-registrar, and that he afterwards put it on his desk in the registry-office; but it does not appear that this was done with a view to a serving of notice pursuant to the act.

- Rule absolute for entering a nonsuit.

# \*The KING v. The Directors of the EAST INDIA COMPANY. Jan. 29.

The Court of Directors of the East India Company sent to the Board of Control for their approval a draft of a dispatch, headed "Political Department," which that Board altered, and returned to them to be transmitted to India, pursuant to 33 G. 2, c. 52, s. 12. The directors objected to the alterations, but not to the jurisdiction of the commissioners to make them; and, the alterations being insisted on by the Board, the directors afterwards rescinded the resolution on which the dispatch was founded, and left it to the commissioners to originate the dispatch pursuant to the sect. 15 of the statute. On motion for a mandamus to the directors to transmit the altered dispatch: Held, first, that the conduct of the directors was equivalent to a refusal to transmit the dispatch; secondly, that the directors could not in this case annul the resolution on which the dispatch had been founded; thirdly, that the dispatch having been originated by the directors, and altered by the Board of Control, and ordered by them to be transmitted, and the proceedings being so far regular, it was no answer to an application for a mandamus, that the Board might by another proceeding, as by originating a dispatch, attain the same end; fourthly, that the Directors, having admitted the jurisdiction of the Board with respect to the dispatch, and only contested the alterations, were estopped from afterwards contending that the dispatch was not one over which the Board had authority.

A Rule had been obtained, calling upon the Directors of the United Company of Merchants of England trading to the East Indies, to shew cause why a mandamus should not issue, directed to them, commanding them to send out to the Governor-General in council, at Fort William in Bengal, a certain dispatch relative to the claim of the trustees of William Palmer & Co. of Hyderabad, against Mooneer Ool Moolk and others, as altered and approved by the Board of Commissioners for the affairs of India on the 14th of May last. It appeared by the affidavits, that W. Palmer & Co. had carried on trade at Hyderabad in the East Indies, which was not within the territories of the East India Company, but in those of the Nizam, a native prince in alliance with them; and there being debts due to that firm by certain persons at Hyderabad, the Court of Directors, with a view of assisting Palmer & Co. in recovering those debts, on the 20th of March 1832, framed a dispatch, (founded on a resolution of the Court,) to be sent to the Company's resident at the \*court of the Nizam, [\*531 recommending him to obtain the concurrence of the Nizam's government in enforcing such adjustment as might be come to in Palmer & Co.'s affairs. This dispatch headed "Political Department," was sent by the Directors on the same 20th of March, to the Board of Commissioners for the affairs of India, (called the Board of Control,) for their consideration and approval. On the 14th of May, the Board returned the dispatch to the Court of Directors with some alterations and additions, and with a letter, under the hand of their secretary, stating the reasons of such alterations, and expressing the wish of the Board that the dispatch, as then amended, might be transmitted to India in the usual form, according to the statute 33 G. 3, c. 52, s. 12. The Court of Directors objected to the alterations, and sent the dispatch back to the Board of Commissioners stating their objections. The Board adhered to the alterations they had made; and on the 8th of August the Court of Directors passed a resolution, that the claim of Palmer & Co. on the subjects of the Nizam did not relate to the civil or military government, or revenues, of the territorial acquisitions in India, and ought not to form the subject of a dispatch framed by the Court and approved or altered by the Board; and, being of opinion, on reflection, that it would be inexpedient for the company to attempt the exercise of any interference in that matter with the Nizam, the Court of Directors rescinded their resolution of the 20th of March on which the dispatch was framed. A further correspondence took place between the Court of Directors and the Board of Control, in the course of which the Directors stated that they left it to the Commissioners to originate the dispatch \*themselves, as they were authorized to do under the 33 G. 3, c. 52, s. 15.

Spankie, Serjt., Sir James Scarlett, Wigram, and Follett shewed cause on a former day in this term.(a) First a mandamus will not lie, because there has been no refusal by the directors to transmit the dispatch, but, merely to be the originators of it. Secondly, this dispatch was not one relating to the civil government or revenues of India, and therefore the Board of Control had no \*533] right, by 33 G. 3, c. 52,(b) to alter it. It related to a claim \*which certain individuals had on the subjects of the Nizam, and which, in an ordia

(a) January 21st, before Littledals, Taunton, and Patteson, Js.

(b) By section 2, certain public officers (who are usually denominated the Board of Control) are appointed commissioners for the affairs of India. By section 9, these commissioners are invested with full power and authority to superintend, direct, and control all acts, operations, and concerns which in anywise relate to or concern the civil or military government or revenues of the territories and acquisitions of the East India Company in the East Indias, subject to the particular directions of the act.

Section 11, enacts, that the Court of Directors of the East India Company shall deliver to the Board of Control copies of all minutes, orders, resolutions, and proceedings of all courts of proprietors and courts of directors, and also copies of such documents received

from abroad as are enumerated in the clause.

Section 12, directs that no orders or instructions relating to the civil or military government or revenues of the territorial acquisitions in India, shall be sent or given to any of the governments or settlements in India by the Court of Directors until the same shall have been submitted to the consideration of and approved by the Board of Control, and for that purpose copies of all orders and instructions which the Court of Directors shall propose to be sent to India, shall be by them previously laid before the Board of Control; and that within fourteen days after the receipt of such proposed dispatches, the said Board shall either return the same to the directors with their approbation, or if the Board shall disapprove, alter, or vary in substance any of the proposed orders or instructions, they shall give to the directors their reasons at large in respect thereof, together with their instructions to the directors in relation thereto. And the directors shall, and they are thereby required forthwith to dispatch and send the letters, orders, and instructions in the form approved by the Board to the proper governments or officers in India, without further delay, unless, upon any representation of the directors, the Board shall order any alterations to be made therein. And the directors shall and they are thereby required to pay obedience to, and shall be governed and bound by, such orders and instructions as they shall receive from the Board of Commissioners touching or concerning the civil and military government of the said territories and acquisitions, and the revenues of the same.

Section 13, authorizes the Directors to make representations to the Board of Gommissioners as to any disapproval or alterations which the Board have made. And the Board are required to take these representations into consideration, and to give such further orders and instructions as they shall think fit and expedient, which orders shall be final

and conclusive upon the directors.

By section 15, whenever the Directors shall neglect to frame and transmit to the Board dispatches on any subject connected with the civil or military government or revenues of India, beyond fourteen days after requisition made to them by order of the Board, the Board may prepare and send to the directors, (without waiting for the receipt of the copies of dispatches intended to be sent by the directors), any orders or instructions for any of the governments or presidencies in India concerning the civil or military government of the said territories or revenues thereof; and the directors are required to transmit dispatches according to the tenor of the said orders and instructions unto the respective governments and presidencies in India, unless upon any representation made by the directors to the Board, the Board shall direct any alteration; which directions the said Court of Directors shall in such case be bound to conform to.

Section 16, provides, "that nothing in the act shall extend or be construed to extend, to give to the Board any power to issue or send any orders or instructions which do not relate to points connected with the civil or military government or revenues of the British territories in India, nor to expunge, vary, or alter any dispatches proposed by the directors, which do not relate to the said government or revenues. And if the board shall send any orders or instructions to the Court of Directors to be by them transmitted, which, in the opinion of the said Court shall relate to points not connected with the civil or military government or revenues, the said Court may petition his Majesty in council, and his Majesty in council shall decide whether the same be or be not connected with the civil or

military government, &c., which decision shall be final and conclusive."

nary case, would be the subject of a law-suit; and it recommends the resident \*to interpose and use his influence with the Nizam for the benefit of those individuals, not for that of the company. Assuming that it was a matter relating to the civil government or revenues, the Court of Directors have rescinded the resolution on which the dispatch was founded; and that distinguishes the present case from Rex v. The Directors of the East India Company, 4 M. & S. 279. It is reasonable that the directors should have the power of rescinding such resolution. Circumstances may occur between the framing of the despatch, and its return by the Board, of which the directors were not aware at the time of originating it, and which might well justify them in annulling it. There is no clause in the act which prevents them from rescinding a resolution originating with themselves; though there is one in section 23, which prevents a Court of Proprietors from rescinding any order or resolution of the Court of Directors. Where the Board of Control originates an order, which, in the opinion of the Court of Directors, relates to points not connected with the civil or military government or revenues, they (the directors) may appeal to the king in council, who is finally to decide that question. But where such order originates with themselves, and is altered by the Board of Control, the Court of Directors have no power to appeal. Suppose, then, the directors framed a despatch relating entirely to trade, and the Board of Control so altered it as to make it relate to the civil or military government or revenues; it cannot bave been the intention of the legislature to compel the directors to send such a despatch to India, as if it originated with themselves; and as they have no power \*to appeal againt such an altered dispatch, it seems to follow ex necessitate that they should be entitled to rescind any order from which such altered dispatch orginated. Besides, here a mandamus will not lie, because the Board of Control have another remedy; for according to section 15, they may

originate a dispatch themselves.

The Attorney General and Solicitor General, and Amos, contrà. rescinding of the resolution on which the dispatch was framed is equivalent to an absolute refusal to transmit it. This was a dispatch relating to the civil government. The subject-matter of it was certain claims which individuals, subjects of the East India Company, had upon subjects of the Nizam. Those claims, as between the individuals interested, would, in an ordinary case, form the subject of a suit in the municipal courts; but as soon as the Company made use of the power and character belonging to it as a government, to influence the Nizam to use his sovereign authority with his own subjects to enforce the settlement of those claims, the subject-matter of the negotiation respected the civil government. The dispatch is headed "Political Department, the directors, in their correspondence, have always treated it as one relating to the civil government, and are now estopped from saying it does not. to the directors having rescinded the resolution on which the dispatch was framed, they can have no power so to do, unless the act of parliament gives it them; but it gives them none: on the contrary, s. 12, requires them to transmit orders originating with themselves, and altered by the Board of Control, forthwith to India, to pay obedience to and to be governed \*and bound by such orders. There is one exception, viz. where, on any representation made by the directors, the Board shall order any alterations to be made therein. Herein such representations were made by the directors; but the Board did not direct any alteration. The directors, therefore, were bound to transmit the dispatch, and had no power to rescind the resolution on which it was framed. Section 16, gives the power of appeal against orders either originating with the Board of Control, or originating with the directors and varied or altered by the Board. [PATTESON, J. It enacts, that if the said Board shall send any orders to the directors, to be by them transmitted, which, in the opinion of the directors, shall relate to points not connected with the civil or military government or revenues, the directors may appeal. Now suppose the

Court of Directors frame a dispatch, containing matter not connected with the civil government or revenues, and the Board of Control alter it, by inserting matter which clearly is connected with those subjects; what is to be done? That would be tantamount to originating a dispatch by the Board of Control. But here the Board of Control have sent orders to the Court of Directors to transmit a dispatch originally relating to the civil government, which order they, according to s. 12, ought to have obeyed. If the order of the Board was objectionable, within sect. 16, the directors might have appealed. In Rex v. The East India Company, 4 M. & S. 279, this Court and the Privy Council must have been of opinion that the Court of Directors might appeal to the Privy Council upon the question whether a dispatch, originating with them, \*5271 \*and altered by the Board of Control, related to the civil or military government or revenues of India; for there time was given to the directors to appeal to the Privy Council, and the Privy Council entertained that appeal. It is not true that there is another remedy here; for the act of parliament, by s. 15, gives to the Board of Control the power of originating a dispatch, not in a case like the present, but only where the East India Company neglect to frame and transmit a dispatch on any subject connected with the government or revenue beyond the space of fourteen days after requisition Here the directors have not neglected to frame and transmit a dispatch to the Board; they have already done so. Cur. adv. vult.

LITTLEDALE, J. now delivered the judgment of the Court. After stating the facts, and that the question arose upon the construction of the 33 G. 3, c. 52, and particularly of ss. 9, 11, 12, 13, 15, and 16, the learned Judge proceeded as follows:—The first objection to this mandamus made by the Court of Directors, is, that there does not appear to have been any refusal on their part to transmit the dispatch which is the subject of the rule. But we are of opinion that, from the discussion and correspondence that have taken place, though there may not have been a distinct refusal in so many words, there has been, particularly from the rescinding of the original resolution, such a refusal as is sufficient to authorize the Court to entertain the subject-matter of the man-

damus.

The Court of Directors then object, that they have rescinded the resolution \*538] of 20th March, under which this \*dispatch was framed; and certainly, if they could rescind the resolution, there would be an end of the dispatch altogether, and all the alterations made by the Board of Commissioners would fall to the ground with the dispatch, and no mandamus could issue.

But we are of opinion that the Court of Directors had no authority to rescind their resolution of the 20th of March. The act of parliament gives no such

power; and we think that there is no implied power.

The dispatch then framed has been sent to the Board of Commissioners; and that board has acted upon it, has made alterations, and returned it to the Court of Directors: upon that a discussion has taken place between these two bodies: and as the act of parliament has been thus proceeded upon by the two bodies constituted for the purpose of considering any measure under the provisions of the act, we think it is not competent for the Court of Directors to annul the dispatch which they have originated, and more particularly, as the latter part of the 13th section says that the orders and instructions of the Board of Commissioners in such a case are to be final and conclusive on the directors. If that could be done, the Court of Directors might at any time annul a dispatch when they were not satisfied with the alterations of the Board of Control, and thus produce the greatest inconvenience in the administration of the affairs which are now entrusted to two separate jurisdictions, each of which is to perform its own functions.

It is urged by the directors, that a mandamus ought not to be granted if there be another remedy; and that there is another remedy in this case, inas-

much as the Board of Control may, under the fifteenth section of the \*539 act, themselves originate a dispatch to answer all the purposes of the latered dispatch, if the directors do not frame and transmit one within fourteen days after request, and that, therefore, this mandamus is not necessary.

But we are of opinion that such an objection to a mandamus cannot be supported. Here a measure has been begun and carried up to a certain point, which is capable of being enforced if the parties who apply for a mandamus are correct in their proceedings: and it is no answer to say that, by some other proceeding to be instituted by them, they may attain the same object. The Board of Commissioners have a right to deal with the existing state of things; and are not bound to abandon that and resort to some other proceeding, merely

because it may possibly in the end have the same effect.

Having disposed of these questions, the case comes to this; the directors originate a dispatch which they now say does not relate to the government of India; but they head it "Political Department." This dispatch is transmitted to the Board of Control, who, it is said, alter it in such a way as to make it a dispatch relating to the government. The directors enter into discussions with the Board of Control, and in these discussions they do not object to the jurisdiction of the commissioners, but their objections are to the merits of the alterations. And we think that, with relation to the present proceedings, they are bound by that admission, and cannot now retract it.

We give no opinion whether the dispatch, if it had not been headed, and afterwards treated as we have mentioned, really did relate to the government of India, nor whether this Court has jurisdiction to decide upon \*that question if it should come before us in any other way, nor whether the directors can in any other mode avail themselves of the opportunity of showing

that it did not relate to government.

Neither do we give any opinion whether the sixteenth section gives an appeal in case of an altered dispatch, as well as a dispatch originating with the Board of Commissioners. Upon that right no such discussion has been raised as to affect the question, whether a mandamus should go. Neither has any application been made to enlarge the rule, to give an opportunity of appealing, as was done in the case of The King v. The Court of Directors of the East India Company, 4 M. & S. 279.

Upon the whole of this case, we are of opinion that the rule for the mandamus should be made absolute.

# \*SNOWBALL, qui tam, &c., v. Sir HARRY JAMES GOODRICKE. [\*54]

In an action against the sheriff, admissions by the under-sheriff are not evidence, unless they accompany some official act of the latter, or tend to charge himself.

And, therefore, in an action against the sheriff for taking illegal poundage, declarations of the under-sheriff, after he was out of office, are not admissible to prove that the bailiff charged with having committed the extortion was the sheriff's authorized agent

<sup>(</sup>b) By the statute 3 & 4 W. 4, c. 85, s. 30, the Court of Directors are prohibited from sending any dispatches, &c. "relating to the said territories, (mentioned in sect. 1,) or the government thereof, or to the property or rights vested in the said company in trust as aforesaid, (s. 1,) or to any public matters whatever," till the same shall have been submitted to, and approved by, the Board of Control; except where the Board shall otherwise allow, as they are empowered to do by the same section. Sections 31, and 32, contain other provisions on this subject; and section 33, provides, that if it appear to the directors that any dispatches, &c. upon which directions may be given by the Board, are contrary to law, the directors and the board may send a special case to three or more Judges of K. B. for their opinion, which opinion said Judges are required to certify, and the same shall be final.

DEBT, against the late sheriff of Yorkshire, under 29 Eliz. c. 4, for taking more than the legal poundage on levying two executions. Plea, the general The cause was tried before Alderson, J., at the York Spring assizes, 1832. For the purpose of proving that the bailiff who made the levy acted under the authority of the sheriff, the plaintiff's counsel put in copies of the writs returned in the two actions, having the bailiff's name indorsed; and in order to shew that such indorsement was made in the sheriff's office by proper authority, a witness was called to prove certain declarations made to him on the subject by Mr. Russell, who was the defendant's under-sheriff: but it appeared that this conversation took place after Mr. Russell had gone out of office, and therefore Alderson, J., rejected the evidence, and the plaintiff was nonsuited. J. Williams, in the next term, obtained a rule nisi for a new trial, against which

Creswell, in this term, shewed cause. The evidence was rightly rejected. The regular proof of the bailiff's authority is the warrant; or, if that cannot be produced, and its absence is duly accounted for, evidence of its contents. default of such proof, the writ, indorsed with the bailiff's name, is sufficient, if it be shewn that the practice of the sheriff's office was to indorse the name of the \*542] bailiff on the writ he was to \*execute, for otherwise it does not appear that the indorsement was made by any proper authority. To establish that point in the present case, evidence was offered of Mr. Russell's declarations: and if he had been under-sheriff at the time, they might have been receivable, on the ground that any thing said upon such a subject by the under-sheriff, as such, is part of the transaction, and binds the principal. But this is only the case so long as the declarations are made by him in the course of his official duty:

nor, unless that be so, can they affect the sheriff as admissions.

John Williams contrà. It is not contended that the mere fact of the bailiff's name appearing on the examined copy of the writ is sufficient to shew that the name was put on according to the course of business in the office; but the other evidence sufficiently proved that. There is no technical rule of proof in such a The fact itself, of the indorsement of the name by authority, is only part of a chain of secondary evidence. The indorsing of the name in the office, probably by some inferior officer, is not more conclusive than the declaration of this party. In Drake v. Sykes, 7 T. R. 113, it was held that the sheriff was not affected by the act of his bailiff without particular evidence of privity between them; but there Lord Kenyon and Lawrence, J., drew a strong distinction, in this respect, between a bailiff and the under-sheriff. [DENMAN, C. J. Is there any difference between one agent and another, if the observation relied upon is merely a gratuitous one, and not made in the course of his duty?] It is on a \*543] point intimately connected with \*the duty of the office. The circumstances under which the declaration was made, and the occasion of making it, would only operate so far as to give it more or less effect with the jury. [Patteson, J., referred to North v. Miles, 1 Camp. 389. Denman, C. J. In Yabsley v. Doble, 1 Ld. Ray. 190, it was held that an under-sheriff's confession of an escape was evidence to charge the high-sheriff, because the under-sheriff gives a bond to save him harmless; and therefore his confession, in effect, charges himself.] That goes far in identifying the sheriff generally with the undersheriff as to admissions and declarations. [Denman, C. J. But a special ground is assigned. The language of Lord Kenyon and Lawrence, J., in Drake v. Sykes, 7 T. R. 113, does certainly appear to identify the under-sheriff with the sheriff to all intents. The question is important, and we will consider of it.]

Cur. adv. vult. DENMAN, C. J. now delivered the judgment of the Court. We are of opinion, that an under-sheriff is not competent to charge the sheriff by his declarations, unless they accompany some official act, or unless they tend to charge himself, he being, in truth, the real party in the cause. The rule must therefore be discharged. Rule discharged.

### \*DOYLE v. DOUGLAS. Jan. 30.

Where actions against under-writers have been consolidated by rule of Court, and the defendant has obtained a verdict in one, the Court will not restrain the plaintiff from trying a second cause, included in the same rule, till the costs of the first are paid.

THE plaintiff had commenced eleven actions against the underwriters of a policy on the ship Triton, claiming as for a total loss. A consolidation rule was afterwards entered into, whereby ten of the defendants agreed to be bound by the verdict in the first action, viz., Doyle v. Dallas, to make certain admissions, and to bring no writ of error, and file no bill in equity for delay; and the proceedings in the last ten actions were to be stayed till after the trial of the first. On the trial of Doyle v. Dallas, 1 M. & Rob. 48, in February, 1831, a verdict was found for the defendant; and judgment was afterwards signed and execution issued for the costs in that action. No levy could be made, the plaintiff's goods being conveyed out of reach; and he stated to the defendant's attorney, that his payment of the costs depended on the sale of certain property in which he was interested, and which sale could not then be forced on. The present cause in the meanwhile standing for trial, an order was made by a Judge at chambers, that the trial should be postponed till after the sittings in Hilary term, 1833, the defendant in Doyle v. Dallas undertaking not to issue fresh execution for his costs (the former writ having expired) without leave of the Court. The cause having been set down for trial at the next special jury sittings in Middlesex after the present term, F. Pollock, in the course of the term, obtained a rule to shew cause why \*the proceedings in Doyle v. Douglass should not be stayed till the plaintiff should have paid the costs in Doyle v. Dallas, and [\*545] why the defendant in the latter cause should not be at liberty to issue execution.

Sir James Scarlett now shewed cause, on affidavits stating, among other things, that the plaintiff had now obtained fresh evidence (which was specified) on a part of the case as to which the jury had been misled on the former trial; and he contended, that in practice the plaintiff was not debarred by a consolidation rule from proceeding in a second action, included in the rule; nor was it reasonable that he should be so, the rule being for the benefit of the defendant; and,

therefore, that the terms here contended for ought not to be imposed.

F. Pollock and Maule contrà. The costs of the former trial ought to be paid before the new one is proceeded upon, as in ejectment. Formerly it was thought that a consolidation rule bound the plaintiff as well as the defendants; but since a different doctrine has been established, (a) the practice should be analogous to that in ejectment as to costs, the plaintiff \*having in other respects the benefit of that form of action. Here every defendant is bound by the verdict in one case, if the plaintiff succeeds. The rule in ejectment has been extended to other cases where the title relied upon by the plaintiff in the second action was clearly the same as in the first. The plaintiff himself states here, that he relies upon new evidence on a question already tried.

PER CURIUM.(a) To grant this rule would be stetching the authority of the court farther than we are entitled to carry it. By the practice contended for, the plaintiff, as well as the defendant, would be bound by a consolidation rule.

<sup>(</sup>a) In Long v. Douglas, Michaelmas term 1831, it appeared that ten actions against underwriters had been consolidated, on the condition, among others, that the defendants should make certain admissions. The plaintiff, failing in the first cause, gave notice of trial in another. The costs of the first were still unpaid. A rule nisi was obtained for staying all proceedings in this second action. Cause was shewn (Nov. 25th), and Burstall v. Horner, 7 T. R. 372, and Cohen v. Bulkeley, 5 Taunt. 165, were cited. The Court discharged the rule; Lord Tenterden, however, observing that where the plaintiff proceeds in a second consolidated action without applying to the Court, he cannot have the benefit of any terms which were imposed on the defendants by the consolidated rule.

•an, C. J., Littledale, Taunton, and Patteson, Js.

In ejectment, the Court would not stay proceedings in a second cause, where the defendant was a different party. The defendant may issue execution; but the rest of the rule must be discharged.

Rule absolute for issuing execution only.

## DEAN and ANOTHER v. JAMES. Jan. 30.

Proof of a tender of 201. 9s. 6d. in bank notes and silver, is sufficient to support the plea of tender of 201.

Assumpsit of goods sold and delivered. Plea, non assumpsit except as to 20l parcel, &c., and as to that sum a tender. Replication, that the defendant did not tender and offer to pay to the plaintiffs 20%, parcel, &c., in manner and form as the defendant had in his plea alleged. At the trial before Denman, C. J., at the Middlesex sittings after last Michaelmas term, the defendant proved a tender to plaintiff of 201. 9s. 6d. in bank notes and silver, and obtained a verdict, the Lord \*Chief Justice being of opinion that this proof was sufficient. In the early part of this term Law obtained a rule nisi for a new trial, and cited from Harrison's Digest, vol. 2 p. 516, Watkins v. Robb, S. C. 2 Esp. N. P. C. 710, as shewing that proof of a tender of 4l. 9s. 6d. is not evidence to support a plea of a tender of 5l. 9s. 6d. Thesiger and Wightman were now about to shew cause, but the Court called upon

Law and Manning to support the rule. The tender which is proved must be of the specific sum pleaded. Where there is a plea of tender, and a replication of a subsequent demand and refusal, the plaintiff must prove that, after the tender admitted in the pleadings, be demanded of the defendant the precise sum before tendered and refused, Spybey v. Hide, 1 Camp. 181, Rivers v. Griffiths, Then, if the plaintiffs here had replied a subsequent demand 5 B. & A. 630. and refusal of 201, proof of a demand of 201. 9s. 6d. would have been inapplicable; and yet, if the court should hold the plea of tender of 201. to be proved by a tender of 201. 9s. 6d., the plaintiffs would have demanded the very sum actually tendered. [Denman C. J. referred to the third resolution in Wade's case, 5 Rep. 115.) That was not necessary to the decision, for there the actual amount due was tendered. So it was in Douglas v. Patrick, 3 T. R. 638, and Cadman v. Lubbock, 5 D. & R. 289, though in the first case two accounts were mixed together, and in the second, change was wanted. There is no case in \*584] which the actual offer was a sum exceeding that which \*was due, except the present and Watkins v. Robb, 2 Esp. N. P. C. 710. There Buller, J. was of opinion, that proof of a tender of 4l. 19s. 6d. did not support the plea of a tender of 4l. 9s. 6d. [TAUNTON, J. There the defendant tendered a 5l. note and demanded 6d. change, which the plaintiff was not bound to give, Betterbee v. Davis, 3 Camp. 71. The rule was granted entirely on a misapprehension of that case.

TAUNTON, C. J. I think the rule ought to be discharged.

LITTLEDALE, J. This case falls within the third resolution in Wade's case, 5 Co. 115, that if a man tender more than he ought to pay, it is good, for omne majus continet in se minus, and the other ought to accept so much of it as is due to him. As to replying a demand, it is not the plaintiff's business to demand more than is actually due; it is enough if in his replication he admits that the sum due was tendered, but alleges that he afterwards demanded that, and it was refused.

TAUNTON, J. concurred.

PATTESON, J. I am of the same opinion. The difficulty suggested as to rereplying would be cured by a special replication.

Vol XXIV.—16

### \*The KING v. The Justices of SOMERSETSHIRE. Jan. 30.

The sixth section of the Friendly Society Act, 10 G. 4, c. 56, does not apply to a society formed before the passing of the act, though it has conformed to the provisions of the act, as required by sections 39, and 40; and, therefore, the justices at quarter sessions are bound to enrol the rules of such a society, although it has not been made appear that the tables of payments to be made, and benefits to be received, may be adopted with safety to all parties concerned.

THE friendly society of Marksbury and Stanton Prior was instituted in the year 1784, and the rules of the society were enrolled at the quarter sessions for the county of Somerset on the 30th of April 1794, pursuant to the statute 33 G. 3, c. 54, and were amended, and duly certified on the 31st September 1832, pursuant to the statute 10 G. 4, c. 56, s. 4, by the barrister appointed to certify the rules of savings banks; and a transcript and duplicate were respectively signed by three of a committee, and by the clerk to the society, and were left with the clerk of the peace for the county of Somerset, before the day appointed for holding the quarter sessions, in January 1832, in order that the transcript might be laid before the justices of the county, to be confirmed and enrolled at such quarter sessions. The court of quarter sessions refused to allow and confirm the rules, because it did not appear to them that the table of payments to be made to the members, and of the benefits to be received by them, could be adouted with safety to all persons concerned, according to 10 G. 4, c. 56, s. 6. It was contended, that this clause did not extend to societies established before the passing of the act; but the court of quarter sessions thought it was a provision to which old societies were required to conform, by the thirty-ninth and fortieth sections of that Act. A rule nisi having been obtained for a mandanus

to the justices of Somersetshire to enrol the rules,

Erle now shewed cause. The question is, whether the 10 G. 4, c. 56, \*s. 6, extends to societies established and duly enrolled before the passing of Section 1, recites, that it is expedient to amend the laws relating to friendly societies, and then repeals several statutes which related to those socie-Section 2, recites that certain friendly societies have been established, and that it is expedient to give protection to such societies, and the funds thereby established, and to afford encouragement to other persons to form the like institutions; and it then enacts, that any number of persons may form themselves into a society for mutual relief, &c. and raise a fund, and make rules." The enacting part of this section, and the provisions of sections 3, 4, and 5, clearly relate to societies to be formed after the act. Then section 6, provides, "that no rules of any society, hereafter to be formed, shall be allowed, unless it shall appear to the justices to whom the same are tendered, that the table of the payments to be made by the members, and of the benefits to be received by them, may be adopted with safety to all parties concerned." This section taken by itself would apply only to societies to be formed after the passing of the act; but it must be construed in conjunction with section 39, which enacts that the statute shall extend "to societies already established, as soon as they shall think fit to conform to the provisions thereof." The society in question has conformed to the pr visions of the act; and it is, therefore, within the sixth section. enacts, "that provided societies already enrolled shall not conform to the provisions of that act within three years, they shall cease to be entitled to the provisions or privileges of any or either of the therein-before repealed \*acts." Section 6, therefore, applies to such societies as choose to come in under section 39, and conform to the provisions of the statute, as well as sections 3, 4, and 5. But, secondly, it is not imperative on the justices, but discretionary in them, to enrol the rules. If that were not so, it would be nugatory to oblige the clerk of the peace to lay the rules before the justices.

Tidd Pratt contra. The 33 G. 3, c. 54, was the first statute passed on the subject of friendly societies. The rules of the society in question were duly en-

rolled under the provisions of that statute in 1794, and the society is now anxious to avail itself of the provisions of the late act, 10 G. 4, c. 56, which was passed to consolidate and amend the previous acts relating to friendly societies, but not to infringe upon, or take away, any privileges enjoyed by such societies under the 33 G. 3, c. 54. The 59 G. 3, c. 128, first made it necessary for a friendly society to submit its scale of payments and benefits to any person; and section 2, which applies to societies formed and enrolled after the passing thereof, provides, that the justices shall not confirm and allow any tables of payments or be lefits, &c. until it shall have been made appear to such justices, that the said tables and rules are such as have been approved by two persons at the least, known to be professional actuaries or persons skilled in calculation. The latter expression was found to be too vague, and new provisions are introduced in this act, sects. 6, and 34; but both refer to societies formed under this act. In construing an act of parliament, effect ought to be given to every word of it; but, if the construction contended for by the justices is allowed to prevail, the words "here-\*552] after to be formed" \*will be nugatory. It cannot be said that the society has "thought fit to conform" to the provisions of this act, and thereby voluntarily adopted the regulation in sect. 6, when the conformity is forced up in them by the thirty-ninth section.

DENMAN, C. J. The question is, whether the provision contained in 10 G. 4, c. 96, s. 6, be one to which a society formed before the passing of that act must conform. It is confined in terms to a society thereafter to be formed. We are all of opinion, therefore, that the magistrates had no power in this case

to refuse to enrol the rules on the ground assigned.

LITTLEDALE, TAUNTON and PATTESON, Js. concurred. Rule absolute.

## The KING v. BATEMAN and Another, Justices of FOLKSTONE. Jan. 31.

To ground a proceeding at petty sessions under 7 & 8 G. 4, c. 31, s. 8, for compensation in respect of felonious injury by rioters, the party or his servant must go before a justice within seven days after the offence committed, and submit to examination, &c. according to sect. 3, of the act, as well as where an action is to be brought. And the Court will not grant a mandamus to summon such petty session, where it does not appear by affidavit that these steps have been taken, though the party swear that he has duly served the notice required by sect. 8.

PLATT, in this term, obtained a rule nisi for a mandamus to John Bateman and Richard Hart, Esqrs., justices of Folkstone, to appoint a special petty session, pursuant to 7 & 8 G. 4, c. 31, for the purpose of hearing and determining the claim of Clark Powsey to compensation for damage which he had suffered by his house in part feloniously demolished by rioters. The affidavit of Powsey \*553] in support of the rule, stated \*the injury done, which was to an amount below 30l., and then proceeded to allege that, five days afterwards, he served notice in writing upon a constable of Folkstone, that he intended to claim compensation, and thereby required the constable, within seven days of his receiving the notice, to exhibit the same to two justices of Folkstone, that they might appoint a time and place for holding a special petty session to determine the said claim. The notice appeared to be conformable to sect. 8, of the statute, and was served upon Messrs. Bateman and Hart; but they did not appoint any special session.

Sir James Scarlett now shewed cause. The affidavit is defective, in not stating that the party damnified, or his servant who had the care of the property, went before a justice of the peace within seven days after the commission of the off nce, as required by sect. 3, of the act, and there made the statement, submitted to the examination, and entered into the recognizance which that section

prescribes. This is directed in the case of a 8, as well as where an action is to be brought. This is directed in the case of a summary proceeding within sect.

Platt, contrà. The eighth section does not require these preliminaries, but only the delivery of a notice in the manner there stated. Even if more be requisite, that will be a ground of objection at the petty sessions; enough is shown here for the purpose of the present rule. [DENMAN, C. J. Ought we to grant the mandamus if we see that the party will ultimately fail?] The only object at present is to put the magistrates in motion: the petty sessions are to hear and determine the claim. It may be shewn there that the proceedings mentioned in sect. 3, were actually gone through. [Den-MAN, C. J. The question is, whether, as a ground for this application, the party ought not to have sworn, at least in general terms, that he could prove those facts at the petty sessions.] If the regular proceedings have not been taken, the justices can return that to the mandamus. [PATTESON, J. We ought not to put them to that. LITTLEDALE, J. Why are we to desire them to hold a petty session, when we do not see that the proper steps have been taken? It lies in the knowledge of the party applying, whether they have been so or not.]

The best course will be, to enlarge the rule till next term, in PER CURIAM. order that the party may, if he is able, make affidavit that the requisites prescribed by the statute have been complied with. He may state this in general

If no such affidavit is made, there will be no mandamus.

In the following term, no affidavit having been made as required, the rule was discharged with costs.

#### \*HOWARD, Gent., One, &c. v. BARTOLOZZI.(a) [\*555

An attorney, employed by a party about to take the benefit of the insolvent act, to prepare a list of debts, which were afterwards to be inserted in the schedule, omitted a debt due from the insolvent to himself, and sued for that debt after the party's discharge: Held, by Denman, J., and Parke, J., that this was not such a fraud upon the general policy of the Insolvent Act, as would bar the action.

Quere, Whether, if he omitted to insert the debt in breach of his duty to his client, that would be a defence to an action brought by him against the latter to recover the debt. or whether it would only be the subject of a cross action? If a defence, quære whether

or not it should be specially pleaded?

Assumpsit for money lent, &c. Plea, first, the general issue; secondly, a discharge under the Insolvent Debtor's Act, on the 28th of July, 1830. At the trial before LITTLEDALE, J., at the Middlesex sittings in Michaelmas term, 1832, it appeared that, before the defendant applied to that court to be discharged, she was indebted to the plaintiff in a sum of 1271, the whole of which debt accrued before the 16th June, 1830, when her petition was filed; and that she had employed the plaintiff as her attorney, had consulted him on that occasion, and the schedule of her debts was made out in his office from accounts furnished by her to him, although he, not being an attorney in the Insolvent Court, did not act as her attorney there. The debt due to him from the defendant was not inserted in the schedule. Since her discharge, on being applied to for payment of the plaintiff's demand, she had admitted it to be due, and promised to pay it in three months. The defendant's counsel contended that it was the duty of the plaintiff to cause his debt to be inserted in the schedule; and that his omission so to do was a fraud, not only upon the policy of the Insolvent Act, but upon the defendant also, and therefore a defence to the present action. The learned Judge was of opinion that the \*omission [\*556]

<sup>(</sup>a) This case was argued and determined in Michaelmas term, 1832.

by Howard to insert his debt was not any fraud upon the Insolvent Act, or the general body of creditors; and assuming it to be a fraud on the defendant, it would give her a good ground of action against Howard, but was no answer to this action. At the same time, he directed the jury to find specially whether or not the plaintiff was guilty of fraudulent conduct in wilfully concealing his debt and leaving it out of the schedule. The jury said, that they considered the debt as wilfully left out of the schedule. The learned Judge then directed a verdict to be entered for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi was obtained for that purpose, against which

Campbell and Follett now shewed cause. The debt to the plaintiff never having been inserted in the defendant's schedule, her discharge under the Insolvent Act is no answer to this action. Assuming that the plaintiff wrongfully omitted to insert the debt, and that the defendant was thereby damnified, that may possibly afford her a good ground of action against the plaintiff, but it is no answer to an action brought to recover a debt which once existed, and has never been released or discharged. Secondly, assuming that that might be a defence to the action if properly pleaded, it is not a defence under the general issue. Thirdly, there was no evidence to warrant the special finding of the jury, that the debt was wilfully left out of the schedule by the plaintiff.

Kelly contrà. It may be conceded that the discharge of the defendant by the court for the relief of insolvent \*debtors is no answer to this action, the plaintiffs's debt not having been inserted in the schedule. plaintiff's omission to insert the debt in the list from which the schedule was prepared, in order that he might sue for it at a future period, is a fraud against the policy of the law. The object of the legislature was, that the creditors of the insolvent should have a rateable proportion of their respective debts paid out of the property: but here, the plaintiff, by the device to which he has had recourse, would recover the whole of his debt, contrary to the intention of the law, Jackson v. Davison, 4 B. & A. 691, Carpenter v. White, 3 B. Moore, 231. But further, after the finding of the jury, this must be taken to be, not only a fraud against the policy of the law, but on the defendant, and if so, is not merely a ground for a cross action, but, to avoid circuity, must be an answer to the In Alderson v. Langdale, 3 B. & Ad. 660, where the vendee present action. of goods paid for them by a bill of exchange, and the vendor, after acceptance, altered it in a material part, and thereby vitiated it, Lord Tenterden, at Nisi Prius, thought that the plaintiff might resort to the original consideration, and recover the price of the goods, although the defendant might have a cross action against the plaintiff for the damage sustained by the alteration of the bill; but, a verdict having been found for the plaintiff, the Court, after argument, and time taken to consider, were of opinion, that the vendor, having altered the bill, and thereby made it his own, could not recover for the goods sold; and that partly on the ground, that allowing the plaintiff to recover for his goods, and \*558] the defendant to bring a cross action, \*would lead to a multiplicity of (He further contended that the evidence was admissible under suits. the general issue, and supported the verdict.)

DENMAN, C. J. This is an application to enter a verdict for the defendant, on the ground, first, that the omission of the plaintiff to have his debt inserted in the schedule was a fraud against the policy of the law, and on the general body of creditors. I think there is no ground for so holding; because, here, the plaintiff never came in under the Insolvent Act. On examination of all the cases it appears to me that where a creditor does not seek to take any benefit from the act, the discharge of the debtor does not operate as a statutable release of the debt due before the debtor applied to be discharged. Jackson v. Davison, 4 B. & A. 691, is distinguishable: there the party was an opposing creditor. In Carpenter v. White, 3 B. Moore, 231, the defendant being about to take the benefit of the Insolvent Act, the plaintiff requested him not to insert his debt in

the schedule, as he would never call on him for its amount. There was, therefore, an express promise not to enforce his demand. But, then it is said that a fraud has been committed by the plaintiff on his client, and, putting a reasonable construction on the question left to the jury, and the answer given by them, we must take it that they have found that the plaintiff was guilty of such fraud. But we are all of opinion, that that finding is not warranted by the evidence; for there was proof that the defendant never expected that her debt to How in would be discharged. We think, therefore that, on this point, there should be a new trial. Assuming \*even that such fraudulent omission would be a defence to the present action, it may be questionable whether it ought

not to have been specially pleaded. PARKE, J. I also think that there ought to be a new trial. The jury have found in effect, that the plaintiff was guilty of fraudulent conduct in wilfully concealing his debt, and preventing its being inserted in the schedule. I think that finding was not warranted by the evidence, and that, upon this ground, there should be a new trial. It has been said, that even if the debt was omitted by the plaintiff with the defandant's consent, that would be a fraud upon the creditors at large, upon the authority of Jackson v. Davison, 3 B. Moore, 231; but there the plaintiff was one of the opposing creditors. A creditor who comes in under the act, and at the same time takes from the debtor a security for his debt, commits a fraud against the policy of the act. So a creditor who is a party to a composition deed, and thereby holds out to the rest of the creditors, that he comes in on equal terms with them, commits a fraud if he take a security for the payment of his whole debt. But it is no fraud in a creditor, not a party to the deed, to endeavour to obtain payment of his debt. Whether the fact of the plaintiff having fraudulently, and in breach of his duty to the defendant, omitted to cause the debt to be inserted in the schedule (if it be found by the jury on sufficient evidence) will be a defence to the present action, may be a question for the Court to decide on a future occasion. The argument, that in order to avoid circuity of action, it ought to be a defence, has great weight with me. In \*a note to Turner v. Davies, 2 Wms. Saund. 150, it is laid [\*550] down, "that a cause of action against a plaintiff will be no bar to an [\*560 action by him for avoiding circuity of action, when the recovery in both actions is not equal." If so, the question would be, whether, in an action brought by Bartolozzi against Howard, for causing his debt to be omitted, that debt would be the measure of damages. (See 7 G. 4, c. 57, s. 57.) I do not, however, mean to give a final and decisive opinion upon that point.

TAUNTON, J. I also think that there ought to be a new trial, because I entertain great doubts whether the jury were justified by the evidence in finding

that the plaintiff fraudulently omitted his debt.

PATTESON, J. I think, upon the whole, the finding is not warranted by the

evidence; and therefore, there ought to be a new trial.

Rule absolute for a new trial.

The cause was tried a second time, before Denman, C. J., at the Middlesex sittings after Trinity term 1833, when nearly the same evidence was given; and the Lord Chief Justice told the jury that the only question was, whether the plaintiff had induced the defendant to leave the debt out of the schedule, and that the onus of proving that lay on the defendant; and he directed them to find for her, if they were satisfied, on the evidence, that the debt had been omitted by the plaintiff's procurement. The jury found for the defendant. No motion was made in this cause in the ensuing term.

#### \*The KING v. The Justices of HERTFORDSHIRE. Jan. 31.

Notice was given of appeal against a poor rate, and the respondents attended at the sessions and prayed a respite, alleging that they had not had time to prepare their defence to the matters stated as grounds of appeal. The appellant opposed the respite; but it was granted, no notice of appeal having been proved or expressly admitted. An order of respite was made out, embodying the grounds of appeal stated in the notice: Held, that at the following sessions, the appellant was entitled to be heard without proving any notice of appeal.

SOLOMON BAXTER, intending to appeal against a poor-rate, served his notices in due time for the October sessions for Hertfordshire, 1832, and attended there ready to try, and to prove notice. The appeal being called on, counsel appeared for the respondents, and prayed a respite, alleging that the respondents had not had time to prepare their defence to the grounds of appeal stated in the notice, which were fifteen in number. The appellant opposed the respite; but it was granted, on payment of costs. Notice of appeal was not proved, nor an admission of it required. One of the notices was handed by the respondent's counsel to the clerk of the peace, and was thereupon (as the appellant represented) filed with the records of the sessions; but the respondents alleged that it was merely furnished to the clerk of the peace for his convenience, to assist him in making out the order of respite. This order (which set forth the grounds of appeal stated in the notice) was served on the churchwardens and overseers of the respondent parish on the 21st of December; but they had no further notice of appeal. At the next sessions, (31st December) the appeal was called on, and the respondents' counsel objected to its being heard without proof of the original notice. This the appellant was not prepared to give, conceiving that the fact had been admitted at the former sessions, and proof of it now was unnecessary; but he offered to prove the order of respite. \*The sessions \*562] held this insufficient, and confirmed the rate with costs. A rule nisi was afterwards obtained in this Court for a mandamus to the justices to enter continuances and hear the appeal.

Ryland now shewed cause, and contended, that upon the clear principles of law on this subject, the respondents were entitled to require proof of the notice, which was necessary to give the court jurisdiction; that the handing of a copy to the clerk of the peace in the manner here stated could make no difference; and that the parties stood in the same situation as to this point at the second

session as at the first.

Platt, contrà, argued that the jurisdiction had been admitted, and proof of the notice dispensed with, by the conduct of the respondents at the first sessions.

PER CURIAM. (a) The respondents had acted upon the notice so as to make further proof unnecessary. The sessions ought to hear the appeal.

Rule absolute. (b)

## \*563] \*The KING v. The Justices of CARMARTHENSHIRE. Jan. 31.

Held, that a notice of appeal given in the name of the officers of the hamlet of A. and reciting the order to be for removal to the hamlet of A., in the parish of L., could not,

An order of removal "to the parish of L." was directed "to the churchwardens and overseers of the parish of L." There were no such officers, but the parish was divided into three hamlets, A. B. and C., each maintaining its own poor, and having separate officers. The pauper, with the order, was delivered by the officers of the removing parish to the officers of the hamlet of A.:

<sup>(</sup>a) Denman, C. J., Littledale, Taunton, and Patteson, Js.

<sup>(</sup>b) See Rex v. The Justices of the West Riding, Michaelmas term, 1833.

under these circumstances, be objected to by the respondents, and that the appeal ought to have been heard.

Two justices, on the 25th of August 1832, made an order for the removal of a pauper and her children from the parish of Mothvey, in the county of Carmarthen, to the parish of Llywell, in the county of Brecon. The order was directed "to the churchwardens and overseers of the poor of the parish of Llywell," and after adjudging that the lawful settlement of the paupers was in the parish of Llywell, it proceeded in the usual form to require "the said churchwardens and overseers of the poor of the said parish of Llywell" to receive and

provide for the paupers. The parish of Llywell is divided into three hamlets, viz. Treganmanr, Traganlaes, and Slydach, each of which maintains its own poor, and has separate churchwardens, separate overseers of the poor, and separate rates. have frequently been tried against orders of removal between the three hamlets at the Brecon quarter sessions. There are no such officers as churchwardens or overseers for the whole parish of Llywell. On the 27th of August 1832, the paupers named in the order of removal were delivered by an officer of the removing parish of Mothyey to one of the oversers of the hamlet of Treganmaur. together with the order of removal. The overseer received the paupers, but at the next quarter sessions, held in October 1832, an appeal against the order of removal was duly lodged and respited on behalf of the churchwardens and overseers of the hamlet \*of Treganmaur: and on the 22d of December 1832, the following notice of appeal was duly served upon the churchwardens and overseers of Mothvey: "To the churchwardens and overseers of the poor of the parish of Mothvey, in the county of Carmarthen. This is to give you notice, that we the churchwardens and overseers of the poor of the hamlet of Treganinaur, in the parish of Llywell, in the county of Brecon, do intend at the next quarter sessions of the peace to be held in and for the said county of Carmarthen, to prosecute an appeal which was duly lodged at the last quarter sessions against an order of, &c. for and concerning the removal of Jane Jones and her four children (describing them by their names, &c.) to our said hamlet of Treganmaur, in the said parish of Llywell, in the county of Brecon aforesaid, from your said parish of Mothvey, in the said county of Carmarthen." The appeal came on at the sessions held in January 1833, and on proof of service of the notice of appeal, an objection was made on behalf of the respondent parish that the notice was improper, inasmuch as it ought to have been given by the overseers of the parish of Llywell, to whom the order was directed, and not by the officers of the hamlet of Treganmaur; and a further objection was made, that the notice stated the order to be an order for the removal of the paupers to the hamlet of Treganmaur, in the parish of Llywell, whereas the order appeared to be an order for their removal to the parish of Llywell.

The justices at sessions determined against hearing the appeal, on the ground of the informality of the notice, on the objections above stated, and the appeal was accordingly dismissed. A rule nisi for a mandamus to \*the justices to enter continuances and hear the appeal was afterwards obtained by E. [\*565]

V. Williams, against which

Whitcombe now shewed cause. The sessions had no jurisdiction to hear the appeal, because the order appealed against was an order upon the officers of the parish of Llywell, whereas the notice of appeal was given by the officers of the hamlet of Treganmaur in the parish of Llywell. The notice ought to have been given in the name of "the churchwardens and overseers of the parish of Llywell," upon whom the order was made. Justices of the peace are not obliged to take notice of the divisions of parishes into townships and hamlets, Spitalfields v. Bromley, 2 Bott. pl. 890, 6th ed. This is not like the case of Rex r. Kirkby Stephen, Burr. S. C. 664, because there the name of the township to the overseers of which the paupers were delivered, as well as that of the parish,

was Kirkby Stephen. Again, there is a fatal variance between the description of the order of removal in the notice of appeal, and the order itself. The notice describes it as an order upon the officers of the hamlet of Treganmaur in the parish of Llywell; whereas, in fact, no such order has ever been made, but only an order upon the officers of the parish of Llywell.

The Solicitor-General and E. V. Williams contra. As to the first objection, that the appeal ought to have been in the name of the churchwardens and over\*566] seers of the parish of Llywell, to whom the order was directed, the statute 9 G. 1, c. 7, s. 8, requires only that the notice shall be given "by
the churchwardens or overseers of the poor of such parish or place who shall
make such appeal;" and that has been done here. Besides, there are no such
officers in existence as those to whom the order was directed. As to the other
objection, that the order does not correspond with that described in the notice,
the respondents cannot have been misled by such a variance, for there was but
one order. And the respondents, by delivering the paupers with the order to
the overseers of the hamlet of Treganmaur, have treated it as an order upon the
officers of the particular hamlet; and are estopped from saying now, that it does
not, in substance, amount to such an order.

DENMAN, C. J. We are of opinion that the quarter sessions ought to have heard the appeal. The notice of appeal could not mislead the parish officers of Mothvey, to whom it was addressed. It recited the order of removal sufficiently; the names of the paupers, the removing parish, and the part of the parish of Llywell to which the removals were made under the order, although the order professed to remove to the parish at large. The parish Mothvey is estopped by its own acts from availing itself of the objection. The removal was by the order to the parish at large, but the service of that order was on the hamlet. Parties, who have thus acted upon their own order, cannot afterwards say, that an appeal against it, under such a notice as this, shall not be heard.

\*LITTLEDALE, TAUNTON, and PATTESON, Js. concurred.

Rule absolute.(a)

(4) It may be convenient here to add the following case, decided in Trinity term, 1833.

The KING v. The Inhabitants of BINGLEY. June 4.

(Before Denman, C. J., LITTLEDALE, PARKE, and PATTESON, Js.)

Paupers were removed to the township of Bingley: the township does not maintain its own poor, but is in the parish of Bingley, which does:

Held, that the order was informal, but the sessions might amend it.

Upon appeal against an order of two justices, whereby Isabella Rushworth, widow, and her children, were removed from the township of Heslington St. Lawrence, in the East Riding of Yorkshire, to the township of Bingley, in the West Riding, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The paupers were removed from Heslington St. Lawrence, to the township of Bingley, under the above order. The parish of Bingley consists of several townships, of which the township of Bingley is one. The parish maintains its own poor collectively, and there are no separate overseers for the township of Bingley. The question was, whether the order of removal to the township of Bingley could be supported.

Wrangham in support of the order of sessions. The overseers have recognized the order as made on them, by appearing and defending the appeal. At all events, the defect was one of form, and might have been amended by the sessions according to the stat. 5 G. 2, c. 19, s. 1, if the appellants had made this objection before the case was heard on the results.

the merits; Rex v. Amlwch (4 B. & C. 757).

Starkie, and R. Hildyard, contra. The objection was properly taken at the sessions. The defect in the order was caused by the default of the removing parish, and they ought to have applied to have it amended. Besides, it is a defect not of form but of substance

the removal being to a district which has no funds to maintain its own poor. The order was therefore not amendable; Rex v. Swalcliffe (2 Bott. pl. 786, 896, sixth edit.).

Cur. adv. vult.

DENMAN, C. J. now said (after referring to Rex v. The Justices of Carmarthen, as in some degree analogous), that the present order was informal, but might have been amended at the sessions; and that being so, the Court thought that the case should go back to the sessions, that the amendment might be made.

#### \*BUNNEY and Another v. POYNTZ. Jan. 31.

**[\*568** 

P. having given a general authority to D. to sell hay for him, D. advertised a sale, by the conditions of which a deposit was to be paid, and three months credit given on approved security for the remainder, and the lots were to be taken away within forty weeks of the sale. D. sold the hay to S., and took his promissory note for the price. S. applied to D. for leave to cut some of the hay, and it being granted, cut and took away part, but he was afterwards forbidden by D. to remove the residue. D. indorsed the note, and discounted it at his bankers, who credited him with the amount, minus the discount; it was afterwards dishonoured. D. having become bankrupt, it was agreed between the bankers and S. that the latter should sell them the residue of the hay, and that they should pay him part in money and return him his note in satisfaction of the residue. The bankers, within forty weeks after the sale, demanded the hay of D.'s principal, (P.), who refused to deliver it. In trover brought against P. by the bankers for the hay:

Held, first, assuming P. to have had a lien after the sale, and after the vendee had given his promissory note for the price of the hay, that that lien was not divested by reason of the vendee having removed part of the hay, it not appearing that this part-delivery

to him was by way of delivery of the whole.

Secondly, that P. had no lien, because he was to be considered as having been paid for the hay by reason of his agent having taken the vendee's promissory note, and discounted it, and its being outstanding in the hands of the plaintiffs.

TROVER for hay. At the trial before Littledale, J., at the Spring assizes for the county of Berks, 1832, the following appeared to be the facts of the case: The plaintiffs were bankers at Newbury. The defendant was the owner of a farm, which was managed by one Cameron, his bailiff. By Cameron's directtion, in October, 1829, one Davis was ordered to sell, by auction, hay and other farming produce, then on the defendants's premises. The whole of the hay was not sold; and Cameron gave general directions to Davis to make the best that he could of the residue. In pursuance of these directions, Davis advertised another sale, which took place on the 5th of January, 1830. By the conditions of that sale, it was stipulated, that 20 per cent. deposit should be paid, and three months' credit should be given, on approved security, within seven days of the sale, for payment of the remainder. The lots were to be taken away, with all faults, at the buyer's expense, within forty weeks after the sale. Davis sold to a person named Smallbones, and, without requiring any deposit, took the joint and several promissory notes of S., and one Drew, bearing date the \*6th of January 1830, for 70l., payable at three months to Davis's order at the Newbury bank. Smallbones soon after the sale applied to Davis for leave to cut some of the hay, and it was granted; and he, Smallbones, cut and took away part of the hay; he was afterwards (whether before or after the note became due did not distinctly appear) forbidden by Davis to remove the residue. Davis indorsed the note, and the plaintiffs, who were his bankers, discounted it, and credited him with the amount, minus the discount; it was afterwards dishonoured. In June 1830, Davis became bankrupt. The plaintiffs then called on Smallbones to pay the note; he could not, but proposed to sell them the hay; and on the 6th of September 1830, by agreement in writing, Smallbones sold, and the plaintiffs bought the hay, still being on the premises of the defendant, for 75l.; and it was agreed, that they should pay 5l. in money, and the note should go in satisfaction of the residue. Within forty weeks after the sale to Smallbones, the plaintiffs sent to the defendant and demanded the hay, but he refused to deliver it. The learned Judge told the jury that the plaintiffs could only stand in the situation of Smallbones; and as to that, he was of opinion that, during the time the note was running, Smallbones might have cut and carried away all the hay; but that if he voluntarily allowed it to remain after the dishonour of the note, the lien of Poyntz the vendor revived; although, if Smallbones had been prevented from removing it during the currency of the note, such prevention was wrongful on the part of the vendor, and he could not take advantage of such wrong so as to retain a right of dominion over the hay. And he told the jury to find for the defendant, if they were of opinion, on the evidence, that he, or Davis his agent, interfered to prevent Smallbones from \*570 removing the hay \*before the expiration of three months after the sale, otherwise for the plaintiffs. The jury having found for the defendant.

Talfourd, in last Easter term, moved for a new trial on the ground of misdirection. First, the delivery of part of the hay to Smallbones prevented the lien of the vendor from reviving. In Slubey v. Heyward, 2 H. Bl. 504, delivery of part of a cargo of goods was held to be, in point of law, a delivery of the whole, so as to divest the vendor's right to stop in transitu. In Hammond v. Anderson, 1 New Rep. 69, a number of bales of bacon, lying at a wharf, was sold for one entire sum to be paid for by a bill at two months; and the vendor gave an order to the wharfinger to deliver them to the vendee, who went to the wharf, weighed the whole, and took away part; and it was held that the vendee, by taking away part, (the goods having been sold by one entire contract,) had taken possession of the whole, so as to divest the vendor's right to stop in transitu. Secondly, the negotiation of the note completed the right of the purchaser to the delivery, and the lien, if it existed before, could not revive, while the note was outstanding in the hands of an indorsee.

Lord TENTERDEN, C. J. I am of opinion, that under the circumstances of this case the lien of the vendor was not divested by reason of the vendee's having taken away part of the hay. The delivery of part of a cargo made in the progress of and with a view to the delivery of the whole, has, indeed, been held to divest the vendor's right of stopping in transitu. In Slubey v. Heyward, \*571] \*2 H. Bl. 504, the delivery of part was held to be a delivery of the whole, on the ground that neither before nor at the time of the delivery, did there appear any intention to separate part of the cargo from the rest. Now, here, the vendee asked permission of the vendor's agent to take away only a part of the hay; so that there was a manifest intention that that part should be separated from the residue. Upon the other point, there may be a rule.

PARKE, J. In Hammond v. Anderson, 1 New Rep. 69, the goods were in possession of a wharfinger, and the vendor gave a general order for the delivery of the whole, and the vendee under that order went to the wharf and took away part; he had actual manual possession of the whole, and took upon himself to separate a part from the residue. Here the intention of both parties was to separate the part delivered from the residue, and the vendee took possession of

part only.

Justice in this term shewed cause. The case was left correctly to the jury, for the right of lien, though suspended during the period of credit, revived as soon as that expired. In New v. Swain, 1 Danson & Lloyd's Merc. C. 193, Bayley, J. says, "Where the owner of goods sells on credit, the buyer has a right to immediate possession; but if he suffer the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them." Then the question is, whether, the note having been given by Smallbones to Davis, and indorsed by him to, and discounted by, the plaintiffs, the lien is taken away. Smallbones not having performed his \*572] \*part of the contract, and having permitted the hay which he might have removed, to remain till the time of credit expired, the defendant was then

entitled to resume his dominion over it, notwithstanding the negotiation of the note.

Talfourd contrà. Poynts, the defendant, has no lien, because he has been paid. Davis, his agent, having taken a note from Smallbones for the price of the hay, and negotiated it, the transaction is, in effect, the same as if Davis had taken cash from Smallbones. The outstanding note would be a defence to an action by the vendor for the price, Kearslake v. Morgan, 5 T. R. 513. Suppose Poyntz himself had sold the hay, taken the note, obtained the discount, and parted with the note to the plaintiffs, and they had then bought the hav of Smallbones, could Poyntz afterwards have refused to deliver the hay? Where the owner of goods had a lien on them until the delivery of good and approved bills for the freight, took a bill of exchange for the freight, and afterwards (though he objected to it at the time) negotiated it, it was held that such negotiation amounted to an approval of the bill, and was a relinquishment of his lien on the goods, Horncastle v. Farran, 3 B. & A. 497. Here there has been payment to Davis, and payment to him is payment to Poyntz. The loss arises from the misconduct of Davis; and the question being, which of two innocent parties is to be damnified, Poyntz, whose agent he was, ought to suffer.

Cur. adv. vult.

The judgment of the Court was now delivered by DENMAN, C. J., who, after

stating the facts of the case, proceeded as follows:—

\*It was insisted in argument, that Davis, the agent of the vendor, [\*573 having taken in payment for the hay the promissory note of the vendee, and negotiated it with the plaintiffs, and that note being outstanding in their hands, that was against the vendor, substantially a payment to him, and he could have no right to retain the hay. We think that argument right, and that the defendant, under the circumstances of this case, must be considered as having been paid for the hay, and can have no right to retain it. The manner in which Davis applied the money which he received is wholly immaterial as between the parties to this action. The rule for a new trial must be made absolute.

# The KING on the Prosecution of DAUBUZ, v. PENPRASE and Others. Jan. 31.

On indictment for felony, removed by certiorari, the Court, under special circumstances, ordered that the defendants should be at liberty to plead by a clerk in court, and that they and the prosecutor should be restrained from bringing error on account of the pleas being so taken.

But in the same case the Court refused to allow a suggestion to be entered for the purpose of removing the trial from Cornwall into another county, on the alleged ground that titles to duchy property were likely to come in question, with respect to which prejudices existed in Cornwall, and that an impartial trial could not be had there.

FOLLETT, in this term, obtained a rule calling upon the prosecutor to shew cause why the defendants should not be at liberty to appear and plead to this indictment by a clerk in court; and why the prosecutor and the defendants should not be restrained from assigning error on the ground of such appearance and pleas not being entered by the defendants in their proper persons.

The indictment was found at the quarter sessions for the county of Cornwall, and was on 7 & 8 G. 4, c. 30, s. 7, for maliciously and feloniously pulling down and \*destroying a certain erection used in conducting the business of a mine, the property of the prosecutor; and for other like acts, charged in different counts. It was stated on behalf of the defendants, that Penprase was mining agent to Henry Crease, who, in right of his wife, claimed to be entitled to toll and farm of tin in certain lordships in the duchy of Cornwall, and to certain tin-mines in those lordships, under a duchy lease; that Penprase, as such

agent, had given notice to the agent of the prosecutor, that if certain whims and other mining materials, claimed by him, on one of the above-mentioned mines (which had not lately been worked), were not removed within a week, he, Penprase, should remove them, to make room for machinery about to be erected for Crease; that the notice being disregarded, he had a public survey made of the prosecutor's machinery, and employed the other defendants, as workmen by contract, to take it away; and they accordingly, on the 15th of December, 1832. removed it carefully to a short distance; that they acted without malice, and, as they considered, lawfully; that on the 27th the workmen who had been so employed were charged before a justice with the offences above stated, and by him committed to prison for felony, but they were afterwards admitted to bail by order of a judge of this Court. The indictment had been removed into this Court by certiorari at the instance of the defendants, (see Rex v. Thomas, 4 M. & S. 442,) on affidavits, stating, in addition to the above facts, that it was apprehended questions would be raised on the trial concerning the rights of Crease and his wife, and also of the crown, which could not be impartially tried at the \*575] sessions by reason of the interest which many magistrates and other \*gentlemen of the county had in the decision of those matters. It was further deposed, in support of the present application, that the defendants all resided in Cornwall, 250 miles from the city of Westminster, and were unable to bear the expense of coming up to plead in person.

Follett, in moving for the rule, stated that the application had, in the first instance, been made to Parke, J., who thought it reasonable, but desired that it should be referred to the Court. He also stated, that an order in the terms of the proposed rule had, in one instance, been made by Lord Tenterden.(a)

THE COURT granted a rule nisi; and on a subsequent day of the term (26th

January) the rule was made absolute, no cause being shewn.

On the same day Follett again moved in this case, for leave to enter a suggestion on the record, that a fair and impartial trial could not be had in Cornwall. (b) \*576] for the \*purpose of carrying the trial from that county into some other. The affidavits in support of this application again stated the circumstances exculpatory of the defendants, the expectation that some question of title adverse to that of the duke's lessee would be raised by the prosecutor, and the belief of the defendants that, "owing to the biassed judgments and great influence of the many parties connected with or otherwise interested in mines situate within the duchy," they could not have a fair trial in Cornwall, or in Devonshire, over a considerable part of which the right of the Duke of Cornwall and of those claiming under him extends. This application had been first made in the bail-court; but Parke, J., who sat there, doubted whether it could be granted. [Patteson, J., referred to a late case of an indictment for felony, in which the trial was carried from the town and county of Southampton to the county of Hants.(c)]

#### (a) The KING v. BLACKBURN and Others. March 6, 1832.

As order in the above terms was made by Lord Tenterden in vacation, in the case of parties indicted for felony on 7 & 8 G. 4, c. 30, s. 6. The prosecutor was unwilling to consent to that part of the order which precluded him from bringing error; but Lord Tenterden said, that if this were refused he would stay the proceedings from the Spring to the Summer assizes; upon which the prosecutor consented. The plea was entered on the record as follows:—"And now, that is to say, on the 11th day of January in this same term, before our said lord the king at Westminster, come the said Thomas Blackburn, &c., by Peregrine Dealtry, their clerk in Court, in pursuance of a rule of the Court of our said lord the king before the king himself for that purpose, and having heard the said indictment read they severally say that they are not guilty, &c. (See 2 Hale's P. C., 2.6: Com. Dig. Attorney, (B) 4, 5, 6, and the authorities there cited: Beecher's case, 8 Rep. 58, b.)

(b) See the form of suggestion in Rex v. Hunt, 3 B. & A. 448.

(c) The KING v. WILLIAM RUSSELL.

FOLLETT, on behalf of the defendant, moved (in the bail court) for a certiorari to remove

DENMAN, C. J. I think the Court cannot presume that, in a \*case of felony, a jury of twelve indifferent men would not be found in Cornwall. [\*577 In a case of misdemeanor popular feeling might perhaps operate to the prejudice of defendants, but we cannot suppose it on a charge of felony.

LITTLEDALE, TAUNTON, and PATTESON, Js., concurred. Rule refused.

The defendants were tried at the next assizes for Cornwall, and acquitted.

# \*COLEBROOK, BARONET, and Others v. LAYTON, Clerk. [\*578

A clergyman granting an annuity, agreed that it should be charged on his benefice, and the payment secured by a bond and warrant of attorney, with a judgment to be entered up thereon, for the purpose of charging the benefice. By the deed of grant the annuity was made payable on certain days and chargeable on the benefice, with a power of distress, &c.: it also contained a demise of the benefice to a trustee, with a power in default of payment, to receive the tithes, rents and profits, &c. It was thereby also declared that the bond and warrant of attorney (referred to in the deed as having been already prepared, and meant to bear even date with, and to be executed and given at the same time as the deed,) and the judgment to be entered up thereon, should be further securities for the annuity; and that immediately after such judgment the creditors might sue out execution, and do such other acts as might be necessary for obtaining a sequestration; and that as often as the annuity should be in arrear, they might put in force such writ of sequestration. The condition of the bond, (after reciting the agreement for purchase of the annuity, and for securing the same by such bond, warrant of attorney, and judgment, reciting also the deed of grant,) was declared to be for the due payment of the annuity on certain days. The warrant of attorney gave authority to receive a declaration at the suit of the plaintiffs, in an action of debt on a bond, describing it as a bond of even date with the warrant of attorney, executed by the grantor of the annuity, and given to the grantees, and to suffer judgment. The defeazance recited, that it was given to secure the payment of an annuity of the amount mentioned in the bond, payable on the same days as in the condition of the bond was expressed.

On a motion to set aside the judgment on this warrant of attorney, on the ground that it was a charge on the benefice: Held that this did not sufficiently appear, the reference in the warrant of attorney to the bond amounting to no more than a description of the bond, its date, the parties to it, and the time at which the annuity was to be paid, and not incorporating the terms of the deed of grant (recited in the bond with the warrant of attorney, so as to make the latter operate as a charge on the benefice; and this being an application to set aside a judgment for irregularity, the rule was discharged

with costs.

# A RULE was obtained, calling upon the plaintiffs to show cause why the judg-

any indictments that might be found against him at the sessions for the town and county of Southampton, for stealing two guns, the property of William Burnett. The affidavits on which the motion was made, tended to exculpate the defendant, and to shew that the magistrates of Southampton had acted rigorously in committing him for felony, and refusing bail; and it was sworn that an unfavourable impression had been created against the defendant in the town, and had been openly expressed (by applause and hisses) while he was under examination.

Saunders afterwards shewed cause, and put in counter affidavits.

The Court made the following rule:—"It is ordered, that the rule made on Monday last, that the said William Burnett should shew cause why a writ of certiorari should not issue to remove into this Court from the sessions for the town and county of Souttampton, all and singular indictments which may be preferred there against the said William Russell for feloniously stealing, taking and carrying away two guns, the goods and chattels of the said W. B., be discharged, the said W. B. hereby undertaking to prefer such indictments at the assizes to be holden in and for the county of Southampton, and not at the sessions for the said town and county, and the said W. R. hereby undertaking to pay the said W. B. or his attorney the extra costs occasioned by preferring and trying such indictments at the assizes for the said county of S., instead of the sessions for the said town and county, such costs, if necessary, to be taxed by the coroner and attorney of this Court."

The reporters were favoured with notes of this case, and Rex v. Blackburn and Others from the Crown Office. The law and authorities on the subject of removing indictments for felony, will be found further discussed in Rex v. Holden and Fisk, Trinity term, 1833.

The rule was grounded upon an affidavit of the defendant, stating that he was

the vicar of the vicarage and parish church of Chigwell in Essex, and curate of the perpetual curacy of Theydon Bois in that county; that the plaintiffs were "The trustees of the estate and property of the United Empire and Continental Life Association;" that at the time of the agreement for the purchase of the annuity hereinafter mentioned, it was expressly agreed, that the same should be charged and chargeable upon the above mentioned ecclesiastical \*579] benefices, which were to be \*demised to a trustee for a certain term of years; and that payment of the annuity should be further secured by a bond and warrant of attorney of the defendant, with a judgment to be entered up thereon "for the purpose of charging deponent's respective benefices with the payment thereof in manner thereinafter mentioned." The affidavit then set out an indenture, dated the 3d of September, 1824, to which there were several parties, and whereby, in consideration of the sum of 2000l. paid by the plaintiffs to the defendant, the latter granted to the plaintiffs an annuity of 237l. 2s., to be yearly issuing and payable by, and from, and out of, and charged and chargeable upon the said several benefices, and the glebe lands, messuages, tithes, tenements, oblations, obventions, profits, and emoluments thereof; such annuity to be paid quarterly. The deed contained the usual covenant for payment of the annuity; a power of distress if the same were in arrear twenty-one days; or if in arrear thirty days, a power to enter upon and take and receive the rents and profits of the respective livings, and satisfy the annuity; and it contained a demise by the defendant of the same benefices to one Christopher Godmond (a trustee on behalf of the plaintiffs) to hold to him for ninety-nine years (if the defendant should so long live,) upon trust, until default of payment of the annuity, to permit and suffer the defendant to take the tithes, oblations and obventions, rents and profits thereof; and after default, then upon trust to take and receive the same to himself, the said Christopher Godmond; and thereout, or by demising, selling, leasing, or mortgaging the same, to raise sufficient to satisfy the said annuity and such parts thereof as should from time to time become due; and there was a power to redeem the \*580] annuity \*at a sum agreed upon. The deed further contained an agreement or declaration between the plaintiff and defendant that the band ment or declaration between the plaintiffs and defendant, that the bond and warrant of attorney (referred to in the said deed as having been already prepared, and intended to bear an even date with and to be executed and given at the same time as the deed and the judgment to be entered up on the warrant of attorney) should be further securities for the payment of the annuity; and that immediately after judgment should be so entered up, the plaintiffs might sue out and prosecute such execution or executions by virtue of the said judgment, and do all such other acts, as might be necessary for obtaining a sequestration or sequestrations of the said vicarage and curacy; and that as often as the annuity should be in arrear, they might proceed under such sequestration and sue out execution upon or by virtue of the said judgment by fieri facias de bonis ecclesiasticis, or de bonis propriis, or any other writ whatsoever, or take such other proceeding thereon as they should think fit. The affidavit further stated that the bond was in fact executed and the warmat of attorney given at the same time, and bore even date, with the aforesaid grant; and that the warrant of attorney was given for the express purpose of charging the said vicarage and curacy with the payment of the annuity, and

for the purpose of enabling the plaintiffs to sue out the before mentioned executions. The bond was in the usual form. The condition thereof (after reciting the contract for the purchase of the annuity, and that it had been agreed that the same was to be secured by such bond and warrant of attorney and the judgment to be entered up thereon, and reciting the deed of grant) was declared to be \*for the due payment of the annuity during its continuance by even \*581] be \*for the due payment of the annuly daring and for paying in a certain quarterly payments on certain specified days, and for paying in a certain

event 2000%, for the repurchase thereof. The warrant of attorney authorized the parties named to appear for the defendant, and to receive a declaration at the suit of the plaintiffs in an action of debt on a bond (describing it as a bond of even date with the warrant of attorney, under the hand and seal of the defendant, and given to the plaintiffs) and to suffer judgment in such action in the usual manner. The defeazance to this warrant of attorney recited that it was given to secure the payment of one annuity of 237l. 2s., during the life of the defendant, by even quarterly payments on the 3d of March, the 3d of June, the 3d of September, and the 3d of December, the first payment to be made on the 3d day of December next, "as in and by the condition to the bond or obligation referred to by the said warrant of attorney is more particularly expressed in that behalf;" and it authorized the plaintiffs when and as often as the annuity or any part thereof should be in arrear for the space of twenty-one days after the days appointed for payment thereof, to sue out such execution or executions upon or by virtue of the said judgment by one or more writ or writs of fieri facias de bonis ecclesiasticis, or de bonis propriis, or both, or any writ or writs, or to take and adopt such other proceedings, as they should think fit, for the recovery of the annuity and all costs.

Sir James Scarlett and F. Pollock shewed cause in the present term. There is no ground for setting aside this judgment. The validity of it depends solely on the warrant of attorney, and as there is nothing on the face \*of that instrument to shew it was given with intent to charge, and that it does charge, the benefices, contrary to the 13 Eliz. c. 20, it is quite unobjectionable, although the consequence of any execution which may issue upon the judgment founded on it may be to affect the profits of the living. The want of any objection apparent upon the face of the warrant of attorney, clearly distinguishes this case from Flight v. Salter, 1 B. & Ad. 673, and brings it within the principle recognized in the cases of Gibbons v. Hooper, 2 B. & Ad. 734, and Wynne v. Robinson, 4 Bligh, Parl. C. 27, and further sanctioned by the judgment of this Court in Moore v. Ramsden, 5 B. & Ad. 917, note (d).

Follett, contrà. It is not intended to question the correctness of the decision in Gibbons v. Hooper, 2 B. & Ad. 734, and the class of cases which have followed it. This is clearly distinguishable. The fair result of all the authorities is this: where the Court is satisfied that the warrant of attorney was given with an intent that it should operate as a charge upon the benefice, there the judgment founded upon it cannot be supported: but where nothing appears necessarily leading to the conclusion that it was given with such intent, the judgment is free from objection, though the consequence may happen to be, that the profit of the living will probably be taken in execution. If this is the correct rule, and is to be applied to the present case, the judgment must be set aside. In the first place, it is sworn by the defendant (and is not denied) that the warrant of attorney was given for the express purpose of charging the defendant's vicarage and curacy, and of enabling \*the plaintiffs to sue out the executions mentioned in the grant, obviously meaning the obtaining sequestration immediately upon the execution of the deed. [LITTLEDALE, J. Can we take this from the affidavit? We must look to the language of the warrant of attorney to ascertain whether it is or is not a charge upon the living.] The affidavits unanswered are sufficient evidence of the intent of the parties. At all events, the Court is not to look to the warrant of attorney alone. Here the deed of grant, the bond, and the warrant of attorney all bear even date, were executed and given at one and the same time, and all in pursuance of a previous agreement to that effect. They constitute together one assurance. If the recitals and powers contained in the deed were expressly contained in the warrant of attorney, it could not be disputed that the latter would be bad, but those statements are virtually and sufficiently incorporated with the warrant of attorney. It expressly refers to the bond, which it minutely describes, and the defeazance refers to it, for it is there

stated that the warrant of attorney is given as a security for payment of the annuity in the manner more expressly pointed out by the condition of the bond. The bond too as distinctly refers not only to the deed of grant, but to the agreement previously made, and the stipulation relative to the several securities. The warrant of attorney so expressly refers to the bond, and the bond to the deed, as to make it clear that the warrant of attorney was given with intent to charge the benefices; and, if so, it is void. The ground on which the Court, in Flight v. Salter, 1 B. & Ad. 678, set aside the \*judgment, was, that the party giving the warrant of attorney had attempted to do indirectly what the law would not permit him to do directly; and that is equally applicable here, unless it is to be held indispensable that the intention of the parties to charge the living by the warrant of attorney should be expressed in so many words therein. Gibbons v. Hooper, 2 B. & Ad. 734, cannot be said to govern the present case. There the warrant of attorney did not refer to the deeds, and there was nothing necessarily connecting the deeds with the transaction in respect of

which the warrant of attorney was given.

LITTLEDALE, J. I am of opinion that the rule must be discharged. In Flight v. Salter, 1 B. & Ad. 673, it was expressly recited in the warrant of attorney, that it was given to secure the annuity which was to be charged on the living. Here the warrant of attorney does not refer to the deed of grant. It is in the common form which would be adopted for providing payment of an annuity secured by bond, but not charged, or intended to be charged, upon any living. It is true there is some incidental mention of the bond in the warrant of attorney. The warrant itself, instead of simply stating a declaration in an action of debt on bond, describes that bond by mentioning the date, and shewing it to have been given by the defendant to the plaintiffs; and the defeasance notices it by stating that the warrant of attorney is given to secure the payment of a certain annuity on given days, and that the first payment is to be made on the 3d of December then next ensuing, "as in and by the condition to the bond or oblistate pressed in that behalf." But this reference to the bond in the warrant of attorney amounts to no more than a mention of that instrument by way of identifying it as the bond on which the action is to be brought, and the mention of it in the defeazance to no more than a precise and distinct reference to the times for, and the commencement of, the quarterly payments. This does not bring the case within the authority of Flight v. Salter, 1 B. & Ad. 673. The stipulation in the defeazance, that a fieri facias de bonis ecclesiasticis may be taken out for the arrears of the annuity is wholly immaterial. If any execution in consequence of arrears could have issued, that writ might have been resorted to as well as any other, without any express stipulation; and the permission given to make use of it was quite unnecessary.

TAUNTON, J. I am of the same opinion. It is sufficient to say that I think this case governed by Gibbons v. Hooper, 2 B. & Ad. 734, and the decisions which have followed it; but even without those authorities, I should have thought that this warrant of attorney was not void under the 13 Eliz. c. 20, the primary object of which was to avoid leases made by persons not residing upon and serving their cures. Another of the reasons for passing it is given by Lord Kenyon in Mouys v. Leake, 8 T. R. 415. But without adverting to what are generally understood to have been the objects of the act, and looking at the language of the clause on which this application is founded, and which declares that all chargings of such benefices shall be void, I think that to bring the case within the statute there must be an actual charging; and that the intention of

\*the parties to charge, where no charge is actually made, is not sufficient. In Flight v. Salter, 1 B. & Ad. 673, the warrant of attorney did operate as a charge on the benefice. There the warrant of attorney recited the deed and made it part of the warrant of attorney. The provisions of the deed in substance were, that Flight was to be at liberty forthwith to obtain a sequestration, though Vol. XXIV.—17

no default might have taken place in the payment of the annuity, and this sequestration was to be a continuing sequestration during the continuance of the annuity even though it should be regularly paid. After reciting this, the defearance to the warrant of attorney expressly alleged, that that warrant was given, and judgment was to be entered up thereon, to the intent that a sequestration might be obtained and continued, pursuant to the agreement before mentioned. The present case is widely different. There is no reference at all in the warrant of attorney to the deed of grant, and the reference to the bond is no more than a description of the bond, its date, and the parties to it, and of the times at which the annuity is to be paid. Such a reference does not, because the bond itself also refers to the deed, so incorporate the deed with the warrant of attorney as to give rise to the objection which the Court relied upon in Flight v. Salter, 1 B. & Ad. 673. There, when the terms of the warrant of attorney were acted upon, the plaintiff did charge the living, for he made the sequestration a continuing security for the growing payments of the annuity. In this case the warrant of attorney would authorize no such proceeding. The power to sue out a writ of fieri facias de bonis ecclesiasticis, does not alter the case; \*no execution is to be sued out but when the annuity is in arrear. In such an event that writ, equally with any other, might have been sued out without any express authority provided by the defeazance.

PATTESON, J. I am also of opinion that this rule must be discharged. Without going the length of saying that the object and intent of the parties to the warrant of attorney must necessarily appear upon the defeazance to it, I am of opinion that it must appear that their intention of charging the benefice has in fact been accomplished; in other words, that the benefice is by the warrant of attorney so far actually charged, that the party to whom the warrant of attorney is given, following the authority which it confers, would, but for the provisions of the statute of Elizabeth, obtain an actual charge on the living. Now, whatever may have been the intention of the parties here, it is quite clear to my mind that they have not, by this warrant of attorney, charged the living. If it were their object, they have failed to do so. The defeazance only gives a power to issue a writ of fi. fa. de bonis ecclesiasticis in case the annuity is not paid, and then only for the arrears. If, by means of the writ, those arrears should be obtained, it would have no further operation, and any sequestration founded upon it would be at an end. For though it is said in the books that a sequestration is a continuing writ, by that is meant that it is a continuing execution for the purpose of levying a given sum, viz. that for which the writ of fi. fa. de bonis ecclesiasticis issues, and no further. That sum, in the present case, could only be the amount of arrears due. Even, therefore, if by referring to the deed, and gathering from that \*the intention of the parties, I should be of opinion that they meant the warrant of attorney so to operate as to create a perpetual charge on the benefice, it is sufficient to say they have not, by the warrant of attorney, carried that object into effect. The rule for setting aside the judgment must therefore be discharged.

Sir J. Scarlett applied that it might be discharged with costs.

LITTLEDALE, J. This is an application to set aside a judgment for irregularity, the alleged irregularity being that the warrant of attorney is void, and that, consequently, there is nothing to support the judgment. Rules to set aside proceedings for irregularity, if discharged, are usually discharged with costs; and we think this case must follow the general rule.

Rule discharged with costs.(a)

<sup>(</sup>a) This case was decided in the early part of the term, when Denman, C. J. was absent, on account of a domestic affliction.

#### \*REGULA GENERALIS.

It is ordered, That in case a rule of Court or Judge's order for returning a bailable writ of capias, shall expire in vacation, and the sheriff or other officer having the return of such writ shall return cepi corpus thereon, a Judge's order may thereupon issue requiring the sheriff, or other officer, within the like number of days after the service of such order as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court by forthwith putting in and perfecting bail above to the action. And if the sheriff or other officer shall not duly obey such order, and the same shall have been made a rule of Court in the term next following, it shall not be necessary to serve such rule of Court or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the mean time.

Signed by the fifteen Judges.

#### MEMORANDUM.

In the course of this term *Thomas Noon Talfourd*, of the Middle Temple, Esquire, was called to the degree of Serjeant at Law, and gave rings with the motto "Magna vis veritatis."

END OF HILARY TERM.

# CASES

#### ARGUED AND DETERMINED

IN THE

# COURT OF KING'S BENCH,

D

# Caster Cerm,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

#### \*MEMORANDUM.

F\*590

In the course of the last vacation, David Pollock, Philip Courtenay, John Blackburne, and William Henry Maule, Esquires, were appointed His Majesty's Counsel learned in the law.

### CHAUVEL v. CHIMELLL. April 15th.

Plaintiff's attorneys gave defendant's attorneys their own undertaking as security for costs; the defendant obtained a verdict and died, and judgment was entered up in his name within two terms: Held, that the attorney for such deceased party, having a claim against his estate in respect of the costs, might enforce the security, to satisfy such claims, without any scire facias having been sued out by the personal representatives.

F. Pollock, in Michaelmas term, obtained a rule, calling on the plaintif's attorneys to shew cause why they should not pay to the defendant's attorneys 1191., the taxed costs in this cause, pursuant to their undertaking. [\*59] \*The plaintiff residing abroad, the attorneys for the defendant had demanded security for costs from the plaintiff's attorneys; and the latter signed a memorandum, by which they undertook, as sureties for the plaintiff, to pay such costs, if any, as he should become liable to pay the defendant in that action. At the sittings in London after Trinity term, the defendant had a verdict; final judgment was signed on the 15th of November, and the costs were taxed, but between the verdict and judgment the defendant died. The plaintiff's attorneys being called upon for the costs by the defendant's attorneys, two whom the defendant had been indebted on account of the costs in a larger amount than 1191., declined paying them, alleging that there was no person entitled to receive them till a scire facias should be sued out by the defendant's representatives.

Sir James Scarlett now shewed cause, and contended that the attorneys, if they paid these costs under the present circumstances, would do so in their own

wrong, and could not recover them from the plaintiff.

F. Pollock, contra. The statute 17 Car. 2, c. 8, s. 1, authorises the entering up of judgment in the name of a deceased party, within two terms after the verdict; and his attorney, having a lien for his costs, may avail himself of the statute to enforce his demand against those who have given security.

THE COURT, (a) being of the same opinion, made the Rule absolute.

#### \*592] \*The KING v. The HUNGERFORD MARKET Company. April 15.

#### (Ex parte STILL.)

The act 11 G. 4, c. lxx. (passed May 1830) incorporating the Hungerford Market Company, empowers them to purchase certain estates; and section 17 enacts, that every lessee or tenant for years or at will of any messuages, &c., to be purchased under the act, shall deliver up possession to the company at three months' notice, they making compensation to every such tenant, &c., who shall be required to quit defore the expiration of his term: such compensation, in case of dispute, to be assessed by a jury. Section 19, provides, that all tenants for years, from year to year, or at will, occupiers of any messuages, &c., forming part of the estates to be purchased, who shall sustain "any loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this act," shall receive compensation from the company, by such means as are provided in respect of the tenants of certain hereditaments mentioned in a schedule to the act; namely, by assessment, as before stated.

A lessee, whose term expired on the day the company came into possession, (June 24th, 1830,) obtained leave to hold on till the premises were wanted, and did so for a year and three quarters, at the end of which time he quitted, having received half a year's notice. His under-tenant, who came in at Christmas 1828, and had held from year to year, and who knew of the above proceedings, and also received notice to quit, was held entitled

to compensation for good-will (to be assessed by a jury) under section 19.

A RULE nisi was obtained, last term, for a mandamus, calling on the company to summon a jury, pursuant to the statute 11 G. 4, c. lxx., to assess compensation to John Still for his being compelled to leave certain premises, called the Cannon public-house, in Hungerford Street, Hungerford Market. In support of the rule it was stated, that the party took the premises at Christmas, 1828, paid the outgoing tenant 412*l*. for good-will and fixtures, and had expended large sums of money in improving the premises and extending the business; that since the passing of the act (May 29th, 1830), the company had brought an action of ejectment against him, which was still depending; and had also, by pulling down the neighbouring houses, rendered his house so unsafe (in and about October, 1832), that it was condemned by the annoyance jury, and the parish authorities were taking it down; that he was tenant from year to year, \*593] and had never entered into any agreement to alter the terms of \*his tenancy, to determine it on less than the usual notice, or not to part with the premises without leave, and he had occupied them upon this footing till after the passing of the act, when he received notice to quit.

On behalf of the company it was sworn, that the Cannon public-house wasupon the estate purchased by them of the Rev. Henry Wise; (see Ex parte Farlow, 2 B. & Ad. 341); that by their agreement with him, they were to be entitled to the rents and profits of the estate from the 24th of June, 1830, on which day the then existing lease of the premises in question expired; that the company, on applying to Still upon the subject, were informed by him that Mr. Tritton was his landlord, and thereupon requested him to see Tritton, and refer him to the company; that shortly after the 24th of June it was communicated to them that Tritton wished to hold the premises till the company wanted them

<sup>(</sup>a) Denman, C. J., Littledale and Parke, Js. Patteson, J. was gone to chambers. During this term, Taunton, J. was absent on account of indisposition. Patteson, J. sat in the Bail Court at Nisi Prius and at chambers.

and it was agreed between him and the company, that when possession was required, the company should leave notice for Tritton on the premises, and he would then deliver them up. On the 29th of September 1881, the company left notice accordingly for the representatives of Tritton (he being dead) to quit

on the following Lady-day.

Sir James Scarlett now shewed cause. There is no claim to compensation. Where the company have to do some act to expel the tenant, there may be ground for such a demand; but here the tenancy ended without their interference. The interest, both of Still and his landlord, determined with the lease, which expired on the 24th of June 1830; and from that time Tritton only \*held the premises by the permission which he had requested, until notice. The company may surely enforce the same rights which any other landlord has when a term expires. There is no pretence of a claim for good-will.

Kelly and Tomlinson contrà. This application is well grounded on section

19 of the statute. Section 17 applies to parties who are put out by the company before their terms expire; but section 19(a) gives the right of claiming compensation to all who are prejudiced in "any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise," which they enjoyed at the time of the passing of the act, and which, but for the act, would still have been The infirmity of the title and smallness of the interest can only affect the amount of compensation. This case falls within the reasoning of the Court in Ex parte Farlow, 2 B. & Ad. 341, and differs from Ex parte Wright, 2 B. & Ad. 348, where the tenant had made a special agreement with his landlord to quit in any year at three months' notice, and not to underlet or part with the premises without leave in writing. Here the party had a saleable good-will in May 1830, when the act passed; and even after the expiration of the lease he might properly consider himself a tenant from year to year. Tritton, during the continuance of his interest, would not have disturbed him, and the company did not take any step for that purpose till some time after the lease expired. [PARKE, J. The question is, whether the under tenant of a lessee whose term expired soon after \*the passing of the act, is entitled to compensation for good-will.] He is in the same situation, in this respect, as other tenants; there was the same probability (but for the company's intervention) that his interest would continue. In Ex parte Farlow regard was had to the practice on the estate not to disturb yearly tenants. DENMAN, C. J. We think there is no material distinction between that case and the present. The rule must be absolute.

LITTLEDALE, J. concurred.

PARKE, J. There was here, as in Ex parte Farlow, a chance of the tenancy being continued. Rule absolute. (b)

(a) See the clauses more fully stated in Ex parte Farlow, 2 B. & Ad. 342, and page

599, post.

(b) In Crutwell v. Lye, (17 Ves. jun. 346,) where the question related to a carrier's premises, which had been sold "with the good-will of the trade," Lord Eldon said, "The good-will is nothing more than the probability that the old customers will resort to the old place." In Ex parte Farlow, Ex parte Still, Ex parte Gosling, (p. 596, post,) the interest in "good-will" rested upon a further contingency, viz. that the landlord would not remove the tenant. Such an interest, it may be presumed, would be too slight and pre-carious to be noticed at law or in equity, if it were not upheld (as the Court considered it to be in the three last-mentioned cases) by conclusive words in an act of parliament. That the tenant has no claim in equity against his landlord, on the ground of having made improvements (with the landlord's knowledge,) in the expectation of having his term prolonged, is laid down by Sir William Grant, in Pilling v. Armitage, (12 Ves. jun. 87.) "These parties," he says, "independent of any promise, rested so much upon the faith that they should not be disturbed in the enjoyment, as their ancestors had not been for many years, that they thought themselves as safe as if they had a lease. But can I convert that hope into an actual engagement by the landlord?"—"For that purpose I must say that the true measure of justice is, that a landlord shall never turn out a tenant, if improvements have been made with the knowledge of the landlord, until the tenant shall be completely reimbursed."

\*The following case, though decided later in the term, (April 25th,) may conveniently be added here.

#### The KING v. The HUNGERFORD MARKET Company.

(Ex parte Gosling.)

Under sections 17, and 19, of the Hungerford Market Act (see the preceding case) compensation was claimed by a party, who in 1823 became the assignee of a lease for fourteen years, granted in 1818, of premises on the estate purchased by the company. The lease contained covenants to yield up the premises, with all fixtures and improvements, at the end of the term, and not to underlet or assign without leave; but this latter clause had not been introduced in contemplation of any advantage to be taken of it by the landlord with reference to the present act. The company suffered the lease to expire, and then turned out the tenant: Held, that he was entitled to have compensation assessed for the loss, if any, sustained by him in respect of good-will, or the chance of a beneficial renewal of his lease: but not for fixtures set up or purchased, or for improvements made by him, inasmuch as he had no legal interest in them.

Held, nevertheless, that these might be considered by the jury in estimating the chance

of a beneficial renewal.

This was a similar application to the last, the party claiming compensation for his estate and interest in premises taken by the company, and for loss, &c. in respect of any interest whatsoever for good-will, improvements, tenant's fix-tures or otherwise, which he had sustained or might sustain by the passing of the act, Mr. Wise (mentioned in the former cases) had demised the premises in question to Thomas Day, for fourteen years from the 25th of March 1818, at the rent of 801. a year. Gosling purchased of Day the lease, good-will, and fixtures in February 1823, when the lease was duly assigned to him; Day informing him that he might rely on a renewal of the lease if he conducted himself well, as Mr. Wise never turned out a respectable tenant. Gosling made considerable improvements on the premises, where he carried on the business of a confectioner and pastry-cook: and it was stated in his affidavit, that while these were going on, Gardiner, Mr. Wise's agent, told him in conversation, that he might make himself \*easy as to a renewal of his lease, as Mr. Wise never turned away a good tenant. In April 1830, the company made an inquiry of Gosling as to the terms on which he would part with the property; and a correspondence followed, which continued after the passing of the Hungerford Market Act, but led to no result. The lease expired at Lady-day 1832, and the company then brought an ejectment against Gosling, and turned him out of possession. He further deposed, that in 1830, he could, as he believed, have sold his lease and good-will for several hundred pounds if the act had not passed; whereas, after its passing, they were of little or no value. stated that the custom on the estate, as he was informed and believed, had been not to dismiss tenants who conducted themselves well; mentioning an instance, among others, in which an individual and his ancestors had been tenants on the estate (in Hungerford street) for upwards of two hundred years.

In answer it was sworn, that the premises in question were part of the estates purchased by the company of Mr. Wise pursuant to agreement entered into with him before, and completed after, the passing of the act, subject to certain outstanding leases, (mentioned in sect. 2, of the act) of which that in question was one. That the tenant, in and by that lease, covenanted to repair, &c., and at the end of his term to yield up the premises in good repair, with all fixtures and improvements; and not to let, set, underlet or assign, without the landlord's consent in writing; and there was a power of re-entry in case of breach: that at the expiration of the term the company had demanded possession, which being refused, they brought ejectment and obtained judgment; but Gosling still re\*598] fused to give up the premises, alleging \*that he was bound not to quit till he had received compensation for his good-will: whereupon the com-

pany, after some delay, obtained a writ of possession and expelled him. Gardiner, Mr. Wise's stewart, stated that proposals were made to him in that capacity by the company for the purchase of the estate in the beginning of 1824, and the negotiations continued till 1830; and that he had no recollection of having used the expressions stated by Gosling, but had told him, that Mr. Wise would be disposed to sell the estate to the company if they could raise enough money. He added, that the renewal of leases on the estate was always upon a valuation, and with reference to the current annual value.

Sir James Scarlett and Follett now shewed cause. If the operation of this statute is to give the compensation contended for, it is an injustice to the landlord, who, when about to sell his estate, is, without any reason, deprived of part of the saleable value. The seventeenth section provides an indemnity for the tenant where a tenancy for years or from year to year is determined by the act of the company, because they may put out the party at three month's notice, where the law would not otherwise allow it. The nineteenth section was intended to give compensation where any injury arose from the act of the company, even though they might not determine the tenancy at three months' notice; but this compensation was designed only for a particular class of tenants; for the act says, that all tenants for years, from year to year, or at will, on the Hungerford House estate, who shall be injured in respect of any interest for good-will, &c., by the passing of the act, shall have such compensation from \*the company, by such and the same means as are provided for the tenants of all and singular the hereditaments contained in the first schedule to that act.(a) Now, those are certain leaseholders enumerated by name, of whom the party at present applying is one, and the sale and purchase of whose interests is provided for by the first section of the act: and when this clause enacts, that the persons mentioned in it shall receive compensation for good-will by the same means as are provided in respect of the persons mentioned in the schedule, it distinguishes these last, and recognizes them as a separate class from the tenants who are to have a claim in respect of good-will. It cannot be supposed that the legislature meant to allow such a claim in persons who held leases for fourteen or twenty years, as if they could have a valuable interest in the expectation that such leases would be renewed on the same terms. The evidence in this case shews that in fact the tenant had no ground for such expectation. If Mr. Wise had kept the estate, and Gosling had sold the residue of his term to a private person, could he have obtained a price for good-will? Not only did his term expire at a stated time, when it \*was covenanted that he should yield up the premises with all fixtures and improvements, but he was forbidden by his lease to underlet or assign without leave in writing which of itself excludes the supposition of any right to dispose of a good-will. If the company, after purchasing these premises, had kept them standing, could this party, when his lease expired, have insisted on a renewal, or compensation for the refusal of it? It appears from Gardiner's affidavit, that if the lease had been renewed, it would only have been upon a fresh valuation. [PARKE J. That would be good evidence before the jury that his interest in the renewal was worth very little.] Ex parte Farlow, 2 B. & Ad. 341, is no authority for this

<sup>(</sup>a) Section 19. "And be it further enacted, that all or any person or persons, tenant or tenants for years, from year to year, or at will, occupier or occupiers of all or any part of the said old market, market-house, messuage, shops, buildings, wharfs, and other hereditaments forming the said estate called Hungerford House or Hungerford Inn, or therewith contracted to be purchased by the said company, who shall or may sustain or be put to any loss, damage, or injury, in respect of any interest whatsoever, for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this act, shall and may have and receive all and every such benefit and advantage by way of compensation from the said company, for every such loss, damage or injury, by such and the same means as are herein enacted and provided for and in respect of the person or persons, tenant or tenants of all and singular the hereditaments in the first schedule in this act contained."

application: the case is more like that of Joseph Wright, Ibid. 348, where the tenant had agreed to quit at three months' notice, and also, as here, not to underlet or give up possession without leave, and the Court refused a mandamus. [Parke, J. It was the impression on the Court in that case, that Mr. Wise made the contract in those special terms with a view to the treaty he then had in contemplation with the company, and to enable him the better to make his \*601] hargain with them.(a) In this case \*he had not the opportunity of requiring new terms of his tenant when the treaty with the company began, but it would be very hard to say that he could not, to the fullest extent, enforce those of the subsisting lease.

Kelly and Hoggins, contrà. There is no substantial distinction between this case and Ex parte Still, ante, p. 592, unless it arise upon the covenant in the present lease against assigning or undertaking without leave. The covenant as to fixtures and improvements cannot alter the right in respect of good-will. The covenant not to assign or underlet without leave, was discharged when the original lessee assigned to Gosling, Paul v. Nurse, 8 B. & C. 486. If that assignment created a forfeiture it was waived. Besides, the covenant, if subsisting, would not bring this case within the reason of Ex parte Wright, for there the agreement was one which the landlord, Mr. Wise, had required several of his tenants to enter into at one particular time when the present act of parliament was in contemplation, and with a view to the act, of which facts they were apprised, and knew therefore that they could have no good-will to dispose of. But this is a lease granted in 1818, and a part of its value might reasonably be considered to lie in the good-will, which was impaired only by the passing of this statute at the instance of the company. [PARKE, J. The only question which does not appear satisfactorily answered, is with respect to \*the improvements and tenant's fixtures. The mention of these in sect. 19, must refer to cases where the tenant has a legal interest in them. Here he has not, for he is bound to yield them up at the end of the term. The only way in which they can be considered as affecting any interest mentioned in the nineteenth section is, that they gave the tenant a better chance of having his lease renewed on favourable terms.] The interest which the party had in the fixtures and improvements would be for the consideration of a jury, who could look into the particulars both of the original holding and of the assignment. This Court has not sufficient information to enable it to do so. And a mandamus must go. at all events; for on the point of good-will there is no distinction between this and former cases.

Denman, C. J. The rule must be made absolute, and the mandamus will be, to summon a jury to assess compensation for the damage, if any, sustained by this party by reason of the act having passed, in respect of good-will, or the chance of a beneficial renewal of his lease. Whatever difficulties arise under this section are difficulties which the company have brought upon themselves. They have procured an act to be drawn containing a very obscure clause, and it

<sup>(</sup>a) Follet here suggested, that this could not have been so, as the report stated Wrights agreement to have been "to hold from Michaelmas 1822," whereas the treaty with the company was not contemplated so early as that year. On reference to the papers in the case, it appears that Wright orignally had a lease for one year certain, from Michaelmas 1822, with a covenant not to underlet, &c., without leave (as above), and, if he held beyond the year, to quit at three months' notice ending with the day on which the tenancy began. In June 1823, notice was given to Wright and other tenants similarly circumstanced, to quit at Michaelmas, but they were afterwards informed that they might renew for a year certain on the former terms, except that if they held beyond the year, they should quit on three months' notice at any quarter day. Wright held on upon these terms, but was not required to execute a written agreement, the treaty between Wise and the company being entered upon in 1824, and being, as was supposed, notorious to all the tenants. It appears, that before the commencement of the treaty, a subscription had been set on foot and other preliminary steps taken by the persons who afterwards formed the company, and probably the notices to quit in 1823 were given in consequence of these proceedings, though no actual treaty took place till 1824.

is on condition of carrying that clause into effect that they enjoy the powers with which they are invested as a company. I do not see how the operation of the nineteenth section is to be carried beyond that of the seventeenth, except by the construction which was adopted in Ex parte Farlow and Ex parte Still. The interest in question is certainly a most imperfect one, but the clause ought to receive a liberal construction.

\*LITTLEDALE, J. The seventeenth section is not applicable to this case, because it relates to persons who are called upon to quit possession [\*603] before their terms expire. But the nineteenth seems to have been framed in contemplation of cases where the term and interest have expired; for it provides that all or any "tenant or tenants for years, from year to year, or at will, occupier or occupiers of all or any part, &c., who shall or may sustain or be put unto any loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant's fixtures or otherwise, which they now enjoy, by reason of the passing of this act," shall have compensation, &c. This section would have been unnecessary if it had applied merely to cases where the tenant was put out before the expiration of his term: it must be taken to extend to those interests in good-will, and the chance of beneficial renewal, or in other respects, which the parties, notwithstanding the expiration of their terms, would still have had if the act had not passed.

PARKE, J. I am also of opinion, that this case does not materially differ from Ex parte Farlow, but that it is distinguished from Ex parte Wright by the circumstance I have already referred to. We must give some meaning to the nineteenth section, and to do so, we must apply it to cases not within the seven-The clause must, according to the general rule, be construed benefiteenth. cially to the parties to be affected by it, as against those who obtain the act. There is a distinction, however, as to the fixtures and improvements, because it appears that the party here had no legal interest in these; and, I think, the mention of them in the act only applies to cases where there is such interest. The \*inquiry, therefore, will be as to the compensation in respect to injury sustained "for good-will or otherwise;" the fixtures and improvements will not be a subject of assessment, though the jury may consider how far they added to the chances of a beneficial renewal. They will only form an element in the consideration of that chance. Rule absolute.

# The APOTHECARIES' Company v. COLLINS. April 16.

A person authorized to practise as a physician, by diploma from a Scotch University. is not thereby exempted from the penalty imposed by 55 G. 3, c. 194, s. 20, for practising as an apothecary in England or Wales, without the certificate required by that act.

DEBT for penalties incurred under 55 G. 3, c. 194, s. 20,(a) by practising as an apothecary in England, without having obtained a certificate of qualification from the Court of Examiners of the Apothecaries' Company. At the trial before Parke, J., at the last Spring assizes for Dorsetshire, a verdict was taken for the plaintiff, subject to the opinion of this Court upon the question, whether or not the defendant, having a diploma from a Scotch university, authorising him to practise as a physician, was thereby exempted from the penalties of the above clause.

Barstow now moved to enter a nonsuit. By the twenty-ninth section [\*605, of the act,(b) the privileges of the \*English universities and of the Col-

<sup>(</sup>a) Which enacts, "That if any person (except such as are then actually practising as such) shall, after the said 1st day of August, 1815, act or practise as an apothecary in any part of England or Wales, without having obtained such certificate as aforesaid, every person so offending shall, for every such offence, forfeit and pay the sum of 201."

(b) Section 29, is as follows:—"Provided always, and be it further enacted, that

lege of Physicians are saved, and this extends by implication to a physician having a diploma from a university in Scotland. A Scotch physician, since the union, has always been considered as entitled to the privileges of an English one, though there is no express provision to that effect. In Smith v. Taylor, (a) Sir James Mansfield, after referring to the statute 14 & 15 Hen. 8, c. 5, (which confirms the charter of the College of Physicians, and enacts, that no person shall practise physic without having been examined by the college and obtained testimonials from them, except he be a graduate of Oxford or Cambridge,) adds, "Since the union with Scotland, it has been considered, though I do not exactly know upon what ground, that a degree conferred by a Scotch university is of the same effect as a degree conferred by the universities of Oxford or Cambridge; though, in looking through the articles of union, (b) I find nothing upon the subject, except that the four Scotch universities shall subsist as before with the same rights. Had the matter been attended to at the union, some express provi-\*606] sions would have probably been made; but although no such \*provision was made, it has been generally understood that, in consequence of the clause alluded to, a diploma granted by one of the Scotch universities gives the same right to practise physic as a degree at one of the English universities, and dispenses with the necessity of being examined by the College of Physicians, and obtaining letters testimonial from thence." [DENMAN, C. J. How can you get over the express words of the statute? It is certainly difficult; but if the statute were to be strictly construed, a person in the situation of the defendant (and there are many similarly circumstanced) must leave off acting as an apothecary in this country, until he has served an apprenticeship of five years, according to the fifteenth section of this act.

DENMAN, C. J. It is clear that all persons are affected by the twentieth section, except those who are specifically exempted. Even English physicians would be included within it, if there were were not a special exception in their favour in the twenty-ninth section. If there are many persons interested in this question, that very circumstance is a reason for not granting a rule to shew

cause if we think the point perfectly clear.

LITTLEDALE, J. The act, which begins by reciting the charter of the Apothecaries' Company, proceeds, in sect. 14, to prohibit any person from practising as an apothecary except upon the conditions there imposed; and these are extended in general terms to all persons except those already in practice as apothecaries. The words would include all persons who have taken medical degrees, were it not for the twenty-ninth section, which saves the rights of "the \*607] two universities of Oxford and \*Cambridge," and of the other bodies there named. But the act, by expressly exempting the two English universities, does not exempt those of Scotland also. The statute applies to England and Wales only: Scotland is not in contemplation.

PARKE, J. The words of the act are too plain to be got over. Section 14 contains a general prohibition, to which certain exceptions are made by sect. 29, but that contains no exemption in favour of Scotland or Ireland: all the provisions on the subject apply to England and Wales. The duty of an apothecary,

nothing in this act contained shall extend or be construed to extend to lessen, prejudice, or defeat, or in anywise to interfere with any of the rights, authorities, privileges, and immunities heretofore vested in and exercised and enjoyed by either of the two Universities of Oxford or Cambridge, the Royal College of Physicians, the Royal College of Surgeons, or the said Society of Apothecaries, respectively, other than and except such as shall or may have been altered, varied, or amended in and by this act, or of any person or persons practising as an apothecary previously to the 1st day of August, 1815, but the said Universities, Royal Colleges, and the said society, and all such persons or person shall have, use, exercise, and enjoy all such rights, authorities, privileges, and immunities, save and except as aforesaid, in as full, ample and beneficial a manner, to all intents and purposes, as they might have done before the passing of this act, and in case the same had never been passed."

(a) 1 New Rep. 203.

as defined by sect. 5, is, "to prepare with exactness, and to dispense, such medicines as may be directed for the sick by any physician lawfully licensed to practise physic by the president and commonalty of the Faculty of Physic in London or by either of the two universities of Oxford or Cambridge." A Scotch physician is certainly not enabled by the act to perform this duty.

Rule refused.

#### \*DOE dem. WILKS and Others v. W. B. RAMSDEN, Clerk. [\*608 April 16.

A rector, after the stat. 13 Eliz. c. 20, had been repealed, and before its revival by 57 G. 3, c. 99, demised his rectory to a trustee for ninety-nine years, to secure an annuity. After the passing of 57 G. 3, c. 99, by deed reciting the grant of the former annuity, and that A. had agreed to purchase of the grantor an annuity of 574L a year for 4400L and out of that sum to pay off the former annuity, and that that annuity and the term created to secure the same, should be assigned to a trustee for A's benefit, the rector granted the said annuity of 574L, chargeable on his rectory; and the trustee of the term created to secure the annuity of 1813, assigned it to a trustee for the benefit of A: Held, that inasmuch as the term was created after passing of the 43 G. 3, c. 84, which repealed the 13 Eliz. c. 20, the assignment of it, though for the purpose of securing the payment of an annuity charged on the benefice after the passing of 57 G. 3, c. 99, was valid.

EJECTMENT to recover the rectory of Great Stambridge, in the county of Essex. At the trial before Lord Lyndhurst, C. B., at the Spring assizes for Essex, 1833, the following appeared to be the facts of the case: -On the 18th of February, 1813, the defendant, the rector of Great Stambridge, granted by indenture to Elizabeth Fisher, an annuity of 2601. per annum for her life, and by the same indenture demised to Robert Withy the rectory and glebe lands and tithes thereof, &c. habendum for ninety-nine years, upon trust for better securing the payment of the annuity. By another indenture, dated the 6th of September, 1816, the defendant granted to Thomas Henry Shepherd, during his life, an annuity of 931., which was also secured by a demise of the rectory to a trustee, for ninety-nine years. In 1820, and in 1823, he granted two other annuities, the first charged on his vicarage of Little Wakering and the second charged on the rectory of Great Stambridge and vicarage of Wakering; and demised those two benefices for terms of years to trustees, for the purpose of securing those annuities. By indenture of the 19th of January, 1825, reciting the grants of annuities above mentioned, and that the defendant had agreed \*to pay off and re-purchase those annuities, and that Peter Moore, the chairman of the British Annuity Company, had on behalf of the company agreed with the defendant for the purchase of an annuity of 574l. for a term of ninety years, if the defendant should so long live, for the price of 4400%, and that it had been agreed that Moore should out of that sum pay of the several annuities before granted, and that the annuities, and the terms created to secure the same respectively, should be assigned to a trustee for the benefit of the company, the defendant granted an annuity of 574l., payable quarterly on certain specified days, and charged on his rectory and vicarage, w Moore; and there was a power of distress in case it should be in arrear for twenty-one days, and a power to enter and take the rents, tithes, and profits, if it should be in arrear for twenty-eight days. The indenture also contained an assignment of the four annuities by the annuitants; of the two terms created in 1813 and 1816, by R. Withy and J. H. Shepherd; and of the two other terms created in 1820 and 1823, by the trustees of those terms, respectively, to Wilks, as a trustee, for the benefit of the company. In 1826 the annuity became in arrear, and a sequestration issued. It was contended for the defendant that the deed of 1825 created a new charge on the defendant's living, and the assignment of the former terms to a trustee for the purpose of securing the payment of an annuity so created since the statute 57 G. 3, c. 99, was void. Lord Lyndhurst was of opinion, that the assignment to Wilks of the terms created in 1813 and 1816, vested the legal estate in him, and therefore that the lessor of the plaintiff was entitled to recover; \*and he directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Comya now moved accordingly. The assignment of the terms granted in 1814 and 1816, to Wilks, did not vest the legal estate in him, because the object of it was to secure, not the original annuities, but the annuity first granted by the deed of 1825. It operated, therefore, as a new charge on an ecclesiastical benefice, and consequently is void. The terms created to secure the annuities granted in 1813 and 1816, have been satisfied by the payment of those annuities. [Parke, J. The two terms created in 1813 and 1816 for the purpose of securing the annuity and charged on the benefice, were valid in point of law, because the charge created by them was made after the passing of 43 G. 3, c. 84, and before the passing of 57 G. 3, c. 99. The assignment of those terms for the purpose of securing the annuity granted in 1825, operated pro tanto as a continuance of the original charge, and vested the legal estate in the lessor of the plaintiffs. This case is precisely the same as Doe v. Gully, 9 B. &. C. 344.]

Per Curiam. There must be no rule.

## \*BARON v. HUSBAND. April 16.

The solicitor to the assignees of a bankrupt, received from them a sum of money, to be applied in payment of the costs of the petitioning creditor up to the time of the choice of assignees. The solicitor offered to pay the money, on condition that the bill should undergo a subsequent taxation, but to that the petitioning creditor would not assent: Held, that the latter could not maintain money had and received thereupon against the solicitor, though after the above offer and refusal, he had authorised the solicitor to pay over part of the money in discharge of commissioners' fees.

Assumpsit for money had and received, &c. Plea, general issue. At the trial before Park, J., at the last assizes for the county of Devon, it appeared that, in 1817, the plaintiff sued out a commission of bankrupt against one The plaintiff was both petitioning creditor and solicitor. costs, previous to the choice of assignees, being 1941. 16s. 7d., the assignees paid him, at different times, 90% on account, leaving a balance due to him of 1041. 16s. 7d. After a lapse of fourteen years, the surviving assignees appointed the defendant their solicitor; and, on the 17th of June, 1831, an audit having been appointed, they were proceeding to pass their accounts, taking credit for the balance due to the plaintiff. The commissioners required an order to be given for the payment before they would complete the audit; whereupon the defendant received a cheque from the assignees for 104l. 16s. 7d., for the purpose of settling the plaintiff's account, and undertook to do so. He thereupon immediately saw the plaintiff, and offered to pay him the money, provided he would give a receipt with an agreement that the costs should be subject to further taxation. This the plaintiff refused to do. It appeared that some fees, due to one of the commissioners, were included in the 1041. 16s. 7d.; and that subsequently to the above interview, the defendant paid them to the commissioner, under the authority of an order from the plaintiff. There was no proof that the commissioners had ascertained the amount of costs, according to 5 G.

\*612] 2, c. 80, s. 25, and 6 G. 4, c. 16, s. 14. \*The learned Judge, being of opinion that this was necessary, nonsuited the plaintiff.

Coleridge, Serjt., now moved to set aside the nonsuit. The 5 G. 2, c. 30, (which was the bankrupt act in force in 1817,) by s. 25, requires the petitioning creditor to prosecute the commission at his own costs until assignees shall be chosen; and the commissioners, at the meeting appointed for the choice of assignees, are to ascertain such costs, and, by writing under their hands, to order the assignees to repay the petitioning creditor his costs out of the first money or effects that shall be collected by them under the commission. And even assuming that the omission to have the amount of costs ascertained by the commissioners according to the present act, might be an answer to an action brought by the solicitor against the petitioning creditor, it is not an answer to this action, which is brought by the plaintiff for money received for his use by the defendant. [PARKE, J. I doubt whether money had and received be maintainable here, because there is no privity between the plaintiff and defendant. The proof is, that the defendant offered to pay the plaintiff the amount of the check, on a condition which the latter refused to comply with. It does not appear that there was any previous agreement between them, that the defendant should receive the money from the assignees for the plaintiff's use. If I give a sum of money to my servant to pay a tradesman, the latter cannot maintain an action for money had and received against the servant.] Here it must be taken that the defendant received the money with the sanction of the commissioners; he received it expressly for the use of the plaintiff; the audit could not have proceeded, except on the footing of \*the plaintiff's bill having [\*613 been paid by the assignees, by the payment made to the defendant. The subsequent disposition of a part of this money, pursuant to the directions of the plaintiff, shews that the defendant was continuing to hold it as the plaintiff's money; and having received it for the plaintiff, and held it for him, it is not open to him now to repudiate the character of agent to the plaintiff, or to deny the privity between them. Cur. adv. vult.

DENMAN, C. J. in the course of the term delivered the judgment of the

Court.

In this case a motion was made by my brother Coleridge for a rule nisi to set aside a nonsuit in a cause tried before my brother Park, at Exeter. It was an action for money had and received, brought by the petitioning creditor against the solicitor to the assignees, who appeared to have received a check from them for the amount of the plaintiff's bill up to the choice of assignees, but who had declined to pay the plaintiff's demand. It may be taken that the defendant had received cash for the cheque. The nonsuit proceeded on the ground that the plaintiff had no right to sue for the amount, until his bill had been taxed under 6 G. 4, c. 16, s. 14; and it was contended that the learned Judge was wrong in this respect, and that taxation of the bill was not requisite if the assignees chose to waive it. It is not necessary for us to pronounce any opinion upon this question; because admitting that the bill need not have been taxed, we are of opinion that this action will not lie, for want of privity between the plaintiff and defendant.

The defendant received the money as the agent of \*the assignees and not of the plaintiff; he held it subject to their control and directions, and would continue to be accountable to them, until he entered into some binding engagement with the plaintiff to hold it for his use. As soon as that engagement was entered into, and not until then, he would hold the money for the plaintiff's use. This is the doctrine laid down in Williams v. Everett, 14 East, 582, Wharton v. Walker, 4 B. & C. 163; 6 Dow. & Ryl. 288; Scott v. Porcher, 3 Mer. 652; Wedlake v. Hurley, 1 Cro. & Jervis, 83, and has been acted upon in many other cases.

In this case there has been no such engagement. The defendant never promised to pay the plaintiff, except upon a condition to which he would not assent, namely, that his bill should undergo a subsequent taxation; and his part payment, by the direction of the plaintiff, of the commissioner's fees, cannot ope-

rate except as part payment. For these reasons we are of opinion that the nonsuit was right, and, therefore, refuse a rule. Rule refused.

#### WILSON v. BARKER and MITCHELL. April 17.

A person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use.

TRESPASS for assaulting the plaintiff, and taking a gun from him. At the trial before Alderson, J., at the last Spring assizes at York, the following facts were proved:—The plaintiff was shooting on Meltham Moors in the West Riding of Yorkshire, when the defendant, Mitchell, seized him and took away \*615] his gun. The taking \*was wrongful. Mitchell was the servant of a Mr. Peace, to whom the game on these moors was given by certain parties, entitled as holders of allotments under an inclosure act. The other defendant, Barker, was employed by Mr. Peace in protecting the game. Mitchell took the gun to Barker, who, on being subsequently asked for it by the plaintiff, refused to give it up. An endeavour was made, but without success, to shew that Barker admitted having authorized Mitchell to seize it. ALDERSON, J. was of opinion, that this evidence did not support an action of trespass against Barker, and that, to reach both parties, the form of action should have been trover. A verdict was therefore taken, under the learned Judge's direction, for Barker, and against Mitchell with 40s. damages.

Alexander now moved for a rule to show cause why a new trial should not be had, on the ground of misdirection. Assuming that Mitchell did not act as Barker's servant in seizing the gun, yet Barker ratified the act by his subsequent conduct, and thereby made himself liable as a trespasser. In Badkin v. Powell, Cowp. 478, Lord Mansfield says, that a pound-keeper is not liable in trespass for merely taking in cattle brought to the pound by other persons, who act at their own peril if the taking has been wrongful: but "if he goes one jot beyond his duty and assents to the trespass, that may be a different case." In Aaron v. Alexander, 3 Camp. 35, where a wrong person was apprehended under a warrant and carried to the watch-house, the watch-house keeper, who received \*616] and detained him, was held liable in trespass, though he had no means of acceptaining the identity \*66.41 the detention was a fresh trespass.] In Hull v. Pickersgill and Others, 1 B. & B. 282, the defendants (in trespass) were creditors who had seized the goods of an uncertificated bankrupt for debts incurred after the bankruptcy; but it appeared that the assignees had afterwards surrendered to the defendants all their interest in these goods under the commission, and this was held to be a ratification of the seizure as made to the use of the assignees. [PARKE, J. Lord Coke, in 4 Inst. 317, states, as a difference between the forest law and the common law, that, by the former, whosoever receives within the forest any malefactor in hunting or killing the king's deer, knowing him to be such malefactor, or any flesh of the king's venison, knowing it to be the king's, is a principal trespasser; whereas by the common law, "he that receiveth a trespasser, and agreeth to a trespass after it be done is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case omnis ratihabitio retrobahitur et mandato æquiparatur; but, by the law of the forest, such a receiver is a principal trespasser, though the trespass was not done to his use." Unless you could prove here that the seizure of the gun was to Barker's use, he cannot be made liable in trespass.]

PER CURIAM.(a) The direction was right; there must be no rule.

Rule refused.

#### \*DOE dem. CAWTHORN v. MEE. April 17.

**F\*617** 

The 48 G. 3, c. 149, s. 32, which requires that every surrender of copyhold, and admittance, &c., made out of court, or a memorandum thereof, shall be stamped; and sect. 33, which enacts, that in cases of surrender, &c., in court, the steward shall make, and deliver to the tenant a stamped copy of the court roll, are merely revenue regulations, and not intended to vary the rules of evidence; and, therefore, a surrender and admittance out of court, (presented and enrolled afterwards) may be proved by an examined copy of the court roll, without producing the original surrender, &c., or memorandum thereof.

At the trial of this cause before Bosanquet, J., at the last Northampton assizes, the plaintiff, in order to prove a surrender of a copyhold tenement, made out of court, and the subsequent presentment of such surrender, according to the custom of the manor, and the admittance of the new tenant, produced copies of the entrance of these proceedings on the court rolls, examined and stamped. Miller, for the defendant, objected that such copies, assuming that they would have been evidence if the surrender had been made in court, were not so where the surrender was out of court. Bosanquet, J. received the evidence, and the

plaintiff had a verdict.

Miller, by leave reserved, now moved to enter a nonsuit on account of the reception of the above evidence, to which he renewed his former objection. The original surrender at least should have been produced at the trial. In 2 Watkins on Copyholds, 4th ed. p. 38, note 1 (by the editor,) it is stated that "copies of court roll are but secondary evidence of the copyholder's title," and [LITTLEDALE, J. that "in ejectment the rolls themselves must be produced." There would be great inconvenience in requiring the production of the original PATTESON, J. Is there any authority for such a proposition? The contrary is stated in Buller's Nisi Prius, 247 a, 7th ed.] The stamp act, 48 G. 3, c. 149, (s. 32,) requires every lord of a manor taking a surrender or granting admittance, \*out of court, to cause the same or a memorandum thereof to be put in writing on stamped paper, &c.; and by section 33, in cases of surrender and admittance in court, the steward is to make a copy of the court roll of such surrender and admittance, on a stamp, and deliver the same to the party entitled, under a penalty of 50%. In the latter case the act requires a stamped copy of the roll to be given, and such copy may, therefore, be evidence; but in the case of a surrender out of court, the original only need be stamped, and if the surrender could be proved without production of the original, a title might be established without shewing any stamped document, and so the revenue might be defrauded. Doe, lessee of Bennington v. Hall, 16 East, 208, was cited for the defendant at the trial, but that only shews that the original entry on the court roll is evidence notwithstanding the statute.

LITTLEDALE, J. I think the statute makes no difference as to the admissibility of this evidence. The object of the clauses which have been cited was, to establish a mode of getting at the payment of revenue in the case of transfers of copyhold, since it was not practicable to regulate the ad valorem duty on conveyance of this, in the same way as of other kinds of property; but there was no intention to vary the rules of evidence. There is no doubt that copies

of the court rolls are admissible in all cases.

PARKE and PATTESON, Js. concurred.

Rule refused.

<sup>(</sup>a) Littledale, Parke, and Patteson, Js. Denman, C. J. had left the Court.

\*BOLTON, Administrator of TIMOTHY BOLTON, v. DUGDALE, Executrix of ABRAM DUGDALE. April 18.

"Received and borrowed of A. B. 30l., which I promise to pay with interest, at the rate of 5 per cent. I also promise to pay the demands of the sick club at H. in part of interest, and the remaining stock and interest to be paid on demand to the said A. B. Witness my hand, &c. C. D." This is not a promissory note.

Assumpsit for money lent, &c. Pleas, the general issue, and statute of limitations. At the trial before Alderson, J., at the last assizes for the county of York, the following instrument was given in evidence to prove the loan of the

money by the intestate to the testator.

"Received and borrowed of Timothy Bolton, labourer, the sum of 30%, which I do hereby promise to pay with interest at the rate of 5 per cent. I also promise to pay the demands of the sick club at Haworth in the county of York, in part of interest, and the remaining stock and interest to be paid on demand to the said Timothy Bolton, his executors, administrators, or assigns. Witness my

hand this 17th day of September, 1805. Abram Dugdale."

The instrument bore a 11. agreement stamp, and on the back of it was a receipt for the penalty of 5l., and 1l. duty. Bolton the intestate lived at Blackburn in Lancashire, and was a member of a sick club at Haworth, near which place Dugdale the testator lived. Dugdale had within six years paid money to the club on Bolton's account. For the defendant it was contended that the instrument was a promissory note, and, therefore, could not be received in evidence, the stamp having been affixed after it was made; to which point Green v. Davies, \*6901 4 B. & C. 235, was cited. The learned Judge thought the \*writing was \*620] 4 B. & U. 250, was circu. The heart of the plaintiff, giving leave to move to enter a nonsuit.

Knowles now moved accordingly. No specific form of words is necessary to constitute a promissory note. Here, if the document had ended with the first sentence, it would have nearly resembled that which was held to be a promissory note in Green v. Davies, 4 B. & C. 235. Then was its character altered by the subsequent promise to pay the demands of the sick club in part of interest? The mention of the club was only a description of the mode in which those payments were to be made; as if at the foot of a common promissory note there had been a memorandum that the interest was to be paid into a particular bank. [PARKE, J. Could Dugdale have been obliged to pay the interest in any other way than to the sick club? And it was uncertain what their demands would be.] He was liable to pay Bolton on demand, and it is not clear that that demand might not have been made before any thing was due to the club. The payments to be required by the club could not exceed five per cent. on the prin-

Denman, C. J. To a certain extent this instrument resembled a promissory note; but it was, in fact, an agreement engrafted on a note. The objection

cannot prevail.

LITTLEDALE, J., concurred.

PARKE, J. The amount of the sick club charges was uncertain; so, therefore, was the sum to be paid to \*Dugdale; the instrument, as far as regarded this contingent demand, could not be a promissory note; and the transaction was entire.

PATTESON, J. The instrument engages for the payment of remaining stock and interest" at a time not fixed. It is something like the undertaking in Leeds v. Lancashire, 2 Camp. 205, which was held not to be a promissory note. Rule refused.

#### MARY ANN WILLIAMS v. WILLIAM CARWARDINE. April 18.

A. by public advertisement stated, that whoever would give information which should lead to the discovery of the murder of B. should, on conviction, receive a reward of 201.: Held, that C., who gave such information, was entitled to recover the 201., though she was led to inform, not by the proffered reward, but by other motives.

Assumpsit to recover 201., which the defendant promised to pay to any person who should give such information as might lead to a discovery of the murder of Walter Carwardine. Plea, general issue. At the trial before Parke, J., at the last Spring assizes for the county of Hereford, the following appeared to be the facts of the case:—One Walter Carwardine the brother of the defendant, was seen on the evening of the 24th of March, 1831, at a public house at Hereford, and was not heard of again till his body was found on the 12th of April in the river Wye, about two miles from the city. An inquest was held on the body on the 13th of April and the following days till the 19th; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates, but did not then \*give any information which led to the apprehension of the real offender. On the 25th of April the defendant caused a hand-bill to be published, stating that whoever would give such information as should lead to a discovery of the murder of Walter Carwardine should, on conviction, receive a reward of 201.; and any person concerned therein, or privy thereto, (except the party who actually committed the offence) should be entitled to such reward. and every exertion used to procure a pardon; and it then added, that information was to be given, and application for the above reward was to be made to Mr. William Carwardine, Holmer, near Hereford. Two persons were tried for the murder at the Summer assizes, 1831, but acquitted. Soon after this the plaintiff was severely beaten and bruised by one Williams; and on the 23d of August, 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant, to give evidence, the law would not imply a contract by the defendant to pay her the 20%. The learned Judge was of opinion, that the plaint !!, having given the information which led to the conviction of the murderer. had performed the condition on which the 201. was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. jury found that she was not induced by the offer of the reward, but by other motives.

\*Curwood now moved for a new trial. There was no promise to pay [\*623] the plaintiff the sum of 201. That promise could only be enforced in favour of persons who should have been induced to make disclosures by the promise of reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negatived any contract on the part of the defendant with the plaintiff.

DENMAN, C. J. The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within

the terms of the advertisement, and therefore is entitled to recover.

LITTLEDALE, J. The advertisement amounts to a general promise, to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE, J. There was a contract with any person who performed the con-

dition mentioned in the advertisement.

PATTESON, J. I am of the same opinion. We cannot go into the plaintiff's motives. Rule refused.

#### \*624] \*HINE v. ALLELY and Another. April 18.

In assumpsit on a bill of exchange drawn upon "P. P., No. 6, Budge Row," and accepted by him, an averment that the bill, when due, was presented and shewn to P. P. for payment, is supported by proof that the holder went to 6 Budge Row to present it, but found the house shut up, and no one there. And notice may be given to the drawers on the day of such dishonour, as in the case of an actual refusal to pay.

Assumpsit by indorsee against drawers of a bill of exchange, dated 15th May, 1830, payable to themselves, at three months, directed to "Mr. Peter Perry, No. 6, Budge Row, Watling Street," and accepted by him. Averment, that on the 18th of August, 1830, the said bill was presented and shewn to the said Peter Perry for payment; and he then and there had notice of the indorsement, &c., and was requested to pay, but would not, of which the defendants Plea, the general issue. At the trial before Parke, J. at the sittings in Middlesex, after last Hilary term, it appeared that on the day the bill became due, it was taken to No. 6 Budge Row, to be presented on behalf of the plaintiff, but the house was shut up, and no further presentment could be made. On the same day the bill was shewn to the defendants, and notice given them of the dishonour. No other noticed appeared to have been given within proper time. It was objected, upon this evidence, that the averment in the declaration, that the bill was presented and shewn to Perry, was not made out, though if the declaration had said "duly presented" only, the proof might have been sufficient. Parke, J. thought there was a presentment, and that the rest of the averment might be rejected as surplusage. It was further objected that the only notice proved was given to the drawers on the day the bill became due: whereas the whole of that day ought to have been allowed them for payment. Parke, J. overruled this objection also, and a verdict was found for the plaintiff, but leave given to enter a nonsuit.

\*625] \*Erle now moved accordingly, and re-stated the objections. [PARKE, J. As to the first, Hardy v. Woodrooffe, 2 Stark. 319, is in point.] At all events the notice on the 18th was premature. Burbridge v. Manners, 3 Camp. 193, may be cited in answer, but there Lord Ellenborough said, "I think the note was dishonoured as soon as the maker had refused payment on the day when it became due." Here the holder only concluded that the bill would not be paid, from finding no one at the house. There had been no refusal.

PER CURIAM.(a) It is the same, if the house is shut up and no one there. Both cases are in point. Rule refused.

# The APOTHECARIES' Company v. ALLEN. April 18.

A person who advises patients, and compounds and sells the medicines recommended by himself, but does not and cannot make up physicians' prescriptions, is liable to the penalties of 55 G. 3, c. 194, s. 20, for practising as an apothecary without a certificate.

DEBT for penalties under 55 G. 3, c. 194, s. 20, for acting and practising as an apothecary in England, to wit, at Grantham, by then and there, as such apothecary, attending and advising, and furnishing and supplying medicines to and for the use of R. R., without having obtained a certificate pursuant to the act;

<sup>(</sup>a) Denman, C. J., Littledale, Parke, and Patteson, Js.

it being also averred, that defendant was not practising as an apothecary on or before the 1st of August, 1815. Plea, the general issue. At the trial before Denman, C. J., at the Lincoln Spring assizes 1833, it appeared that the defendant had not been in regular practice as an apothecary on or before the 1st of August, 1815, and had not a certificate; \*that he kept no shop, but lived in lodgings; that he did not make up physicians' prescriptions, and was not able to do so, but that he advised patients, and made up and sold to them the medicines which he himself ordered. Denman, C. J. was of opinion, that a person compounding medicines, and selling them under these circumstances, did act as an apothecary in the ordinary sense of the term; and that it made no difference if he prescribed, as well as prepared, the medicine. The jury, under his direction, found a verdict for the plaintiff.

Balguy now moved for a new trial, on the ground of misdirection. It is not a practising within the act, where the party merely prepares and dispenses medicines recommended by himself, and does not make up physicians' prescriptions. In The Apothecaries' Company v. Warburton, 3 B. & A. 40, it was held, that a person could not come within the protection of the act, as having practised before the 1st of August, 1815, if he was then incapable of preparing medicines from a prescription. If a person so disqualified could not practise for the purpose of acquiring the privileges of the act, neither ought he to be considered as practising so as to incur its penalties. It was not the design of the legislature to guard against such cases as this; they might be left to the common sense of mankind. In section 5, the duty of an apothecary is stated to be "to prepare with exactness, and to dispense, such medicines as may be directed for the sick by any physician lawfully licensed," &c. And the penalty imposed by that clause is for not observing the directions to be given by such prescription. PARKE, J. \*According to your argument, any person, however ignorant, might safely dispense any quantity of medicine.] Provided he did not practise as an apothecary within the terms of the act. In the extreme case suggested, if people are willing to trust such a person, they are not within the protection which the legislature intended to give.

DENMAN, C. J. It is true that the Court held in The Apothecaries' Company v. Warburton, 3 B. & A. 40, that a man who before August 1815 had administered medicines without being able to make up a physician's prescription, had not practised so as to be within the protection of 55 G. 3, c. 194, s. 20; but it does not follow that a person so disqualified is free from the penalty there

imposed.

LITTLEDALE, J. I do not know what is acting or practising as an apothecary

within the clause in question, if this is not.

PARKE, J. The preamble to section 5, does not profess to recite all the duties of an apothecary, but only those referred to by the penal enactments which follow. It is not to be inferred from the decision in The Apothecaries' Company v. Warburton, 3 B. & A. 40, that if a person compounds medicine without being able to make up a physician's prescription, he is not liable to penalties for practising as an apothecary.

PATTESON, J. concurred.

Rule refused.

\*The KING v. The Inhabitants of HENDON. April 19. [\*628

A parish may be indicted for non-repair of a bridge, without stating any other ground of liability than immemorial usage.

INDICTMENT stated that there is a certain common public bridge called Decoy Bridge, situate in the parish of Hendon, in the county of Middlesex, in the king's common highway there, for all his Majesty's subjects to go, return, &c.

on foot, and with horses, and carriages, &c.; and that the inhabitants of the said parish, from time whereof, &c. have repaired and amended, and been used and accustomed, &c. and of right ought to have repaired and amended, and still of right ought, &c. the said bridge when and so often as it hath been or shall be necessary; and that the said bridge on, &c., and from thence hitherto was out of repair. Plea, not guilty. At the sittings in Middlesex after last Hilary term the defendants were convicted, and now

Talfourd, Serjt. moved in arrest of judgment. A parish is not chargeable of common right with the repair of a bridge, and therefore an indictment against them for non-repair ought to shew some consideration for such duty being imposed upon them, and not merely to state immemorial usage. In the Glusburne Beck case (Rex v. The Inhabitants of the West Riding, 5 Burr. 2594,) it is laid down that "the inhabitants of the county are of common right bound to repair all public bridges, because they are for the benefit of the county;" and that "if a man builds a bridge, and it becomes useful to the county; and
the county shall repair it." It is difficult to say how such a body as a
second of the county shall repair it." It is difficult to say how such a body as a parish could originally incur this liability; (see Rex v. The Justices of Buckingham, 8 B. & C. 375;) it could not be ratione tenurse, and they are not a corporation for the purpose of taking tolls. In Rex v. Oswestry, 6 M. & S. 361, a hundred was charged in the form here used, but that case was considered chiefly with reference to another objection: and hundreds and ridings are integral parts of a county: parishes are not: a parish is often in two counties. The statute 22 Hen. 8, c. 5, for the repair of bridges, recites in (PARKE, J. sect. 2, that, "in many parts of this realm it cannnot be known and proved what hundred, riding, wapentake, city, borough, town, or parish, nor what person certain or body politick ought of right to make such bridges decayed;" and enacts by sect. 3, that in such cases, the bridges shall be made by the inhabitants of the shire or riding. This recognizes a parish as a district which might be liable at common law to repair bridges. And it would be very difficult to distinguish this case from that of a township charged with the repair of a highway, where the liability is constantly stated as established by prescription. DENMAN, C. J. There is no ground for a rule. Rule refused. (a)

\*630] \*TOMLINSON, Gent. one, &c. v. BRITTLEBANK, Gent. one, &c. April 19.

The words, "He robbed J. W." are actionable, as imputing an offence punishable by law. If they were used in any other sense, the defendant must shew it.

Per Denman, C. J., and Parke, J.; Littledale, J. dubitante.

Case for words. The declaration contained several counts for words reflecting on the plaintiff as an attorney, but the last count merely stated, that in a certain discourse which the defendant had of and concerning the plaintiff in the presence, &c., he, the defendant, contriving and intending to injure the plaintiff in his good name, fame, and credit, falsely and maliciously spoke and published of and concerning him, the false, scandalous, malicious, and defamatory words following: viz. "He robbed John White; thereby meaning that the said plaintiff

(a) See Rex v. Ecclesfield, 1 B. & A. 348, Lord Ellenborough there, referring to the statute of bridges and to Magna Charta, cap. 15, says: "From both which statutes it appears that towns or districts smaller than a county, had been accustomed in some cases to make bridges; and so in fact they continue to do until this day. And upon the whole it seems manifest, that the extent of the territory chargeable in this case is to be ascertained by usage and custom, and that in default only of an usage and custom to charge a smaller territory, the charge shall fall upon the larger, that is, upon the county." P. 359. And he draws an analogy from the liability of a parish to repair a bridge, to that of a township to repair a road, by usage.

had been and was guilty of an offence punishable by law." No special damage was laid, applicable to this count. Plea, the general issue. At the trial of this cause at the last assizes for Stafford, a verdict was taken for the plaintiff upon the whole declaration.

R. V. Richards now moved for a rule to shew cause why the judgment should not be arrested. The words in this count are not actionable without special damage. It is true that in 7 & 8 G. 4, c. 29, s. 6,(a) the word "rob" is used to signify the commission of a felony; but the word is of equivocal import, like "forsworn," which by itself is not an actionable expression. There is nothing here to connect the word "rob" with any \*transaction to which the statute applies: it is not said that the plaintiff robbed White of any chattel or specific thing. In Com. Dig., Action on the case for Defamation, (D) 16, robbery is mentioned as a word of slander, but the instance given is, where it was spoken of a clergyman in his profession, "yonder is Dr. A. robbing the church." In Com. Dig., under the same title, (F) 2, it is laid down that to say of a man "he poisoned A.," without averring that A. is dead, is not sufficiently certain to be actionable (semble), and in (F) 4, some equally strong cases were put with respect to stealing. [PARKE, J. The case under that head in Com. Dig., as to taking words in mitiori sensu, have been very much criticised, as going into too great minuteness.(b) The reason assigned is that when those cases occurred, vexatious actions for words were too frequent, and the courts resorted to subtleties to get rid of them. (See Button v. Heyward, 8 Mod. 24.) When it is said that a man robbed another, does not it imply that he took something from him?] There ought at least to be some explanation by the context, to give words the unfavourable sense here contended for. [PARKE That is where the sense to be assigned is not the ordinary one. It is for the plaintiff to establish the sense which he relies upon. An innuendo cannot enlarge it. In Holt v. Scholefield, 6 T. R. 691, where the words were "T. H. has forsworn himself," an innuendo was added, "meaning that the plaintiff had committed wilful and corrupt perjury;" but the count was held not maintain-If the present count was good, that also might have been supported.

\*Denman, C. J. Almost any words may be used in more than one sense. But the word to "rob" gives a sufficient description of an offence punishable by law in the very terms of the statute 7 & 8 G. 4 c. 29. It has but one legal sense. "Forsworn" is applicable, not only to purjuries punishable at law, but also to offences of the same description which incur no temporal

punishment. I think, therefore, that the count is sufficient.

LITTLEDALE, J. I do not think the term "to rob" necessarily means taking goods from another by force in the sense of the statute, and I very much doubt whether the count is good; but, as my brothers are of a different opinion, there will be no rule.

· Pabke, J. I think the prima facie import of the word is, that the plaintiff has done that which in ordinary parlance is called robbing, and is described in this count as a punishable offence. If they were used in any other sense, it was for the defendant to shew it.

Rule refused.

<sup>(</sup>a) It enacts "that if any person shall rob any other person of any chattel, money, or valuable security, every such offender, being convicted thereof, shall suffer death as a felon."

<sup>(</sup>b) An instance cited, (F. 2., ibid.), of words not laid with sufficient certainty, is, "He cleaved his head; one part lay on one shoulder, another part on the other; without saying that he was dead. 2 Cro. 184."

ODBRIDGE And Others, Assignees of PARKER, and AGER and bluers, Assignees of ELLIS, v. SWANN and Others. April 19.

he bankruptcy of one of two partners, the solvent partner, thinking the firm ble of paying its debts, continued the business, and paid partnership money into a er's, to be applied in discharge of running bills of the firm, payable at the bank; it was so applied: Held, that this payment, having been made bona fide, and out any contemplation of bankruptcy by the solvent banker, was valid at law. signees and the solvent partner afterwards opened a fresh account at the bank, and in 900L to discharge a debt on the old account, which carried interest. The ad partner then became bankrupt: Held, that the assignees of the two could not ver this last sum.

SUMPSIT for money had and received. Plea, general issue. At the trial Denman, C. J., at the London sittings after last term, the following facts red:—The action was brought by the assignees of Parker and the assignees is, jointly, to recover two sums of 900%. each, which were paid after the uptcy of Ellis to the defendants, who were bankers at York. Ellis and r were in partnership. Ellis became a bankrupt in March, 1827; and is bankruptcy Parker continued to carry on the joint trade, thinking the olvent. He paid into the bank of the defendants, after the bankruptcy of 900%, part of the partnership funds, to be applied by the defendants to inning bills of Parker and Ellis, which were payable at the bank; and 101. was applied accordingly. This was the first sum of 9001. sought to overed in this action. After some time, the assignees of Ellis joined with r in opening a fresh account with the bank. Parker was desirous of apg the money which was paid in on this account, to discharge the debt due the firm on the old account to the bank, and which was carrying interest; he obtained the consent of Ellis's assignees to the transfer of the sum of . only, their solicitor thinking that that sum would place the defendants se same situation as the other creditors of the firm. The sum of 900l. was ed to the credit of the defendants, and formed the second sum sought to be \*recovered in this action. Parker became bankrupt in 1829; and his assignees joined with those of Ellis in suing the bankers for both sums. Lord Chief Justice was of opinion that they were not entitled to recover er; and he directed the jury to find a verdict for the defendants, but rved liberty to the plaintiffs to move to enter a verdict for those sums or er of them.

ir James. Scarlett now moved accordingly. The plaintiffs are entitled to ver the first sum of 900%, because the solvent partner had no authority to see of the partnership funds after the bankruptcy of his co-partner. The tof the bankruptcy of one partner is to put an end to the partnership, and e consequent authority which one partner has to bind another in partner-transactions. The partners, originally, had a joint interest in the partner-effects. That interest continues joint after an act of bankruptcy of one, upon the taking of accounts, it is ascertained that there is a surplus; and each of the partners has a separate interest in that surplus. Harvey v. sett, 5 M. & S. 336, was cited, to shew that a transfer of partnership pro-

by a solvent partner after an act of bankruptcy committed by his co-partner, is valid, even though the solvent partner had notice of his co-partner having committed an act of bankruptcy; but that decision is wholly inconsistent with the judgment of Lord Eldon, In re Wait, 1 Jac. & W. 608, where he decided that joint creditors, who have taken joint effects in execution subsequent to an \*635] act of bankruptcy by one of the \*partners, cannot retain them against the assignees under a separate commission. Speaking of an execution by a separate creditor, he says, "that it always appeared to him that the

interest of the individual partner was all which a creditor of that individual

could take, and that he must take it subject to all the partnership dealings." Then, speaking of the interest which either partner has, after a bankruptcy by one, he says, "If there is a partnership of A. and B., the moment an act of bankruptcy is committed by one of them, A. for example, if a commission is issued on that day, or one is afterwards taken out which has effect from that time,—from that moment the partnership is put an end to. The question then is, what is the property of the insolvent partner A., and what is the property of the solvent partner B.? A. may have no interest in the joint effects, no property at all; B. may have no property at all; I mean, they may have no separate or respective interests, because, until the whole demands of both A. and B. are settled, you cannot say whether any thing remains to be divided; and that must depend, not only on the demands against both, but on the demands which they may have against each other." The effect of that reasoning, if it be correct, is to shew, that the solvent partner has no power to dispose of any part of the joint property after the bankruptcy of his co-partner; and that is consistent with Ramsbottom v. Lewis, 1 Camp. 279, where it was held that after a secret act of bankruptcy committed by one of two partners, the other could not by an indorsement in the name of the firm transfer negotiable securities \*which existed before the act of bankruptcy. And Abel v. Sutton, 3 Esp. 108, is to the same effect. Cur. adv. vult.

DENMAN, C. J., in the course of the term delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows:—

It is quite clear that Ellis's share of the joint effects was transferred to his assignces by relation to his act of bankruptcy, and it is equally clear that Parker's remained in himself after the bankruptcy of Ellis, and therefore the assignces and the solvent partner were tenants in common of all the partnership funds. It follows, that those who claim under the solvent partner are in the same situation, and according to the case of Harvey v. Crickett, 5 M. & S. 336, it makes no difference whether, at the time of acquiring the interest of the solvent partner, the party claiming under him had notice of the bankruptcy of not. In that case, all the previous decisions were considered; and the result of them is, that a creditor of the firm who is paid, fairly and without any contemplation of bankruptcy, by the solvent partner, after the bankruptcy of another, has a good defence at law, to an action by the assignces of both; as he would to an action by the assignces of the bankrupt partner, and by the solvent partner himself.

It was however urged that the case In re Wait, 1 Jac. & W. 605, decided by Lord Eldon, was a subsequent authority to the contrary; and if, upon referring to that case, we had thought that it had thrown any doubt upon the previous decisions in courts of law upon this subject, we certainly \*should have granted a rule, with a view to the reconsideration of so important a question. But we are clearly of opinion that the authority of those cases is left untouched. The Chancellor, sitting in bankruptcy, exercises both a legal and equitable jurisdiction, and in the case cited, and in that of Dutton v. Morrison, 17 Ves. 194, Lord Eldon is considering the equitable rights of the assignees of the bankrupt partner, representing the general creditors.

Whether the assignees of Ellis, for the purpose of paying the general creditors, have in this particular case any equitable claim against the defendants for the money which has been paid them, fairly and honestly, and in the course of business, by the solvent partner, is a question which does not belong to a court of law to decide.

With respect to the latter sum of 900%, which was paid with the full consent of Parker, and of the assignees of Ellis, and without the least suspicion of fraud, there is not any question; as it is quite clear that the assignees of Ellis, and Parker before his bankruptcy, could not have recovered it back, and it is equally clear that the assignees of both have no right to sue for it. We therefore refuse the rule.

Rule refused.

#### \*DICKENSON v. NAUL. April 20.

**F\*638** 

An auctioneer, employed by a supposed executrix, sold goods of the testator, but before payment, the real executrix claimed the money from the buyer: Held, that the auctioneer could not afterwards maintain an action against the buyer, though the latter had expressly promised to pay on being allowed to take away the goods, which he did.

Assumpsit for goods sold and delivered. Plea, the general issue. trial before DENMAN, C. J., at the last assizes for the county of Lincoln, it appeared that the plaintiff, an auctioneer, was employed to sell the stock of a farm by one Anne Court, supposed to be the widow and executrix of a deceased farmer of the name of Court, who had bequeathed by will his personal property to his wife Anne. The goods were sold by auction to the defendant, who, after an objection had been made to his taking them away without payment, promised, on his being allowed to do so, that he would pay. Long after the sale it was discovered that the testator had, at the time of his marriage with his supposed executrix, a wife living whose christian name was Anne, and she obtained probate and administered, and gave the defendant notice not to pay over the price of the goods to the plaintiff. Parol evidence was offered, but rejected, to shew that the testator intended to bequeath his property to his presumed wife. The defendant paid 3l. 1s. into Court on account of auction duty. Upon this evidence the Lord Chief Justice nonsuited the plaintiff; but reserved liberty to him to move to enter a verdict for the price of the goods.

Humfrey now moved accordingly, (a) and he cited Williams v. Millington, 1
\*639] H. Bl. 81, Coppin v. Walker, 7 Taunt. 237, and \*Coppin v. Craig, 7
Taunt. 243, to shew that an auctioneer might maintain an action for goods sold by him in the course of his business, against a buyer. In the first of those cases Lord Loughorough said, that an auctioneer had a possession coupled with an interest in goods which he was employed to sell, and also a special property. He also cited Cock v. Taylor, 13 East, 399, to shew that the law would imply a contract from the circumstance of the purchaser having taken away the goods. Here too there was an express promise, and a good consideration for it; for the plaintiff, having parted with the goods, lost his lien for the price.

Cur. adv. vult.

Denman, C. J., during the term, delivered the judgment of the Court. We are of opinion that no rule should be granted. The action was brought for the price of goods, by an auctioneer, employed by a supposed executrix, named Anne Court, to sell the property of the testator as the goods of the executrix; but before it was paid for, it appeared that another person was the real executrix, who gave notice to the defendant of that fact, and claimed payment of the money. For the plaintiff it was contended, that the auctioneer had a right of action for goods sold by him in the course of his business; and undoubtedly he may sue, where the right of no third person intervenes. But where such right is established, and the person employing the auctioneer is proved not to be the owner, it then becomes clear that the auctioneer, who can have no interest in the goods but what he derives from his employer, has no longer any claim upon the pro\*640] perty against the right owner. The defendant \*was therefore justified in withholding payment to the agent of the supposed executrix after notice of the title of the real executrix, to whom he is certainly liable.

Rule refused.

<sup>(</sup>a) Before Duncan, C. J., Littledale, and Parke, Js.

#### The KING v. The Inhabitants of WROXTON. April 20.

To render a marriage invalid within the 4 G. 4, c. 76, s. 22, which enacts, "that if any persons shall knowingly and wilfully intermarry without due publication of bans, the marriages of such persons shall be null and void," it must be contracted by both parties with a knowledge that no due publication has taken place. And therefore, where the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know that fact until after the solemnization of the marriage: It was held, that the marriage was valid.

On appeal against an order of two justices, whereby Susannah Carpenter, called therein the wife of James Carpenter, was removed from the parish of Moreton Pinkney in the county of Northampton to the parish of Wroxton in the county of Oxford, the sessions confirmed the order, subject to the opinion

of this Court on the following case:-

James Carpenter, the reputed husband of the pauper, is a parishioner of, and legally settled in, Wroxton, the appellant parish. In 1829 he courted the pauper, whose name was Susannah Spencer, and who was then living in service at Kennington near London; and she consented to marry him. He knew her name, and told her that he would see the banns properly published. She took no steps in the matter. He told her that they had been published. riage took place at St. Mark's Kennington, on the 8th of October, 1829. The banns were published in the names of James Carpenter and Agnes Watts; and the register was produced, containing an entry of the 8th of October, 1829, of the marriage of James Carpenter and Agnes Watts by banns; and the parish clerk, who attested the register, identified the pauper as the woman married under the name of \*Agnes Watts. The pauper had never gone by the [\*641 name of Agnes Watts. In the marriage service, the clergyman used the name of Agnes, but no surname. The pauper, who till then believed that she was about to be married in her own name, looked at Carpenter, who told her to hold her tongue. The ceremony then proceeded. The clergyman wrote the name of Agnes Watts in the register; and the pauper, although she could write, was so frightened and confused, that she only made her mark under the name of Agnes Watts. On coming out of church, she told Carpenter that he had married her by a wrong name, and he said it would stand good, and that the banns had been published in the names of James Carpenter and Agnes Watts, but that it would save expense. Before he said this, the pauper did not know that the banns had been published in a wrong name. Carpenter then scratched the name of Agnes Watts out of the certificate, and inserted that of Susannah Carpenter.

Waddington and Reynolds, in support of the order of sessions. riage in this case was valid, because the pauper, at the time of the solemnization, did not know that the banns had been unduly published. It would have been a void marriage by the 26 G. 2, c. 33, which, by sec. 2, enacts, that no parson, &c., shall be obliged to publish banns of matrimony unless the persons to be married shall, seven days at least before the time required for the first publication of such banns respectively deliver or cause to be delivered to him, a notice in writing of their true christian and sur-names; and, by sec. 8, declares all marriages solemnized without publication of banns, or license, null and void. On this statute, it has been held that a \*publication of the banns by a wrong name, was no publication at all. The consequence was, that a husband, to whom the publication of banns was usually entrusted, might, by his own fraud, render the marriage void. To prevent that, a new provision was introduced into the 4 G. 4, c. 76, which by sec. 22, enacts, that if any persons shall knowingly and wilfully intermarry without due publication of banning or license, the marriages of such persons shall be null and void to all intents and purposes. Now the words "any persons," in the plural number, prima facie in-

port both parties, and if that be so, then, to render the marriage void, both parties should be cognizant of the undue publication of banns. When the statute is meant to apply to either of the parties separately, it is so expressed; as in sections 7, and 14. In Wiltshire v. Prince otherwise Wiltshire, 3 Hagg. Eccl. Rep. 332, Dr. Lushington forbore to decide the present question. This, being an act in restriction of the liberty of marriage, must be construed strictly, Hodgkinson v. Wilkie, 1 Hagg. Consist. Rep. 262; and so construing the words "wilfully and knowingly," they donote acts done with a consciousness that the party is doing wrong. That construction was put on similar words in the statute 9 Anne, c. 10, which imposes a penalty upon a postmaster wittingly, willingly, and knowingly detaining letters, and which was held not to apply to a case where the postmaster delivered letters to an assignee addressed to the bankrupt, bona fide believing that the assignee was entitled to have them. Meirelles v. Banning, 2 B. & Ad. 909. (See also Holden v. Lawrie, 3 Camp. 188.) Now here, the pauper, one of the parties to the marriage, did not know, until

\*643] after she left the church, that the banns had been \*published in a wrong
name. Besides, the legislature seems to have assumed in sec. 23, that there may be a valid marriage where one of the parties to it knew that the banns had not been duly published; for it enacts, "if any valid marriage shall be procured by a party thereto to be solemnized by banns between persons one or both of whom shall be under the age of twenty-one years, not being a widower or widow, such party knowing that such person under the age of twentyone years had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published according to the provisions of this act, and having knowingly caused and procured the undue publication of banns, then it shall be lawful for the Attorney-General to sue for a forfeiture of all estate, &c. which hath accrued or shall accrue to the party so offending by force of such marriage."

Dwarris and Humfrey contrà. The question undoubtedly turns on the 4 G. 4, c. 76, s. 22, which, in order to invalidate a marriage, requires two things:-1st, a want of due publication of banns, and 2dly, that the parties should intermarry with a knowledge of that fact; for that is a fraud on the marriage act. Now the decisions on the statute 26 G. 4, c. 33, establish that the publication by banns must be in the proper names of the parties acquired by baptism or by reputation. The word due, in the statute 4 G. 4, if it makes any difference, renders the case stronger. Section 7, explains the intention of the legislature, for it requires the parties seven days at least before the time required for the \*644] publication of the banns respectively to deliver notice \*in writing of their true christian names and surnames. All the authorities on the construction of the statute 26 G. 2, c. 33, are collected in Rex v. Billinghurst, 3 M. & S. 250, and are classified by Lord Tenterden in Rex v. Tibshelf, 1 B. & Ad. 190, and they shew that where the banns are published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in consequence of that publication is invalid; but where there is a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one christian name, the publication may or may not be void; the supposed mis-description may be explained, and it becomes the subject of inquiry, whether it was consistent with honesty of purpose or arose from a fraudulent intention. That being the state of the law before the late statute, the enactment contained in it, that marriages knowingly and wilfully had without due publication of banns should be void, was wholly unnecessary with reference to cases in which there had been only a partial mis-description, and must have been intended therefore to apply to cases where there had been a total mis-description, and in such cases, to let in the same inquiry as to the motives of the parties which might, previously to that statute, have taken place where there had been a partial mis-description.

Then it becomes a question on the facts of this case, whether the parties did

286

**[649** 

of the seals, and the pauper afterwards delivered the deed to his master. (See Shelton's case, Cro. Eliz. 7. Doe dem. Garnons v. Knight, 5 B. & C. 671.)

PARKE, J. I am of the same opinion. The son delivered the deed to his master, and the signatures of the father and son were written by their authority.

Order of sessions confirmed.

#### \*The KING v. The Inhabitants of HAUGLEY. April 20. [\*650

By an act of parliament, all persons seised of land of the annual value of 30% in the hundred of Stow, were incorporated by the name of the guardians of the poor within the hundred of Stow, in the county of Suffolk, and were to have a common seal, and the poor of the hundred were to be placed under the management of the corporation; at the directors and acting guardians, whom the corporation were authorised to appoint in the manner therein mentioned, were empowered, with the consent of two justices to bind any poor child, under their management, apprentice in like manner as churchwardens and overseers of the poor, with the assent of the justices of the peace of the place, were then by law empowered to do.

By indenture, the directors and acting guardians of the poor of the hundred of Stow, with the consent of two justices, bound out a poor boy under their management, an appretice for one year, and affixed to the indenture the common seal of the corporation. but it was not otherwise executed by the directors and acting guardians: Held, that the

indenture was invalid.

Upon an appeal against an order for the removal of Thomas Rampling, his wife and son, from the parish of Mendlesham in the hundred of Stow, to the parish of Haugley, both in the county of Suffolk, the sessions confirmed the

order, subject to the opinion of the Court on the following case :-

By an act of the 18 G. 3, c. 35, all persons seised of messuages, lands, tenements, and hereditaments, of the annual value of 30% and upwards, in the parishes within the hundred of Stow in the county of Suffolk, were incorporated by the name of "the guardians of the poor within the hundred of Stow in the county of Suffolk," and were to have a common seal, and to sue and be sued by that name, and the poor in the said hundred were placed under the management of the said corporation; and it was enacted, that it should be lawful for the directors and acting guardians thereinafter mentioned, at any general meeting, or at any of the quarterly meetings by that act directed to be held, with the consent of the justices of the peace, to bind any poor child or children under their management apprentice for such term as they should see fit, not exceeding seven years, in like manner as churchwardens and overseers of the poor, \*with the assent of the justices of the peace, were then by law empowered to do. The act afterwards directed, that the acting guardians, or so many of them as should think fit, should assemble on the 24th day of June then next, and elect by ballot twelve of the guardians, who should be called directors of the poor within the said hundred. The qualification of a director was, the being seised of messuages, &c., of the annual value of 30l.; but it was provided, that such of the guardians as were seised of messuages, &c., of the annual value of 400l., and the justices resident in the hundred, should be directors without A poor-house was to be built under the management of the directors; and upon its being finished, a general meeting of the guardians was to be held. at which the vacancies which had occurred among the directors who had been ballotted for were to be filled up; and the guardians were at a meeting to elect twenty-four guardians, who, together with the directors qualified as aforesaid, and the twelve directors chosen by ballot, were to be the directors and acting guardians of the said hundred, for putting in execution all the powers and authorities of that act. The directors and acting guardians were to hold four general quarterly meetings in each year; one of them to be always held on the Friday after the 24th of June, and to be for filling up vacancies in the directors chosen by ballot, and for choosing acting guardians; after which the acting guardians were at such meetings to choose six persons from among themselves, who, with the directors, were to admit the accounts, and to choose a treasurer and clerk; and they were thereby authorised and required to transact and do all other business to be done at such quarterly meetings respectively, in pursuance of that act.

\*652] \*By an act of the 5 G. 4, c. xviii., for altering and enlarging the power of the recited act, the provisions in the 18 G. 3, c. 35, respecting apprenticeships were repealed, and re-enacted with a clause enabling the directors and guardians, present at any meeting held in pursuance of the 18 G. 3, to bind

poor children by indenture under the common seal of the corporation.

A quarterly meeting of the directors and acting guardians being duly held under the directions of the act 18 G. 3, by an indenture bearing date the 1st day of October, 1821, it was witnessed that the directors and acting guardians of the poor within the hundred of Stow in the county of Suffolk, incorporated for the better relief and maintenance of the poor within the said hundred, by and with the consent of two justices for the said county whose names were subscribed, and in pursuance of an order of two justices of the said county therein also named, did put and place Thomas Rampling, a poor child belonging to the parish of Gipping, within the said hundred, and residing at and maintained in the house for the poor within the hundred, apprentice to Robert Steggall of Gipping, for the term of one year. To this indenture the common seal of the corporation was affixed at the meeting, but the indenture was not otherwise executed by the directors and acting guardians. It was executed by the master. The pauper served the year, sleeping in the parish of Gipping. The question was, whether or not this binding, previous to the statute 5 G. 4, c. xviii., was valid under the 18 G. 3, c. 35.

Kelly and Austin in support of the order of sessions. The binding was not valid, because the indenture was not signed, sealed, and delivered by the directors and \*acting guardians. The 18 G. 3, c. 35, empowers them to bind out apprentices in like manner as churchwardens and overseers of the poor are, by law empowered to do. Those officers are empowered to bind out children by the 43 Eliz. c. 2, and 8 & 9 W. 3, c. 30, and they must execute the indenture. It may be said that the indenture is the deed of the corporation. But the act makes all owners of land of the annual value of 30l., the corporation. Here the binding purports to be by the directors and acting guardians. They are a part only of the corporation; they did not act in a corporate capacity. In an Anonymous case, 12 Mod. 423, Lord Holt says, that if a person pretending to be a mayor of a corporation, put the corporation seal to a deed, yet it is not by that the deed of a corporation. So here, the directors and guardians had not power to affix the corporate seal: the consequence, therefore, is the same if they assume to have acted on the part of the corporation. If they acted as individuals there was no delivery of the deed. Where a special power is delegated to a part of a corporation (that not being a corporate act) it must be executed with all the formalities required in other cases. The 5 G. 4, c. xviii., passed long after the indenture in case was executed, does in express terms give to the directors and acting guardians power to bind out apprentices under the seal of the corporation. If they had this power before the enactment was unnecessary.

Palmer contra. The corporation of the guardians of the poor within the \*654] hundred of Stow consists of all \*owners of land of the annual value of 30l. The directors and acting guardians are the governing body. They are to purchase land and make contracts. It is incident to a corporation to have a seal, but it may be affixed by a part of the whole body. They had no power to bind out except as a corporation. The binding, therefore, was a corporate act evidenced by affixing the corporate seal. A binding out by the directors and acting guardians, as private individuals, would be bad. They are required to meet quarterly, for the purpose of binding out poor children, or to do so at

the general meetings. If they might bind out as individuals, they might meet for that purpose at any time. The dictum of Lord Holt does not apply, for he is speaking of the affixing of the corporate seal by a stranger to the corporation: here the directors and guardians were not strangers; they acted as the agents of the corporation, when they executed the indenture.

DENMAN, C. J. The indenture was not executed in the name of the corporation, and is not their deed; and if executed in pursuance of the special power reserved by the 18 G. 3, to the directors and acting guardians, it should have

been signed and sealed by each of them. The binding was invalid.

LITTLEDALE, J. I am of the same opinion. The name of the corporation is the Guardians of the Poor within the hundred of Stow. The binding parties to this indenture are the directors and acting guardians. They are in the nature

of a committee of the corporation appointed for certain purposes.

\*PARKE, J. The argument is, that the directors and acting guardians meant to act as the agents of the corporation. But, assuming that to be so, the corporation should have been the binding parties, and the indenture should have been their deed. That brings it to the question whether it is their deed, which again depends upon this, whether they are described as the binding parties by their true corporate name. Now the doctrine upon that subject, as established in the case of the Mayor and Burgesses of Lynn, 10 Co. 124, and recognized in that of the Croyden Hospital v. Farley, 6 Taunt. 467, is, that in grants or conveyances the name of a corporation must be the same in substance with the true name, but need not be the same in words or syllables. Applying that rule to the present case, it seems to me that "the directors and acting guardians of the poor" is not in substance the same name as "the guardians of the poor" is not in substance the same name as "the guardians of the poor." That being so, the binding, not being by the corporation, is invalid. Order of sessions confirmed.

EMPSON, Gent., one, &c. v. WILLIAM SODEN and GEORGE SODEN.

April 20.

A tenant (not a gardener by trade) cannot remove a border of box planted on the demised premises by himself, unless by special agreement with the landlord.

TROVER for one cart-load of box and one thousand plants of box. Plea, not guilty. At the trial before Denman, C. J., at the last Warwick Assizes, the material facts appeared to be as follows. Mrs. Mackie was tenant to one Morris of a house and garden, which she gave up at Michaelmas, 1830, and was then succeeded \*by the defendant George Soden. Before her tenancy expired, she sold to the plaintiff a quantity of box which she had brought upon the premises, and planted as borders to a walk made by her in the garden. After Michaelmas, the plaintiff came upon the premises to take away the box, and had dug up some of the plants, when the defendants obliged him to design, and to quit the place, leaving behind the plants which he had rooted up. Some evidence was given to shew, that Mrs. Mackie, before giving up possession, had had license from G. Soden, the incoming tenant, to leave the box upon the premises till it could conveniently be removed. The case ultimately turned upon the question, whether growing box were such an article as could be removed by the tenant during the term. On this point, the plaintiff was nonsuited, with leave to enter a verdict for one shilling damages.

Humfrey now moved accordingly. The strictness of the law with respect to things annexed to the freehold has been much relaxed in modern times, and the rule as deduced from the cases in Amos and Ferard on Fixtures, p. 77, is, "that a tenant is entitled to take away certain things which he has at his own expense affixed to the demised premises for the purpose of ornament and furniture. And

the principle on which this rule is founded appears to be, that as annexations of this nature must generally be designed for temporary purposes only, it would greatly incommode tenants in the enjoyment of their estates, if, by every slight attachment to the freehold, the property should immediately be changed, and pass over to the reversioner." Every case of this kind must depend mainly on \*057] its own circumstances. This principle \*was lately acted upon in the Common Pleas, in Grymes v. Boweren, 6 Bingh. 437. [Parke, J. There is no authority for saying that an ordinary tenant may take up growing trees without a special agreement for that purpose.] The question is, whether any damage results to the freehold. Could not a tenant remove flowers which he had planted in the ground? [LITTLEDALE, J. No. DENMAN, C. J. A border of box is a thing intended to be permanent. Parke, J. It might as well be contended that a tenant could take up hedges].

PER CURIAM. There must be no rule. Rule refused.(a)

# STEARN 5. WILLIAM MILLS and ELIZABETH WRIGHT, Executor and Executrix of JAMES WRIGHT. April 22.

The inventory exhibited in the Ecclesiastical Court by an executor, for the purpose of obtaining probate, is not generally prima facie evidence of his having received assets. Semble, (per Parke, J.) that where the inventory only describes effects on a farm with which the executor was acquainted, it may be prima facie evidence; but this is rebutted if it appear that no effects actually came to the executor's hands, though his co-executor has, with his knowledge, intermeddled with the property.

Semble, (per Littledale, and Parke, Js.) that a probate stamp is not prima facie evidence

that the executor has received assets to the amount covered by the stamp.

DEBT on testator's bond for the payment of money. Plea, by Mills, plene administravit; judgment by default against Wright. At the trial before Gurney, B., at the Suffolk Lent assizes, 1832, it appeared that the testator died in 1816, and that the will was proved by both defendants, on which occasion an inventory \*of the effects was exhibited in the Ecclesiastical Court: Mrs. Wright produced it, but Mills was present and acquiesced, though without saying any thing; and neither signed it. The inventory comprised only the stock upon the farm occupied by the testator at the time of his death, amounting in value to 1,105l.; there were other effects, and likewise debts and moneys of the testator, which were not included. The probate stamp was 30l. No other inventory appeared ever to have been exhibited. Mrs. Wright continued in the occupation and management of the farm (according to the desire of the testator) till 1830. Mills knew of her doing so, and was himself occasionally at the farm; but it was not shewn that any of the effects actually came to his hands. Upon this case, the learned Judge, being of opinion that the inventory was in itself proof of assets received, unless that conclusion were rebutted by other evidence, directed a verdict for the plaintiff against Mills, with leave to move to enter a nonsuit as to him, if the Court should consider that the proof of assets, as against him, was not sufficient. A rule nisi having been obtained for this pur-

Biggs, Andrews and Austin now shewed cause. There was evidence to go to the jury against Mills. In 4 Burn's Ecclesiastical Law, tit. Wills, V. 1, it is said, that "at the time of probate or administration granted, it is required that the executor produce an inventory of the goods, chattels, and credits," and take an oath to exhibit such further inventory as shall be lawfully required: it is added that, "if an executor, without making an inventory, shall intermeddle himself with the administration of the goods" (except in particular cases), "he

<sup>(</sup>a) See Penton v. Robart, 2 East, 90, and Wyndham v. Way, 4 Taunt. 316. Vol. XXIV.—19

shall be bound to answer to every one of the creditors his whole debt," \*and also to pay legatees their legacies; "for in this case the law presumeth that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same; whereas otherwise, the executor is presumed not to have any more goods which were the testator's than are described in the inventory, the same being lawfully made." [PARKE, J. The practice of producing an inventory is disused now: the modern authorities on the subject are collected in a note to the new edition of Burn, 8th edit., by Tyrwhitt, p. 293, note 3.] This relaxation is also noticed by Toller, Law of Executors, 6th ed. p. 249; but he adds that a prudent person will make an inventory, and that if a party administer without doing so, the law will suppose him to have assets, unless he repel the presumption; and Burn says, vol. 4, tit. Wills, V. 20, p. 310, 8th edit., that, if an inventory be not made according to the ecclesiastical law and the statute 21 H. 8, c. 5, s. 4, yet, by the practice of the courts, if it be properly made and exhibited in due time on the cath of the executor, it shall receive credit, and the party exhibiting be freed from the burden of proving its truth, that is, that the deceased had no more goods; and the proof of goods having been omitted shall be thrown upon the legatary or other person claiming interest in the goods And it is added, that by the oath here mentioned is to be understood the oath taken at the time of probate granted; unless another inventory on oath be afterwards called for. In Orr t. Kaines, 2 Ves. sen. 193, it is said, that an executor is at liberty to prove that the money for which he has charged himself by inventory, never came to his hands; \*which shews that it would prima facie be binding. In Parsons [\*660 v. Hancock, 1 M. & M. 330, it appears to have been so considered. [PARKE, J. I do not believe that, in that case, the inventory was exhibited at the time of proving the will; and this point was not raised.] In 2 Starkie on Evidence, 322, it is said that "In proof of assets, the plaintiff may give in evidence the inventory of the personal estate of the deceased, delivered by the defendant in the Ecclesiastical Court;" and "evidence of such an inventory is sufficient to throw it on the executor to show how he has disposed of the goods and money specified in the inventory;" and Ayliff v. Ayliff, Bull. N. P. 142, b., and Giles v. Dyson, 1 Stark. Rep. 32, are cited. [PARKE, J. It appears from the nature of the disbursements in the last case, that the inventory could not have been the one exhibited at the time of proving the will.] In the present case, at all events, the inventory was exhibited on proving the will; it was that which the statute binds an executor to put in, and which he derives a benefit from exhibiting. Having done so and proved the will, he was bound to see to the property. Instead of turning it into money, he voluntarily allowed the widow to continue in possession of it, at a risk of any loss that might ensue. He, therefore, is chargeable, though he may not himself have received the profits, Churchill v. Hopson, 1 Salk. 318, Sadler v. Hobbs, 2 Bro. C. C. 114, Crosse v. Smith, 7 East, 246. [PARKE, J. In the last case the money had actually come to the hands of the party whose co-executor misapplied it. Here Mills had ascertained the amount, and knew that Wright was disposing of it. But it is sufficient to say, that the inventory itself was prima \*facie [\*661 proof of assets having come to Mills's hands. There was some evidence; and, at least, it was not rebutted. The amount of the probate stamp has been held sufficient proof of assets, in absence of any answer by the executor, Foster v. Blakelock, 5 B. & C. 328.

Storks, Serjt. and Kelly, contrà. The document referred to, had nothing of the character of an inventory; and as to the other part of the case, there was no proof of Mills having taken part in the management of the farm, or received assets. [Parke, J. The learned Judge seems to have thought that the non-interference with the property was made out, and to have put the case merely on the legal inference from the exhibition of an inventory.] He can only be held liable on the assumption, for which there is no ground, that assets actually

have come into his possession. In Crosse v. Smith, 7 East, 246, the executor had received them. That the amount recoverable against an executor, on plene administravit pleaded, is the amount of assets really in his hands, was held by Lord Mansfield in Harrison v. Beccles, 3 T. R. 688; and the principle, that the actual receipt of assets is the ground of liability, is recognized in Parsons v. Hancock, 1 M. & M. 330. But, in the present case, the learned Judge considered the question of fact on this subject as concluded by the exhibiting of the inventory.

DENMAN, C. J. I am opinion that the inventory delivered by an executor on proving the will is not, in itself, evidence of assets having come to his hands: and \*the fact, in this case, of Mills having occasionally gone to \*662] hands: and the fact, in this case, or trained the farm, is not sufficient to affect him with liability as an executor having had possession of the property. In some of the cases cited, it does not appear that the inventory relied upon was that which is delivered by the executor in the first instance; in one it was clear, from the items of disbursement and other circumstances, that the inventory was one subsequently given in, and relating to assets received. Then, as the finding of the jury in this case was governed by the presumption supposed to arise from the delivery of an inventory, I think the defendant Mills is entitled to have a verdict entered for him.

LITTLEDALE, J. I am of the same opinion; and it is not necessary here to consider whether an inventory, in some cases, may or may not be evidence of assets received: it was not so under the circumstances of this case. It was, indeed, stated here that nothing came to the hands of Mills; but I do not agree in the general proposition, that an executor, who has exhibited an inventory, is bound to shew that he received no assets; because, even if that did not appear, I think an inventory, exhibited as this was, would be no evidence against him. An executor is not obliged, before proving the will, to go into any distant county, where effects of the testator may be, to ascertain their real value; it is sufficient if he receives such information as he is able to obtain, and then exhibits an inventory to shew, as far as possible, the amount of the property to be administered: one object of which is, to ascertain the fees to be taken on the probate, pursuant to the statute 21 H. 8, c. 5. There may be goods in the hands of a factor, who may \*prove insolvent; it cannot be said that an executor, by including them in the inventory, charges himself with them 28 assets. I was not present at the decision of Foster v. Blakelock, 5 B. & C. 328; the point, in that case, regarding the effect of a probate stamp, as prima facie evidence of assets, does not seem to have been much considered; and the stamp, in such a case, is the less conclusive, as the Stamp Act, 55 G. 3, c. 184, 8. 38, requires the whole value of the estate and effects to be sworn to, without deducting any thing on account of debts due from the deceased.

PARKE, J. Assuming that the inventory, here, was exhibited by both defendants, of which I have some doubt, it could be only prima facie evidence. I will not say whether such an inventory as this would not be prima facie evidence, since it related wholly to effects which were upon the farm, and did not include any debts. But if so, the evidence was clearly rebutted, by proof that Mills never did, in fact, take possession. To say generally, that the mere circumstance of having joined in an inventory for the purpose of obtaining probate, renders an executor liable, would be going further than is warranted by any authority. No doubt, it was rightly held, in Crosse v. Smith, 7 East, 246, that an executor, having received assets, cannot discharge himself by paying the money over to his co-executor. Here, however, the presumption of such receipt is not raised; but, on the contrary, rebutted by the evidence. The point referred to as decided in Foster v. Blakelock, 5 B. & C. 328, does not appear to have undergone \*much discussion there; and I cannot concur in that decision. One objection is, that for the purpose of the stamp duty, the

executor must include in the amount sworn to, debts due to the testator, though

not recovered. I am of opinion, that in the present case, Mills was not shewn to be responsible, and that he was entitled to a verdict.

Rule absolute to enter a verdict for Mills.

### ROBERTS v. DAVEY. April 23.

Trespass for breaking and entering the lands of the plaintiff, and sinking pits. Pleathat before the plaintiff had anything in the said lands, one U. was seised in fee of one undivided third part therein, and, by indenture, granted to B. license to dig, mine. &c. throughout his one third part, with liberty to erect engines, &c., for the term of twenty-one years; that before the expiration of the term the grantee died, and his executive became legally entitled to the enjoyment of the license, and because she could not enjoy it so fully as it was lawful for her to do without committing the supposed trespasses, the defendant, as her servant, entered upon the said lands, and upon the plaintiff's possession, and committed the same.

Replication, that the supposed license was granted subject to a condition, "that if the grantee, his executors, &c. should neglect to work the mines for a certain time, or should fail in the performance of all or any of the covenants, then and from theoretorth the indenture and the liberties and licenses thereby granted, should cease, determine, and be utterly void and of no effect." Averment, that the grantee, for a space of time exceeding that specified, neglected to work the premises, contrary to the condi-

tion, and the license thereby became utterly void:

Held, on general demurrer to the replication, that the word void in the proviso meant voidable at the election of the grantor, and, therefore, that it was necessary for the plaintiff to allege that the grantor or some person claiming under him (which it was not shewn that the plaintiff did) had by some act evinced his intention to avoid the license.

TRESPASS for breaking and entering the lands of the plaintiff, called Carvannell, in the parish of Gwennapp, in the county of Cornwall, and sinking shafts, and carrying away ore. Plea, that on the 7th of June 1821, long before the said time, when, &c., and before the plaintiff had any thing in the said lands. one Stephen Ustwicke was seised in fee of one undivided third part in the said lands; and by indenture between him of the one part, and John Bullocke of the other part, he, Ustwicke, \*granted to Bullocke, his executors, administrators, and assigns, full and free liberty, license, and authority to dig, mine, and search for tin, tin ore, and all other ores, metals, and minerals within. throughout, and under all that, his one third part undivided, of and in the said lands, with free liberty, license, power, and authority to erect such engines and buildings, &c. as might be useful and convenient in the use and exercise of such several liberties, licenses, &c.; and also to divert and use waters and watercourses, for the purpose of working such engines, and to make new leats for carrying off water for the like purpose; to have and to hold the liberties licenses, &c. thereby granted to the said J. B. &c. for the term of twenty-one Averment, that before the expiration of the said term, &c., to wit, on and before the times when, &c., J. B. made his will, and appointed one Bets? Lovell Bullocke, his wife, executrix, and died; that she duly took upon herself the execution of the said will, and became and was legally entitled to the use. exercise, and enjoyment of the liberty, license, and authority so granted by the said indenture to Bullocke, his executors, &c. for the residue of the term. The plea then stated, that because, without committing the said trespasses, the said Betsey Lovell Bullocke could not, at the times when, &c. have or enjoy the said liberty, license, and authority so fully and effectually as it was lawful for her to do, the defendant, as her servant and by her command, entered into and upon the lands in which, &c. in and upon the plaintiff's possession thereof, and committed the supposed trespasses.

Replication, that the supposed liberty, license, and authority were granted subject to a condition, that if J. B., his executors, &c. should, at any time or

times, neglect effectually to work the said premises, by the \*said supposed indenture granted, for any time or times exceeding in the whole six calendar months in any one year of the said term, or should not work effectually such mine or mines, and the veins and lodes discovered, or to be discovered, within the said premises, unless hindered by unavoidable accident, or should fail in the performance of all or either of the covenants, &c. in the said supposed indenture contained, then and from thenceforth, that supposed indenture, and the liberties, licenses, powers, and authorities thereby granted, and every of them, should cease, determine, and be utterly void and of no effect to all intents and purposes. The replication then averred, that J. B. in his lifetime, and the executrix afterwards, for a space of time exceeding in the whole six calendar months, &c., neglected effectually to work the said premises by the said supposed indenture granted, he the said J. B. not having been during the said time hindered by unavoidable accident, contrary to the condition of the said indenture, and true intent and meaning thereof, whereby the said supposed indenture, and the said supposed liberty, license, and authority, long before the committing of the trespasses mentioned in the plea, to wit, on the 8th December 1822, ceased, determined, and became and were utterly void and of no effect.

General demurrer and joinder. Follett in support of demurrer. The instrument set out on the record is a license granted by Ustwicke before the plaintiff had any interest in the land in question; and the latter, in his replication, without connecting himself with \*667] Ustwicke, or shewing any authority from \*him, or any person claiming under him, states merely that Bullocke had not performed certain covenants in the lease, and that the lease thereby became void. It follows, therefore, that if the license be not absolutely void, but voidable only at the option of the grantor, the replication is bad. Now Doe dem. Bryan v. Banks, 4 B. & A. 401, shews that a lease with a proviso similar to that in this license is voidable only at the option of the lessor. There the lease was of coal mines for ninety-nine years, reserving a royalty rent for every ton of coals raised, and a proviso that the lease should be void to all intents and purposes if the tenant should cease working at any time for two years; and it was held that the true construction of the proviso was, that the lease was only voidable at the option In Arnsby v. Woodward, 6 B. & C. 519, the proviso was, "that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, the term thereby granted, or so much thereof, as should be unexpired, should cease, determine, and be wholly void; and it should be lawful for the landlord to enter and the same to hold to his own use, and expel the lessee." It was held that this, in the event of a breach of covenant, made the lease voidable and not void; and that the landlord was bound to enter in order to take advantage of the forfeiture, and that, not having done so, he waived the forfeiture by a subsequent receipt of rent. In Rede v. Farr, 6 M. & S. 121, there cited, it was held that such a proviso did not make the lease voidable by the lessee, on the principle that a party shall never take advantage of his own \*wrong. If it might be determined at the option of the person in possession, the landlord might thus be deprived of the benefit of all the covenants: and if a stranger, like the plaintiff, could treat it as void, the hadlord might be deprived of a beneficial rent when he and the tenant were agreed that the lease should continue. The result of the authorities is, that the difference supposed formerly to exist between leases for lives and for years, as to the necessity of an entry to avoid the lease, no longer exists. That being so, it follows that in order to avoid this license the grantor or some one in privity with him should either have entered, or done some act shewing his intention to determine the license.

Jeremy, contrà. The instrument set out upon the record, passed to the grantee no interest in the soil, but a mere easement in it. It is not a lease; but contains a mere license to dig and search for minerals, subject to a condition; Doe

dem. Hanley v. Wood, 2 B. & A. 724. The consideration of the grant was the render of the ores. The performance of that condition goes to the whole consideration of the grant, and, as in any case of mutual and dependent covenants, must have been averred in pleading by the grantee, for the purpose of enforcing such grant: 1 Wms. Saunders, 320, d. a. 4. Here, if there be no performance, the whole profit of the subject-matter of the grant will be lost to the lord for the whole term. Then, this being a license for a term of years, to dig for minerals, subject to a condition that it should be void on the grantee's neglecting to work the mines for the time therein mentioned, \*it became, on such neglect, absolutely void; and not merely voidable at the option of the grantor. Even as to leases, there is a distinction in this respect between leases for lives and for years. In the former, if the tenant be guilty of any breach of the condition of re-entry, the lease is only voidable, and not determined until the lessor re-enters, or brings an ejectment for the forfeiture; but, in a case of a lease for years, it is absolutely determined by the breach. 1 Wms. Saund. 287, c., note 16. In the cases cited on the other side, the leases were undoubtedly for years; but they passed an interest in the land, and not as this grant does, a mere easement in it. In Arnsby v. Woodward, 6 B. & C. 519, there was a clause of re-entry superadded to the provision for avoidance, and the Court held that both were to be construed together, as amounting only to a power of determining the lease by re-entry, and that a subsequent acceptance of the rent was a recognition of a lease still subsisting. In Doe dem. Bryan v. Bancks, 4 B. & A. 401, a tenant attempted to insist on a forfeiture created by his own act, and thereby to convert the term into a yearly tenancy; but the Court held, that the lease did not become void, unless the landlord thought fit to make it so; and there was a subsequent receipt of rent. In Rede v. Farr, 6 M. & S. 121, a proviso for avoidance on nonpayment of rent was held not to enable the lessee to vacate the lease; and that upon the principle that a party cannot take advantage of his own default. Here the plaintiff, who, in the pleadings, is admitted to be in lawful possession, stands in the situation of the original grantor. [DENMAN, C. J. That does \*not appear. It is consistent with the facts stated in the pleadings, that the plaintiff may be the owner PARKE, J. Possession is not sufficient, provided it be of the other two-thirds. necessary that some one in privity with the grantor should have done an act to determine the license.] No entry or claim by the grantor, or any person claiming under him, was necessary to determine this license. A license lies only in grant, and not in livery; and, therefore, re-entry is not necessary to determine There is a distinction between a condition annexed to a freehold lease and one annexed to a lease for years. A lease for life cannot commence by words without other circumstances, viz. livery and seisin, and therefore shall not be determined without entry; but a lease for years may begin by words without entry, and may be determined by words without entry, Browning r. Beston, Plowden, 135, 136; 1 Wms. Saund. 287, c. note 16; and Co. Litt. 214, b. is to the same effect. And when the land itself remains in the possession of the grantor, no entry or claim by him is necessary to determine the grant. In Co. Litt. 218, a, it is said, "if I grant a rent-charge in fee out of my land upon condition, there, if the condition be broken, the rent is extinct in my land, because I (that am in the possession of the land) need make no claim upon the land, and, therefore, the law shall adjudge the rent void without any claim." In Digges's case, 1 Rep. 174, 5th edit., it is said to have been agreed in 20 E. 4, 18 and 19 a, that "if a feoffment be made upon collateral condition, and before the condition performed the feoffee leases it to the feoffer, if afterwards the feoffee doth not perform the condition, the land shall be in the feoffer immediately \*without entry or claim, because he himself is in possession of the land. So if a villein purchases rent which is issuing out of the lord's land, it shall be in the lord without entry or claim of the lord; for if he should make an entry or claim, it ought to be upon the land, and that it is not necessary when he himself is seised thereof." The necessity of an entry depends on

the wording of the condition. "If the words be, that upon the doing of an act the reversioner may enter, there must be an entry to avoid the estate; but if the estate be granted upon condition that if the grantee do such an act the estate shall thereupon immediately cease and determine, then no entry is necessary;"

per Bayley, J. in Fenn dem. Matthews v. Smart, 12 East, 448.

DENMAN, C. J. There is nothing to connect the plaintiff with Ustwicke, and it is possible he may have come in by title inconsistent with that of Ustwicke, who had only a third part in the lands. Assuming, however, that it had appeared that he represented the grantor of the license, I think it quite clear, according to Doe v. Bancks, 4 B. & A. 401, and on the wording of this grant, that it was necessary for him to have done some act shewing his intention to determine the license; until such act were shewn, it continued in force.

LITTLEDALE, J. The replication cannot be supported; it seems to me that, according to Doe v. Bancks, 4 B. & A. 401, this instrument was liable to be rendered void only at the election of the grantor. If it had been a freehold lease of land subject to a condition \*that it should be void on non-performance of covenants, it would have been necessary for the lessor to avoid it by entry; or, if that were impossible, by claim. This instrument is a mere license to dig, and did not pass the land. An actual entry, therefore, was unnecessary to avoid it; but by analogy to what is required to be done in order to determine a freehold lease, which, by the terms of it, is to be void on the nonperformance of covenants, it seems to follow that, to put an end to this license, the grantor should have given notice of his intention so to do. The giving of such notice in the case of an instrument like this is equivalent to an entry or claim by the grantor of a freehold estate to which a condition is annexed. Till such notice were given, the right of possession in those claiming under the license was so far continued that the plaintiff, who, for any thing that appears, was a stranger to Ustwicke, could not take advantage of the breach of condition. If the plaintiff had set out his title, and shewn that he claimed under Ustwicke, the case might then be different.

PARKE, J. The question is, upon the construction of this instrument, whether the grant is void, or voidable only on the default in question. If it be void, the plaintiff is entitled to judgment; if it be voidable only, then, as it does not appear that the grantor did any act amounting to an exercise of his option, the defendant is entitled. It is not necessary to decide whether the word void means voidable by entry, or voidable by any other act, shewing the election of the grantor, because in either case, Doe v. Bancks, 4 B. & A. 401, shews that a \*lease containing such a proviso is not void at all events, and that a breach

of it cannot be taken advantage of by a stranger, which the plaintiff here must be taken to be, for we cannot infer any privity between him and Ustwicke. He must be taken on these pleadings to be in lawful possession, but he may have been so as the owner of the other two third parts; in order to avoid the license, it ought to have been shewn that Ustwicke, or somebody claiming under him, had done some act to determine it. That not being, shewn the replication

is bad, and there must be judgment for the defendant.

Judgment for the defendant.

## MEAGER v. SMITH. April 24.

Defendant paid money into Court in an action for work and labour generally, where full particulars were annexed to the record. The plaintiff proved the work mentioned in the particulars to have been performed on the property of G., by the order of M., and gave evidence to shew that M. was authorized by the defendant, and also proved acts done by the latter, which it was contended were a recognition of his own liability for the work. The Linder left to the jump whether a reflicient money had been residue. the work. The Judge left to the jury, whether sufficient money had been paid; whether the defendant had ratified M.'s order, and to what extent? The jury having found for the defendant, declared, in answer to a question from the Judge, that M. had no authority to bind the defendant. The Court, Parke, J. dubitante, refused to disturb the verdict, it not distinctly appearing that the opinion last expressed by the jury was

the ground of their verdict.

Held, per Littledale and Parke, Js., that payment into Court shews only a liability for some work and labour, and is merely evidence which may be coupled with other facts, so as to shew a partial or total liability on the particular claim; and that the effect of such payment is not altered in this respect by the rule of Trin. 1 W. 4, which requires a particular of demand to be annexed to the declaration.

Assumpsit for work and labour; money counts, and account stated. Plea, At the trial, before Bolland, B., at the Glamorganshire spring assizes, 1832, it appeared that the defendant resided near Swansea, and was the correspondent of Messrs. Gautier and Dubois, who were merchants residing at Brest. In the year 1831, a vessel belonging to Messrs. Gautier and Dubois arrived at Swansea, to be laden by the defendant. She was laden accordingly, but in quitting the \*port, she took the ground and sustained considerable damage. The vessel was repaired by the plaintiff, who now sued the defendant for such repairs. The plaintiff, in the bill of particulars annexed to the record, enumerated specifically the repairs done to the vessel, and charged the defendant with 165l., and credited him with a payment of 70l., the balance being 951. The defendant paid 101. into Court generally. In order to fix the liability upon the defendant, it was proved that a person named Mills had directed the repairs to be done; and evidence was given of the general connection of Mills with the defendant, and of acts on the part of the defendant, which were insisted upon as shewing a recognition of his own liability in respect of the The learned Judge left two questions to the jury: first, whether sufficient money had been paid into Court to satisfy the balance remaining due for reasonable repairs; and, if not, secondly, whether the defendant had by his own acts ratified the order given by Mills, and, supposing him to have done so at all, whether the ratification extended to repairs sufficient to carry the balance beyond the amount paid into Court. The jury found a verdict for the defendant. Upon this, at the suggestion of the plaintiff's counsel, the defendant's counsel objecting, the learned Judge asked the jury, whether they considered that Mills had no authority to bind the defendant, or that the money paid into Court was sufficient to cover the balance due? The jury answered, that they were of opinion that Mills had no authority to bind the defendant. In Easter term 1832, John Evans obtained a rule to shew cause why there should not be a new trial, on the ground that the payments made were admissions of Mills's authority to bind the \*defendant; and that, therefore, the jury had found a verdict [\*675] on false grounds.

Maule and E. V. Williams now shewed cause. The question was properly left to the jury. It is, however, true that if the jury had expressly found a fact inconsistent with their general verdict, the verdict could not have been supported. But it is not so if, as here, they merely find a fact which is of itself sufficient to support the verdict. Besides, the payment into court is not conclusive evidence of the liability or authority. In cases where the declaration sets out a special contract, the defendant has express warning as to the nature of the claim, before he pays the money into court. But it could not be maintained that, if the declaration contained only a common count for goods sold and delivered, and money were paid into court, the plaintiff might establish a case by simply shewing that some goods were delivered to a third party. It will be said that, in the present case, only one claim has been shewn to exist, and that the payment must be applied to this one. But suppose work and labour had been performed for the defendant four or five years ago, to the amount of 101. the payment might have been made with respect to that work. The plaintiff cannot use the payment as conclusive proof of the defendant's liability for any work which the plaintiff may have performed at any time or place. It might as well be treated as proof of the execution of any written special agreement

which the plaintiff might allege to have been made. Besides, there are two questions here; first, whether the defendant be liable at all, and, if he be, then, \*676] \*secondly, to what extent he is liable. At most, the payment of 10?. admits the liability to that extent only. In Seaton v. Benedict, 5 Bing. 32, Gaselee, J. says, "Payment into court generally, in assumpsit, admits nothing beyond the amount of the sum paid in. Where, indeed, there is a special contract, the payment into court admits that contract; but where, as in the common indebitatus assumpsit, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due." The plaintiff might have authorized repairs to the extent covered by the 10?, or he might mean, although not actually liable, to assent to the liability to that extent; but, beyond that, to recur to his legal rights. And the jury may have answered the question in either sense. As to the payment for which the plaintiff gives credit in his particulars, the 70? is not shewn to have been paid by or on behalf of the defendant; and, even if that were shewn, he might have paid it as agent of Gautier and Dubois. But in fact the giving of the credit amounts only to an admission on the part of the plaintiff.

John Evans and Whitcombe contrà. The defendant, by his payment into Court admits that there was something due upon the repairs; and all that the jury ought to have considered was the amount due. Such a case as this must, since the late rule of Court, (Trin. 1 W. 4, 2 B. & Ad. 788,) be treated exactly as if the declaration set forth the items contained in the bill of particulars, the latter being now a part of the record. The language used by Tindal, C. J. in \*677] Macarthy v. Smith, 8 Bing. 146, shews that the parties go to \*trial upon the understanding that the complaint on the record amounts to neither more nor less than the claim made in the bill of particulars. The direction of the learned judge is also wrong. He left it to the jury to say whether there was a liability beyond the sum paid. But there could not be a shifting liability; the defendant must have been liable to the whole demand or to no part of it. Again, the direction to the jury was such as to induce them to suppose that the defendant's liability rested simply on Mills's right to bind him; whereas there were independent acts shown to have been done by the defendant which of them-

selves amounted to a recognition of liability.

DENMAN, C. J. This rule must be discharged. I think, substantially, all the material points were submitted to the jury. I had rather, indeed, that it had not been left as a question whether Mills had any authority at all to bind the defendant, because there were acts of recognition independent of any thing done by Mills, which tended to show the defendant's liability. But it was very proper that the jury should be desired to consider whether that authority extended beyond the sums paid. And, if it did not go beyond that, then it became a proper question whether, and how far, the defendant by his own acts had made himself liable to the demand. These questions were all, in substance, left to the jury, and they found a verdict for the defendant. After the verdict, the jury, in answer to the question put, negatived the authority of Mills altogether. But it does not follow, that the jury founded their verdict upon this belief; it may may have rested upon one of the other grounds. Where a verdict is returned upon a proper summing up, \*and an endeavour is made afterwards to disturb that verdict by reference to something which has operated on the minds of the jury, it must be shewn distinctly that they went upon that in giving their verdict. Here that is not the case.

LITTLEDALE, J. I am of the same opinion. The payment of money into Court may under some circumstances, amount to an admission of liability. It cannot be construed only as a purchase of peace, unless there be a stipulation of that sort at the time of the payment; which does not take place when money is merely paid into court. In that case it amounts only to a formal admission of the defendant by his attorney, that so much is due on a claim of the nature expressed in the declaration; that is, in the present case, for work and labour.

It is no more an admission of liability than if a payment had been made on a similar account before action brought. In the present case, it did not necessarily follow from the payment that this work and labour should have been performed upon the vessel. Nor did it shew a liability of any sort upon the sum paid in. Now the liability, according to the case on behalf of the plaintiff, rests not in any interest of the defendant in the vessel repaired, but in directions given by him. So that it becomes material to ascertain, whether the admission of liability extends to the whole, or to how much of the claim. It may appear, either that there was an authority to the extent only of the money paid, or that there was an authority to the whole extent of the work performed. the defendant might be willing to undertake a liability for a partial repair, though not for a general one. That is a question for the jury. It is, however, \*urged on the part of the plaintiff that, since the new rule, the case must be treated as if the particulars of demand were a part of the declaration; for instance, if the declaration had alleged certain work performed on the bowsprit, and so on. I cannot agree to this, so far as regards the effect of payment of money into Court. It might be that the full particulars were not originally annexed to the record, and in that case, there being only a claim for work and labour in the first instance, the defendant might choose to admit that he owed 101. for some work and labour, and pay that sum into Court, and afterwards might demand full particulars, which, when delivered, might contain what he considered new causes of action. For this reason, I think it safer to adhere to the rule, that the payment of money into Court does not bind the defendant to admit the particulars of the demand and that the particulars are not necessarily connected with the payment. I am of opinion, therefore, that the question was properly left to the jury. The liability would be established by Mills having authority, or, in default of that, by the defendant ratifying the engagement; and, if the liability existed, the question would be, how far it extended. PARKE, J. I am not satisfied that the jury have found their verdict on the right ground; and, if the matter depended upon me, I should send the case to a second trial. The jury, in answer to the question put to them after the verdict, negatived Mills's authority, and from the mode in which the question was put, and their answer to it, I should infer that they founded their verdict altogether upon Mills's want of authority; whereas it is clear, that he might have had none, and yet the \*defendant have been liable to their demand. Under these circumstances, I should have wished the case to have gone to a second trial, that the jury might have decided upon both questions; first, whether Mills had authority to bind the defendant; and secondly, in default of that authority, whether the defendant had rendered himself liable, by his own acts, to a greater amount than the money paid into Court. With regard to the effect of payment of money into Court, there is no doubt, but that if such a payment is made on a count alleging a special contract, it operates as an admission of that contract: if on a general indebitatus count for work and labour, or the like, on which the plaintiff might recover for one or more distinct contracts, it operates as an admission of a liability to that amount, on some one or more of such contracts: its effect, in both cases, is the same as if a payment had been made by the defendant to the plaintiff of the like sum before action brought. But in that case, supposing it had clearly appeared in evidence, that there was in reality one entire indivisible contract in question between the parties, to which the payment must necessarily be referred, such payment would have operated as an admission of that contract, leaving it open to the defendant to make out his defence as to the unsatisfied part of it: and, in like manner, the pay-

ment into Court on a general indebitatus count for several things, may, I conceive, in some cases, coupled with the evidence, have the effect of an admission of a particular contract. I do not mean to say, that the payment would have had that effect in the present case: but as the only transaction in question between the parties was, the demand for the repairs of the ship on one particular

\*681] occasion, the payment of money into Court would certainly have \*had the effect of an admission of liability to a part of that demand: the defendant being at liberty to contend that he had not made himself liable beyond that amount. I cannot help thinking, that the jury have proceeded on a wrong ground; and that they have not taken into consideration at all the acts of the defendant as tending to establish his liability, but that they have inquired only whether Mills was the agent of the defendant; and assumed that, unless he were, the defendant would not be liable. On that account a new trial would have been more satisfactory to my mind.

Rule discharged.

#### EVERETT v. YOUELLS. April 24.

The delivery of food to a juryman, after the jury were shut up to consider of their verdict, is no ground for setting the verdict aside, if it do not appear that such refreshment was supplied by a party to the cause, or that it was delivered to a juryman, whose holding out decided the event.

Affidavits of jurymen are admissible as to matters which pass openly in Court, but where

there is a Judge's report on the same points, that is conclusive.

This was an action of assumpsit, on a warranty of sheep, tried before Vaughan, B., and a special jury, at the Norfolk spring assizes, 1832. The verdict was for the defendant. Storks Serjt., in Easter term, 1832, (April 19th), moved for a rule to shew cause why there should not be a new trial(a); first, on the ground that the verdict was against evidence; and secondly, on affidavits. By the first of these, it appeared that the trial began in the afternoon of Friday, the 23d of March, and occupied the rest of that and all the following day; that on Saturday evening, at eight o'clock, the jury retired from the box to consider their verdict, \*and, not agreeing, were shut up till the following morning; and that about three hours after they were shut up, a servant of J. A., Esq., the foreman, conveyed a sandwich to him by stratagem. second affidavit (by the plaintiff's attorney), stated the deponent's information and belief, that about ten o'clock on the Snnday morning, the jury had an interview with the Judge, who then observed to them on the subject of their verdict, "that concession ought to be made by the minority to the majority; shortly after which, they agreed to find for the defendant; and the deponent said he was informed and believed, that in consequence of the Judge's explanation, and of exhaustion for want of victuals, three jurymen whom he named, (not including J. A.) were induced, though against their inclination, to yield up their own opinion and agree with the rest of the jury to find for the defendant. Serj. also proposed to put in affidavits of two of the jurymen to a similar effect with the last. [Lord TENTERDEN, C. J. I doubt whether these are admissible.] They do not come within the decided cases, where jurymen have offered to allege their own misconduct; and a ground is laid for receiving them, if the Court be of opinion that the verdict was against evidence.

Lord TENTERDEN, C. J. The delivery of food to the foreman might be ground for imposing a fine, but it is not a reason for setting aside the verdict. It does not appear that the food was supplied by a party to the cause, nor on which side the juryman who received it, was at the time; that one juryman only held out; or that the delivery of refreshment to the one who held out \*683] turned the event of the trial. Unless the \*affidavits would shew that this refreshment had the effect of carrying the verdict, they would not

support the rule.(b)

LITTLEDALE, J., concurred.

 <sup>(</sup>a) Before Lord Tenterden C. J., Littledale, Parke, and Patteson, Js.
 (b) See Co. Litt. 2276. Dunc. Trials per Pais, 8th edit. 248, 252.

PARKE, J. The officer who attended the jury may be punishable for neglect; but it would be a fearful thing if verdicts could be set aside on such grounds as this.

PATTESON, J., concurred.

The rule, therefore, as to this point, was refused; but a rule nisi was granted on two of the grounds stated; one of them being the alleged misdirection of the learned Judge, which was said to have influenced a part of the jury:—Lord Tenterden at the same time observing that the statements on this point might, perhaps, go the length of shewing that the verdict was not that of the whole jury; but that this would be a very dangerous ground to act upon in setting aside a verdict.

The report of the learned Judge was now read; by which it appeared that the expressions he had used were different from those ascribed to him. Kelly and

Austin, in opposition to the rule, were stopped by the Court.

F. Pollock, and Storks, Serjt., contra, adverted to the affidavits of the two jurymen; contending (which was denied on the other side) that the Court, on the former occasion, had permitted them to be filed. [PARKE, J. We cannot hear these affidavits.] A juryman is competent \*to state on affidavit what passes publicly in presence of the Court.

PER CURIAM.(a) We cannot receive statements from the jury to shew on what grounds they acted. Affidavits of jurymen may be admissible, to shew what questions they put to the judge (though that would come better from any other source) or they may be used to supply the defect of notes by counsel: but

when we have the Judge's own statement, that is a better authority.

The Court, therefore, being of opinion that on the report there appeared no misdirection, nor any ground for saying that this was not the verdict of the whole jury; and that on the other point there was no reason for disturbing the verdict, the rule was

\*The KING v. The Justices of the West Riding of YORKSHIRE. [\*685

#### (In the Matter of Bower.)

In a notice of appeal against an order for stopping up a footway (under 55 G. 3, c. 68, s. 3,) it sufficiently appears that the appellant is a party aggrieved, if it be stated that he and his tenants, occupiers of a farm and lands near the said way, and who have heretofore used, and have a right to use it, and also other persons and the public, will be put to great inconvenience.

The statute requires "ten days' notice" of an appeal to the sessions against such order. By a rule of the West Riding sessions, in cases of appeal "not otherwise directed by law," ten days' notice is to be given, exclusive of the day of notice and first day of the sessions: Held, that the statute meant ten days' notice, one inclusive and the other exclusive; that the sessions rule did not apply to this case, or if it were intended to do

so, this Court would use its discretionary power of controlling the practice.

The appellant gave notices of appeal against three orders, all of the same date; he attended the clerk of the peace to enter them, and the entry was in the following form:

"A. appellant against an order of B. and C. Esquires, dated, &c., for stopping up footways in," &c. He paid the fee as upon one appeal. At the sessions, the appellant's counsel being called upon by the other side to elect which appeal he would proceed with, proved his notices upon one, which was dismissed on a supposed defect of notice, and the order confirmed, as were the two others, nothing being said of the appeals against these, to which the same objections would have applied. On motion for a mandamus to enter continuances and hear the appeals, it appearing that the preliminary objection taken was unfounded, and that the appellant had in reality intended to enter his appeal against all the orders, this Court made the rule absolute as to all three.

A RULE nisi had been obtained for a mandamus to the justices of the West Riding to enter continuances upon, and hear, the appeal of Joshua Bower against certain orders of two justices for diverting certain public footways in the township of Middleton, in the parish of Rothwell, in the said West Riding. The orders were three in number, all dated the 28th of May, 1832; and Bower, on the 25th of June, 1832, gave notices of appeal against each of the orders, and, among other objections, the following was stated in every notice. cause, if the said order should stand, and the said road be stopped up, the appellant and his tenants, occupiers of a certain farm, lands, &c., near adjoining the said road, and who have heretofore used, and have a right to use, the same, and also other persons, and the public, would be put to great inconvenience." The notices did not otherwise state that the appellant was aggrieved by the orders. \*The next quarter sessions for the West Riding were held on the 5th of July; on which day the appellant's attorney entered an appeal with the deputy clerk of the peace, in the following form-"Joshua Bower, appellant against an order of J. A. and J. I. Esqrs., for stopping up footways in the township of Middleton, dated 28th May, 1832." And he paid the fee which is usual for entering one appeal, the deputy clerk of the peace not being apprised at the time that more than one order was in question.(a) The three orders being, on the same day, returned to the sessions, the respondents' counsel called on the counsel for the appellants to elect which case he would enter upon; and he proceeded to prove his notices of appeal against the order which stood second. An objection was taken, but over-ruled, that the notice did not state the appellant to be a party aggrieved. It was then objected that there had not been ten days' notice of appeal according to the rules of practice of these sessions; one of which is as follows:--"Appeals. In all cases of appeals not otherwise directed by law, ten days' notice in writing shall be given by the party appealing, his, her, or their attorney or solicitor, exclusive of the day of service and the first day of the sessions or the adjournment to which the appeal is intended to be made." The Court held this objection valid, and dismissed the appeal and confirmed the order. They also confirmed the other two orders, no appeal against them being entered upon, nor any evidence offered of service of notice as to them.

\*Blackburne and Dundas now shewed cause. This is a notice given under the statute 55 G. 3, c. 68, s. 3, which enacts that in case of a footway being stopped up by order of justices, it shall be lawful for "any person injured or aggrieved by any such order or proceeding," to appeal to the justices at the quarter sessions next after the expiration of four weeks from the first publication of notice of such order, "upon giving ten days' notice in writing of such appeal to the surveyor of the highways," &c.; and the said court of quarter sessions is hereby authorized and empowered to hear and finally determine such appeal. First, the fact of the appellant being a party aggrieved, is not shewn with the certainty which appears to be requisite on a comparison of the cases, Rex v. The Justices of Essex, 5 B. & C. 431, Rex v. The Justices of the West Riding, 7 B. & C. 678, Rex v. The Inhabitants of Blackawton, 10 B. & C. 792. Secondly, there was not ten days' notice according to the construction which the sessions have determined should be put upon those words in the statute. the expressions there used it was left open to them to decide whether the ten days should be exclusive or inclusive, and then, to prevent disputes, have established a rule, which ought to have been observed. Thirdly, one appeal only was entered or proceeded upon; on two others the orders were confirmed, and as to those at least there is no ground for the application.

Follett contra. It is clearly shewn by the notice, that though not stated in terms, that the appellant is aggricved; on this point, therefore, the language of

<sup>(</sup>a) The attorney for the appellant swore that he served the notices of appeal, and "as such attorney did duly enter the said appeal at the clerk of the peace's office."

the Court in Rex v. The Justices of the West Riding, 7 B. & C. 678, \*and Rex v. Blackawton, 10 B. & C. 792, is expressly in his favour. [DENMAN, C. J. We do not think anything of that objection.] As to the second point, even the rule of the sessions only requires ten days' notice, exclusive of the day of service and first day of the sessions, in those cases where it is not otherwise directed by law. Here the statute requires ten days' notice; the proper construction of which, according to the general rules of law, is, that one day shall be reckoned exclusively and one inclusively. That mode of construction is adopted in the new rules of Court, Hil. 2 W. 4, 3 B. & Ad. 393, and was recognised in Pellew v. The Hundred of Wonford, 9 B. & C. 134, as applicable where the computation is made from an act done by the party against whom the time runs. That is so here. If the sessions intended, by their rule of practice, to require ten days' notice exclusively, where a statute only prescribes "ten days' notice," the question then will be, whether the justices ought to have acted upon such a rule, and if not, this Court will exercise its discretionary power of controlling their practice, as in Rex v. The Justices of Wilts, 10 East, 404, and Rex v. The Justices of Lancashire, 7 B. & C. 691. As to the third objection, it is not denied that there were notices of appeal against three orders: the appellant was called upon in Court to elect on which appeal he would proceed; and when one had been dismissed in the manner stated, it became useless to proceed with the others.

Denman, C. J. I am of opinion that this rule must be made absolute. As to the last objection, the omission \*to proceed on the appeal to the first and third orders is explained by the decision of the Justices on the second: and it appears sufficiently on the affidavits that the attorney meant to tender his appeals to be entered against the three orders. With respect to the second point, the rule of practice at the sessions is inapplicable here; for it applies only to "cases of appeals not otherwise directed by law." Here it is directed by the statute that there shall be ten days' notice of appeal to the sessions, and that, according to the practice of the superior courts in other cases where such notice is required, must be taken to mean that one day shall be reckoned inclusively and one exclusively. It was not competent to the sessions to impose such a rule as is here contended for; if they meant it to be applicable to this statute, they have misconstrued the clause in question; but it seems to me that they have merely left the act as they found it. On the first point their

decision was right.

LITTLEDALE, J. The words "ten days' notice" in 55 G. 3, c. 68, s. 3, must be construed as such words are in other cases, and are not affected by the rule of the sessions. It does in this case sufficiently appear by the words of the notice that the appellant is a party aggrieved; the allegation of inconvenience

to the public in general, is an addition which make no difference.

Parke, J. If the time of notice was already fixed by law, the rule of sessions does not interfere with it; and if the rule were intended to have that effect, this Court might exercise a control over it. The act \*says there shall to the sessions, and the Court cannot cannot adopt a better rule for construing the words than that which has been already adopted in similar cases. If the legislature had intended a different practice to be followed in this instance, they would probably have said "ten clear days." With respect to the appeals against the several orders, it seems that the intention of the appellant was to enter his appeals against all the orders. If that was not done, there is nothing to shew that it was his fault. On the first point, I think the decision of the justices was right.

# Ex parte BATTINE, LL.D. April 25.

A pension during his Majesty's pleasure, granted by order in council on petition, for past services as advocate of the admiralty, and charged on the navy estimates, may be ap-

propriated, under the insolvent act 7 G. 4, c. 57, s. 29, with the consent of the lords of the admiralty, for payment of creditors.

Quære, Whether this Court could have granted a prohibition to the insolvent debtors' court against proceeding upon an order for such appropriation, if it had not been warranted by the statute?

A RULE had been obtained, calling upon the Commissioners of the Insolvent Debtors' Court to shew cause why a prohibition should not issue to the said court against proceeding on an order made by them on the 17th of November. 1831, for the assignment of part of a certain pension of 2001. per annum granted to William Battine, LL.D, by the Prince Regent in council on the 8th of May, 1812, and held by the said William Battine during His Majesty's pleasure; and from making any order, or taking any proceedings for assigning any part of such The material facts stated on affidavit for and against the rule were as pension. follows :-

\*In March, 1812, the Prince Regent, by order in council, referred to a \*691] committee of the privy council a report from the Lords Commissioners of the Admiralty upon a certain memorial of the above mentioned Dr. Battine, late His Majesty's advocate general in his office of Admiralty. The memorial stated, that Dr. Battine had been superseded in his office, and prayed some provision on retirement in remuneration of his past services during twenty years. The Lords of the Admiralty had in their report submitted, for reasons assigned by them, whether it would be proper to grant any pension, but recommended that such pension, if granted, should not exceed 2001. per annum. Upon this report the committee of privy council, on the 8th of May, 1812, represented to the Prince Regent in council that it might be advisable to grant Dr. Battine, in the name and on the behalf of His Majesty, a pension of 2007. per annum to commence from the day he ceased to hold his office, and to be charged on the ordinary estimates of the navy; and on the same 8th of May the Prince Regent, by and with the advice of the privy council, approved of the proposal made by the committee, and ordered that the said pension should be granted, to commence and to be charged as recommended by the committee; and the Lords of the Admiralty were, by that order, required to give the necessary directions.

On the 17th of November, 1831, Dr. Battine was discharged from custody under the Insolvent Debtors' act, 7 G. 4, c. 57, and executed the usual warrant of attorney. Before his discharge it was determined by the Court that the annual sum of 1801., part of the said pension, should be paid to the assignees of the \*insolvent's estate, to be applied in discharge of the debts till that Court should further order; and they communicated to the Lords of the Admiralty their intention to make an order to that effect, if, upon receipt of their communication, the said Lords should consent thereto in writing, according to the statute. The Lords of the Admiralty consented. A similar communication was made to the commissioners of the navy, and assented to

by them.

In answer to an inquiry made by the clerk of the Insolvent Debtor's Court (with reference to the present proceeding) Mr. Barrow, the Secretary to the Admiralty, stated the nature of Dr. Battine's pension as follows:—

"Dr. Battine's pension of 2001. per annum, enjoyed under this department, is a naval pension for civil services, namely, as advocate of the admiralty. is charged, like all other civil naval pensions, on the ordinary estimate of the may, is paid by the treasurer of the navy by warrant from this deportment, and differs in no respect from any other naval pension for civil services, except in its amount being larger than is authorized by the act 50 G. 3, c. 117; which required that it should be sanctioned by His Majesty's order in council."

Dr. Battine denied that the pension was one which the Insolvent Debtors' Court could legally appropriate in the manner directed by 7 G. 4, c. 57, s.

29.(a)

<sup>(</sup>a) 7 G. 4, c. 57, s. 29 "Provided always, and be it further enacted, that nothing in

The Solicitor-General and F. Pollock, now shewed cause. Even assuming \*that the Insolvent Court has acted erroneously, this Court ought [\*693 not to interfere in the manner proposed. The Court below may be in error, and their proceeding void; but that is not of itself ground for a prohibition. [PARKE, J. Not if they had authority to decide the point as to the pension being assignable. But if they had not, this Court may control them.] The same reasoning would have been applicable in Ex parte Cowan, 3 B. & A. 123, where, however, the Court did not decide that a prohibition lay to the Lord Chancellor sitting in bankruptcy. If the present case is not within the proviso made by sect. 29, of the act, the pension is wholly subject to the authority of the Court below; and there is no other exception \*in the act to limit it. [Parke, J. That is so, if the clause operates merely as an exception to [\*694] a general power which the Commissioners possess under the act; but, if the act gives them only a special authority over pensions, while it confers a general power over other kinds of property, may we not be entitled to restrain them if they exceed the limited authority?] It is for them to determine whether the particular instance falls within their jurisdiction; and if they are wrong, it is not a ground of prohibition, as if they had taken cognizance of a subject-matter altogether out of their province. The eleventh section of the act gives a general power over the insolvent's estate; the twenty-ninth restrains that power; but it is for the Commissioners to interpret the restricting clause. Unless they are to do so, how are they to make the orders which that section requires? and it cannot be said that as often as they make an order not warranted by the act. the jurisdiction is exceeded. This order has been made, subject to the assent of the admiralty, as directed by sect. 29. If the section did not apply, the pension was disposable for the benefit of the creditors without such assent Besides, the proceeding was taken by the Court with the consent of the party himself, for his own benefit as well as for the promotion of justice; and is, therefore, valid, even if there was, strictly, no jurisdiction to make the order.

Follett, contrà. A mere pension during pleasure, as this is, would not pass by the general assignment under sect. 11. Neither is it reached by the proviso in sect. 29. That applies only to pensions held under any department of His Majesty's government. This is not \*so held, but is merely an allowance granted at the will of the Prince Regent on the petition of the party. There is no doubt that if the Court below was acting within its jurisdiction, a prohibition would not lie, but here no jurisdiction exists, unless it be given by the twenty-ninth section. The nature of the pension, and the mode in which

this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being or having been an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the service of His Majesty, in the customs or excise, or any civil office, or other department whatsoever, or being or having been in the naval or military service of the East India Company, or an officer or clerk, or otherwise employed or engaged in the service of the Court of Directors of the said company. or being otherwise in the enjoyment of any pension whatever under any department of His Majesty's government, or from the said Court of Directors, to the pay, half-pay, salary, emoluments, or pension of any such prisoner, for the purposes of this act: Provided always nevertheless, that it shall be lawful for the said Court to order such portion of the pay, half-pay, &c. of any such prisoner, as on communication from the said Court to the Secretary of War, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officer of the department to which such prisoner may belong or have belonged, under which such pay, half-pay, &c. may be enjoyed by such prisoner, or the said Court of Directors, he or they may respectively under his or their hands, or under the hand of his or their chief secretary, or other chief officer for the time being, consent to in writing, to be paid to such assignee or assignees, in order that the same may be applied in payment of the debts of such prisoner; and such order and consent being lodged in the office of the paymaster of His Majesty's forces, &c. or of any other officer or person appointed to pay, or paying, any such pay, half pay, &c. as shall be specified in such order and consent, shall be paid to the said assignee or assignees, until the said Court shall make order to the contrary."

it is granted, render that section inapplicable. [PARKE, J. You say this is not a pension under any department of His Majesty's government; but the Lords of the Admiralty are to execute the order in council for the payment.] Still, the question is, whether this be a pension held under the Admiralty; being granted by order in council, merely at the royal pleasure. It is a matter of favour only; and differs altogether from pensions for services, held by vote of parliament, pursuant to the several acts which regulate such pensions. For instance, in 50 G. 3, c. 117, ss. 2, and 3, the former kind of pension is expressly distinguished from the latter, It is not subject to the same regulations and deductions. The pension voted by parliament under that act is in the nature of a continued pay; it is fixed by reference to the salary which the party enjoyed in his office, and to the length of his service; and where granted in the offices of the Secretary at War, Master-general of the Ordnance, or Lords of the Admiralty, it is returned with the estimates of that department. But the pension granted by the King in council has nothing analagous to pay. [PARKE, J. Would not sect. 11, pass every kind of pension, but for sect. 29?] It would not pass an officer's half pay, Flarty v. Odlum, 3 T. R. 681. [PARKE, J. \*696] That was under a differently framed act. Here it is \*argued, from the restraining section, that whatever is not within that, was meant to pass by sect. 11.] It could not have that effect if the pension did not come within the description of property enumerated in sect. 11. As to the supposed assent of the insolvent, if he did what was required by the Insolvent Court as a condition of his discharge, that is no bar to the present application, if the matter was wholly out of the jurisdiction of that Court.

DENMAN, C. J. Without touching upon the very important general question, whether or not a prohibition would lie to the Insolvent Court against entering upon a case of this kind under other circumstances, it is sufficient to say here, that I think this pension is clearly within the twenty-ninth section of the act. The eleventh section, prima facie, would pass all those matters which are afterwards made the subject of exception in sect. 29. Then, by that section, a proviso is introduced, that nothing in that act shall extend to entitle the assignees of the estate of any such prisoner, being or having been, an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged, in the service of His Majesty, in the customs or excise, or any civil office or other department whatsoever, or being otherwise in the enjoyment of any pension whatever under any department of His Majesty's government, to the pay, half-pay, salary, emoluments, or pension of any such prisoner, for the purposes of this act:" but, nevertheless, that a part of such pay or pension may be appropriated to the purposes of the act, by arrangement made with the heads of the department, as is directed in that clause. I think, in this case, there is no doubt that the insolvent \*was a person who had been employed in the service of His Majesty in a civil office, and was in the enjoyment of a pension under a department of His Majesty's government. The Privy Council recommended the grant to the Prince Regent, to commence from the day when Dr. Battine ceased to hold his office, and to be charged on the ordinary estimates of the navy. The order in council passed accordingly, and the Lords of the Admiralty were required to give the necessary directions. Here, then, is a pension, held under such a department, and by such a person, as are expressly named in the twentyninth section. Giving that section a reasonable and ordinary construction, I think it is clear that the pension was such as might, with the consent which the act required, be assigned for the benefit of the creditors.

LITTLEDALE, J. I am of the same opinion. The insolvent had certainly been a person employed in a civil office in the naval department of His Majesty's government, and enjoyed a pension under that department. The commissioners, therefore, might properly make the order for paying over a part of it, with the assent of the Lords of the Admiralty. As to the power of this court to grant a

Vol XXIV.—20

prohibition to the Insolvent Debtors' Court, it is not necessary to express any

opinion.

PARKE, J. It is unnecessary to say whether or not such a pension as this would pass under the general assignment directed by section 11; I think it is clearly within the proviso of section 29, as granted to a person who had been in His Majesty's service in a civil office, and held under, and included in the estimates of a department of His Majesty's government.

Rule discharged with costs.

## \*The KING v. DONNISON and Another. April 25. [\*698

The rule established at nisi prius in prosecutions for libel in a newspaper, viz. that after production of the stamp office affidavit, a paper corresponding with it in title, printer's and publisher's name, and place of publication, may be put in and read as published by the parties therein named, without other proof on this point, applies equally on motions for criminal information.

A BULE nisi had been obtained for a criminal information against these parties for misdemeanors in printing and publishing certain scandalous libels. The rule was drawn up on reading the affidavits of the Earl of Lonsdale and other persons, and a paper partly written and partly printed, thereto annexed,(a) and the several printed papers thereby referred to. Upon cause being shown, it appeared that some newspapers, entitled "The Whitehaven Herald," published at Whitehaven, and bearing the name of the printer and proprietor, had been put in with (though not annexed to) the affidavits; but the latter consisted merely of the usual copy of the stamp office affidavit (that the defendants were the printer and proprietor of a newspaper called, &c. and intended to be published at Whitehaven,) and depositions by the Earl of Lonsdale and other persons, denying that the Earl had been guilty of particular acts of misconduct; as peculation, breach of certain trusts, entertaining ruffians at his table, &c. They did not in any more direct manner refer to the newspapers or any part of them, nor did they charge the defendants or any other person with having asserted or published the matters stated to be untrue; but the newspapers did, in fact, contain such imputations upon the Earl.

Armstrong now shewed cause. The rule must be discharged, for the affidavits do not, either directly or \*by reference, impute any offence to the parties against whom this motion is made. The rule states that the printed papers are referred to by the affidavits, but that proves not to be the case; they make no reference to any paper or passage. The act 38 G. 3, c. 78, does not meet this objection; that merely gives facilities in proving who are the printer and proprietor. [Follett, amicus curiæ, mentioned the case of Rex v. Featherstone, editor of The Western Times newspaper, in Trinity term, 1830, where the present objection was taken, and the Court enlarged the rule, in order

that supplemental affidavits might be made.(b)]

Sir James Scarlett and F. Pollock, contrà. On applying for the rule, the stamp office affidavit was produced, and newspapers were put in, corresponding with it in title, place of publication, and printer's and publisher's names. That by 38 G. 3, c. 78, s. 11, was sufficient proof that the papers in question had been printed and published by the defendants; and the rule is drawn up "on reading the printed papers," which shews that the libellous matter was read to the Court on moving for the rule.

(a) The stamp office affidavit.

<sup>(</sup>b) In the affidavits afterwards made, one deponent stated that he had read the libelious matter in a certain paper, &c. and another expressed his belief that it referred to the party complaining.

PER CURIAM.(a) As soon as the stamp office affidavit is proved, the statute enables the prosecutor to put in a newspaper corresponding with it, and to use such paper as evidence against the defendant. (Mayne v. Fletcher, 9 B. & C. \*700] 382.) That is the rule at nisi prius, and by parity of reasoning it \*should be so here. If no other cause is shewn, the rule must be absolute. Rule absolute.(b)

#### ELIZA KELLY v. JOHN PARTINGTON. April 26.

A master in giving the character of his late servant to a person intending to take her, charged her with theft; and in support of that charge, stated, that she had borrowed money when she came into his service, and repaid it before she received any wages. In reply to an inquiry made afterwards by a relation of the servant, he admitted that the time when he paid the wages was entered in a book, which he produced, but refused to state what the time was; and on the same party remonstrating, and observing that the servant, in consequence of her loss of character, might have gone upon the town, he answered, "What is that to us?" Held, that this conduct was evidence to go to the jury (though slight,) that the communi-

cation to the intended master was made maliciously.

CASE for words imputing theft, with an averment that one James Stenning, in consequence of the words, refused to take the plaintiff as a shop-woman. At the trial before Patteson, J. at the sittings in Middlesex during this term, it appeared that Stenning, who was going to take the plaintiff into his service, inquired her character of the defendant, to whom she had been shop-woman; and the defendant, on that occasion, charged her with having secreted money taken from his till, and also stated that when she came into his service she borrowed half a sovereign of her mother, and that before she had been there two months, and before she received any wages, she paid her mother the money, and made her a present of a sovereign. The plaintiff's brother-in-law deposed that he afterwards called upon the defendant for an explanation of the words, when he repeated the same charges. The witness, with reference to the latter statement, observed that the defendant, no doubt, made entries in some book, of the times at which \*he paid his servants' wages, and that on reference to it he would probably find that he was mistaken in what he had asserted. The defendant then went to his desk, took out a memorandum book, and looked at it; after which he turned to the witness, and asked, "Do you know when she received her wages?" the witness answered "No;" but he would go by the defendant's account, as that was likely to be correct. The defendant then said "If you do not know, I am not going to tell you," and put the book into the desk again. The witness upon this made some allusion to intended proceedings at law, and said he considered the case of theft as trumped up; to which the defendant made no answer, but "grinned" in a contemptuous manner at the witness: and upon his remonstrating, and observing that if the plaintiff had not had friends, she might have gone upon the town, the defendant said (speaking of himself and his wife) "What is that to us?" Evidence was then given in contradiction of the defendant's statement as to the time when the plaintiff repaid the half sovereign. Upon this case, Sir James Scarlett, for the defendant, submitted that there was no ground of action, inasmuch as the words spoken to Stenning were a privileged communication to a person inquiring the character

the libellous matter complained of, and which the prosecutor's affidavits were intended to contradict.

<sup>(</sup>a) Denman, C. J., Littledale and Parke, Js. (b) But quære, (although the newspapers were properly before the Court as evidence against the defendants,) whether the affidavits ought not to have specifically pointed out

of a servant; and those to the brother-in-law were spoken to an agent of the plaintiff by way of explanation, which he had called for on her behalf; and there was no proof of express malice. Patterson, J., refused to nonsuit, but reserved leave to move; and the defendant having given some evidence to shew grounds of suspicion on his part, a verdict was found for the plaintiff, damages one shilling.

\*Sir James Scarlett now moved to enter a nonsuit, and contended that, on the above facts, there was no evidence to go to the jury of express malice. In Child v. Affleck, 9 B. & C. 403, the case of malice was much stronger; but the plaintiff was nonsuited, and this Court held the direction

right.

DENMAN, C. J. Where it is clear that the words complained of are nothing more than a communication from one master to another, informing him of the character of a servant, the case certainly ought not to go to a jury. But where there are other circumstances from which malice may be inferred, the question is for them to decide. Here there were such circumstances, though very slight: namely, the refusal to point out an entry in a book, when that became the means of proving or disproving a charge which the defendant had made; and the answer, "What is that to us?" when it was suggested that the plaintiff might have gone upon the town. I think, therefore, we ought not to grant a rule.

LITTLEDALE, J., concurred.

PARKE, J. There was a slight case to go to the jury, and no more.

Rule refused.

#### \*The KING v. The Inhabitants of TADCASTER. April 27. [\*703

A pauper in Nov. 1827, took a dwelling-house of A., at an annual rent of 6l. 10s. In May, 1828, he took of B. a building used as a shed, situate in the same parish, but entirely separated and distinct from the dwelling-house, at an annual rent of 5l. Be occupied both, and duly paid the rents, until September, 1830: Held, that he thereby gained a settlement by renting a tenement under the stat. 6 G. 4, c. 57.

On appeal against an order of two justices, whereby Jane Silversides, and her five children, were removed from the township of Leeds in the county of York to the parish, township, or place of Tadcaster, the sessions confirmed the order.

subject to the opinion of this Court on the following case:-

The appellants admitted that William Silversides, the late husband of the pauper Jane Silversides, gained a settlement by apprenticeship in the township of Tadcaster, and the respondents admitted that he afterwards went to reside in the township of Leeds, and in November, 1827, took a dwelling-house, there situate, as tenant to one W. Wheelwright, and occupied the same until September, 1830, at the yearly rent of 6l. 10s., which rent was duly paid for all that period; that in May, 1828, William Silversides also took a building used as a shed, where he carried on his business of a bricklayer and mason, situate in the said township of Leeds, as tenant to one Robert Myres, and occupied the same until September, 1830, at the yearly rent of 5l., which rent was also duly paid for all that period. The dwelling-house was wholly separated and distinct from and unconnected with, the other building, there being a separate and distinct tenement between them, belonging to and occupied by another person. The question for the opinion of the Court was, whether the pauper gained a settlement in Leeds by renting a tenement under 6 G. 4, c. 57.

\*Milner and Baisen in support of the order of sessions. The pauper gained no settlement in Leeds. The settlement by renting a tenement arises by implication from the statute 13 & 14 Car. 2, c. 12, which authorizes two justices of peace to remove any poor person "coming so to settle, as aforesaid, in any tenement under the yearly value of 101.," within forty days after he

shall so come to settle; and in the reign of George the first it was held in South Sydenham v. Lamerton, Str. 57, that the taking of an entire tenement of 10%. per annum conferred a settlement though it lay in two parishes, but that two distinct tenements making together 10%, per annum in different parishes would not. That decision was virtually overruled in Rex v. Newnham, Burr. S. C. 756, where it was decided that a settlement was gained by renting a house at a rent of 3l. per annum of one landlord, and land at the rent of 8l. of another landlord. Such was the state of the law before the passing of 59 G. 3, c. 50, which enacts "that no person shall acquire a settlement in any parish by reason of his dwelling for forty days in any tenement rented by him, unless such tenement shall consist of a house or building being a separate and distinct dwellinghouse or building, or of land within such parish, or of both, bona fide hired by him, at and for the sum of 10l. a year at the least, for the term of one whole year; nor unless such house or building shall be held and such land occupied, and the rent for the same actually paid for the term of one whole year at the least, by the person hiring the same." Now these words seem to import, that there should be one tenement, taken at one time. It was decided, \*how-\*705] there should be one cenement, was a work as the same of different ever, in Rex v. North Collingham, 1 B. & C. 578, and Rex v. Stow, 4 B. & C. 87, that the tenement required by this statute might consist of different parcels hired at different times. The act 59 G. 3, c. 50, was repealed by 6 G. 4, c. 57, which enacts, that "no person shall acquire a settlement by reason of settling upon, renting, or paying parochial rates for any tenement not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bona fide rented by such person in such parish &c., at and for the sum of 10l. a year at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied under such yearly hiring, and the rent for the same to the amount of 101. actually paid, for the term of one whole year at the least; provided always that it shall not be necessary to prove the actual value of such tenement. This latter statute differs from the former, inasmuch as it requires the house, or building, or land to be occupied, not by the party hiring the same, but under such yearly hiring. That expression imports, that the occupation should be under one, not several contracts of hiring. This case is not within the act. because the two buildings were not hired at the same time; and the words of an act of parliament are to be construed in their grammatical and natural sense, unless it appears clearly from the context that they were intended to be used in some other sense: per Parke, J., in Rex v. Ditcheat, 9 B. & C. 186.

But, secondly, in order to satisfy this statute, the tenement must consist of a \*706] dwelling-house, or building, or of land, or of both. It will be said, that the \*word both applies to any two of the three things previously mentioned, and consequently that the tenement may consist of a dwelling-house and building; but as the word building necessarily includes in it a dwelling-house, the statute may, therefore, be read as if it had said "a separate and distinct building, or land, or both;" and, if so, then two separate and distinct buildings would not satisfy

the meaning of the statute.

Cresswell contra. The dwelling-house and shed constituted a tenement within the meanining of 6 G. 4, c. 57, which, in terms, requires that it should consist of a dwelling-house, or building, or land, or both. No sufficient reason can be assigned why it should not consist of a dwelling-house and building as well as of a dwelling-house and land, or of a building and land. The argument on the other side assumes that only two things are specifically mentioned, to which the word both can refer; a dwelling-house and building being one, and land the other; but three things are, in fact, mentioned; and the word both, which, in strictness, can apply to two only, is perhaps improperly used in the place where it occurs in this sentence. But why may it not be considered as repeated three times, and the clause read thus: "unless the tenement shall consist of a dwelling-house or building, or both; or

of a dwelling-house, or land, or both; or of a building, or land, or both." By so reading it, effect will be given to the word both in its natural sense; and the intention of the legislature will be effectuated. Besides, building and land, for this purpose, are synonymous. Lord Coke says, "that land legally includeth all castles, houses, and other buildings; for castles, houses, &c., consist upon two things, viz., land or ground, as the foundation \*or structure there-upon; so as passing the land or ground, the structure or building thereupon pased therewith," Co. Litt. 4, a. In Rex v. Macclesfield, 2 B. & Ad. 870, Parke, J. expressed an opinion, that the occupation of a dwelling-house and another distinct building in the same parish, would confer a settlement; and there can be no reason why it should not, as well as the occupation of a dwellinghouse and land. Then, as to the different parcels of the tenement being taken at different times, there is no difference between the statutes 6 G. 4, c. 57, and 59 G. 3, c. 50, as far as respects the present case. Before the 59 G. 3, c. 50, a settlement might be gained by the occupation of a tenement under different hirings; and in Rex v. North Collingham, 1 B. & C. 578, and Rex v. Tonbridge, 6 B. & C. 88, it was held, under that statute, that a tenement consisting of two parts, hired by the year, at different times, provided it was hired at the aggregate rent of 101. per annum, and the whole was occupied for one whole year, would confer a settlement. The only difference (as to the present question) between that statute and the 6 G. 4, c. 57, is, that the first required the holding and occupation for a year, to be by the party hiring; but the second only requires the occupation to be under the yearly hiring; and in Rex v. Ditchest, 9 B. & C. 176, and Rex v. Great Bentley, 10 B. & C. 520, it was held, that a pauper who rented a tenement for a year at a rent exceeding 10l. per annum, but who underlet part, gained a settlement under the latter statute, the whole being occupied under the yearly hiring. To remedy the inconvenience resulting from those decisions, the 1 W. 4, c. 18, requires that the house, or building, or land, shall be occupied under the \*yearly hiring by the person hiring the same. It is immaterial whether the rent be payable to one or several, and there need not be a concurrent occupation of the several tenements for the space of one whole year, Rex v. Ormesby, 4 B. & Ad. 214, though in the present case there was.

DENMAN, C. J. It has been often observed, that the word tenement in the decisions upon the statute 13 & 14 Car. 2, c. 12, has received a much larger construction than the legislature intended; but those decisions are so numerous, and have been acquiesced in so long, that we must abide by them, unless the legislature has in clear terms altered the law which they established. Now, if the statute 59 G. 3, c. 50, or 6 G. 4, c. 57, was intended to alter the law in this respect, it seems to me that the enactments have not hit this precise case. Under the first of those statutes it was held, that a settlement might be gained by the occupation of a tenement on different hirings. In Rex v. Stow, 4 B. & C. 87, a pauper, three weeks after May-day, 1820, hired a house and land in the parish of Stourton by Stow for a year from the preceding May-day, at a rent of 15l. and at the expiration of that time hired it again for another year at the same rent. He occupied the premises from the time of the first hiring until six months after the second hiring, and paid the rent during the whole period; and it was urged that the house and land were not occupied as the statute required, for the term of one whole year. Abbott, C. J. there says, "It has been contended, the legislature must have meant the hiring, occupation, and payment to be for the same year; if that had been their intention, it would have been easy to say that the occupation and \*payment should be for such term;" and [\*709 Holroyd, C. J. says, "If it had been intended that the occupation should be for the same term as the hiring, the legislature would probably have introduced the words for the said term. It seems to me, that the words 'nor unless,' have been used in order to divide the sentence, and to exclude the construction now contended for on behalf of the appellants." Now those observations apply to the present case; for the words of 6 G. 4, c. 57, "unless such house or building, or land, shall be occupied under such yearly hiring," do not make any difference in this respect. I am of opinion, that the fact of the house and shed having been hired at different times will not prevent the gaining of a settlement. But it is said, that, as the statute requires that the tenement shall consist of a dwelling-house or building, or land, or both, it is not satisfied by a tenement consisting of a dwelling-house and building; but I think the mere collocation of the words "or both" in that sentence ought not to prevent the acquisition of a settlement by the occupation of any two of the three things there mentioned, and consequently that a settlement was gained in this case by the occupation of the dwelling-house and shed.

LITTLEDALE, J. The word tenement means any thing which one man holds of another; and it may consist of several parts not contiguous to one another, and hired at different times. According to the argument, if a man were to hire three fields at three different times, at an entire annual rent of 101., or one half of a field at one time and the other half in six months afterwards, that would not constitute a tenement within the meaning of the statute; but I think it \*710] wholly immaterial whether the different parcels of the tenement be \*hired at the same time or not. That being so, I am of opinion that the pauper was not prevented from gaining a settlement by reason of the house and shed having been hired at different times. But then it is said the statute requires that the tenement shall consist of a dwelling-house, or building, or of land, or of both, and that the word both can apply only to two of the things previously mentioned, and that it must be referred to a dwelling-house and land, or a building and land, but not to a dwelling-house and building. both is improperly used in this sentence. But as no good reason can be assigned why a tenement (in order to confer a settlement) should not consist of a dwelling-house and building, as well as a dwelling-house and land, I think we are not bound by the inaccurate use of the word both, to hold, in this case, that the legislature meant to confine the meaning of the word tenement to a dwellinghouse and land, or to a building and land. I think it includes a dwelling-house and building, as well as a building and land, and that it may even apply to all

PARKE, J. I am of the same opinion. I am not sure that we shall, by our decision in this case, give effect to the intention of the legislature; but that is so obscure, that we cannot say with precision what it is. It struck me, in Rex v. Macclesfield, 2 B. & Ad. 870, that the occupation of a dwelling-house and another distinct building in the same parish would confer a settlement. If that were not so, a distinct dwelling-house and a pig-sty taken at an entire rent of 100l. would not be sufficient for the purpose. I think the hiring of a distinct \*711] dwelling-house and of a distinct building, of the required annual value, \*is sufficient to confer a settlement. Then, as to the house and shed having been held under different hirings, Rex v. North Collingham, 1 B. & C. 578, has decided that a tenement held under two distinct hirings was sufficient to confer a settlement under 50 G. 3, c. 50, and the statute 6 G. 4, c. 57, has made no alteration in that respect. The pauper, therefore, gained a settlement in Leeds.

Order of sessions quashed.

The KING v. The Inhabitants of WOODBRIDGE. April 27.

To gain a settlement by serving an office, the party must reside in the parish where it is executed.

On appeal against an order of two justices, dated the 8th of February, 1832, whereby Joseph Bird was removed from the parish of St. Matthew, in the

borough of Ipswich in Suffolk, to the parish of Woodbridge in the same county, the sessions confirmed the order, subject to the opinion of this Court on the

following case:

The pauper was, on the 29th of September, 1820, appointed by the bailiffs of Ipswich a crane porter at the common quay in that town. The business of the crane porters is to unload vessels arriving at the common quay; it is a public annual office, and the pauper served it for a year. The quay where the vessels are unloaded is situated in the parish of St. Mary at the quay, at Ipswich, but during the whole of the year the pauper resided in the parish of St. Matthew in the same town; and the sessions, thinking the office was executed in the parish of St. Mary at the quay, were of opinion that no settlement was gained in St. Matthew's. If the Court should \*be of the same opinion, [\*712] the order of sessions was to be confirmed; if of the contrary opinion, the order to be quashed.

Austin, in support of the order of sessions, was stopped by the Court.

Biggs Andrews, contra. It is not necessary that a party should reside in the parish where he executes his office. In Rex v. Liverpool, 3 T. R. 118, the pauper resided in the parish of Liverpool, but served the office of sexton in the chapel of St. James. The churchyard was partly in the parish of Walton and partly in the parish of Liverpool, but no corpse was ever buried in that part of the churchyard which lay in the parish of Liverpool; and it was held, that the pauper gained a settlement in Liverpool; yet he did not exercise his office therein. [Parke, J. There the churchyard was in two parishes; and the Court held, that he gained a settlement in that in which he resided. The statute 3 W. & M. c. 11, s. 6, which gives the settlement, enacts, that if any person who shall come to inhabit in any parish shall execute any public annual office in the said parish during one whole year, he shall be adjudged to have a legal settlement in the same. It contemplates, therefore, that the party shall reside in the parish.]

DENMAN, C. J. The words of the statute are sufficiently explicit to shew that a settlement can be gained only by serving an office in the parish where the

party resides. The order of sessions must be confirmed.

Order of sessions confirmed.

# \*The KING v. MATTHEW SNOWDON. April 27. [\*713

The lessee of toll traverse, and of a toll-house, (which he occupies,) is not rateable to the poor for the tolls, but for the toll-house only.

On appeal by the defendant against four several rates or assessments, made for the relief of the poor of the parish of St. Nicholas, in the town and county of Newcastle-upon-Tyne, for the months of July, August, September, and October, 1831, the sessions confirmed the rates, subject to the opinion of this Court on the following case:

Court on the following case:—

The mayor and burgesses of Newcastle-upon-Tyne are, as well by prescription as by virtue of divers charters, and particularly a charter of the 31 Eliz., constituted a corporation by the name or style of "The mayor and burgesses of the town of Newcastle-upon-Tyne," and have been seised from time immemorial of the town and borough of Newcastle-upon-Tyne in their demesne as of fee, and hold the same in fee farm under the crown, at the yearly rent of 100l. The mayor and burgesses claim, as of right by prescription, to demand and receive as a toll thorough, divers tolls, dues, and duties, called the thorough toll or great toll, in respect of goods, wares, and merchandizes, not the property of a burgess of the town, brought into and carried out of the town, in consideration

of their keeping in repair all the public streets of the town of Newcastle-upon-Tyne, and also two third parts of the bridge over the river Tyne, called Tyne

Bridge, which connects the town with the county of Durham.

The appellant, who is not an inhabitant of the parish of St. Nicholas, is lessee under the mayor and burgesses of \*their toll-house, situate in the parish of St. Nicholas, at the north end of Tyne Bridge (one of the ancient avenues leading into and out of the town,) and of such of the abovementioned tolls as are collected at that avenue. The joint annual value of both tolls and toll-house is 500l., but the annual value of the toll-house, when separated from the tolls, is only 10l.

By an act passed in 1822, the mayor, burgesses, and their lessee of the said tolls were authorized to take from all persons who should bring or convey into or out of the town, by any of the avenues or passages leading into or out of it, any goods, &c., liable to the said tolls, such tolls as the said mayor and burgesses were then, by law, entitled to receive in respect of the said thorough toll or great toll; and the act also authorized "the mayor and burgesses, and their lessee of the said tolls, to erect, set up, and maintain at all and every or any of the avenues or entrances leading into or out of the town, at which the said tolls should be demandable, any convenient or proper toll-house or building, with suitable conveniences for the accommodation of any person or persons to be employed in the collection of the said tolls, dues, and duties;" and it enacted "that every collector appointed to receive the tolls, should place his Christian name and surname, painted on a board in legible characters, in some conspicuous part of each toll-house immediately on his coming on duty, and continue the same so placed during the whole time he should be upon such duty."

The toll-house in question is occupied by the servant or collector of the appellant, and the appellant's name is put up in front of the toll-house. The tolls are not actually paid to and received by the collector in the \*toll-house, but are collected from the parties liable to pay the same upon the street in front of, and as they pass, the toll-house. The total annual produce of the tolls received at all the avenues or entrances into the town, the title to which is founded on the consideration of repairing the streets, amounts to 4000l., and it does not appear whether or not the appellant makes any profit. The rent under which the appellant holds these and other tolls is paid half yearly into the Town Chamber, the legal place of receipt of the corporation revenue. rate account is kept of the sums received in respect of the whole of the tolls called the thorough toll, and likewise a separate account of the sums expended in repairing the streets, the consideration on which the title to those tolls is founded; but in no one year has the aggregate amount of the sums received for these tolls been sufficient to defray the expense of keeping the streets in repair; and no regard is paid to the sum received in regulating the amount expended on the streets, the deficiency being supplied, as a matter of course, out of the general fund of the corporation. The appellant is rated in all the four rates or assessments as follows; viz. "Snowdon, Matthew. Toll-house situated at the north end of Tyne Bridge, and the tolls payable there, 500l."

The question for the opinion of this Court was, whether the appellant were rateable for the toll-house and tolls, or either of them. If for the toll-house alone, then the four rates or assessments appealed against were to be amended, by striking out in each "and the tolls payable there," and substituting the figures 101. for the figures 5001. If he were rateable for neither the tolls nor \*716] \*the toll-house, then the order of sessions was to be quashed. If he were rateable for the tolls either alone, or together with the toll-house, the order of sessions was to be confirmed, with such amendment, if any, with respect

to the amount on which the rate was made, as the Court should see fit.

Aglionby and T. Greenwood in support of the order of sessions. The mayor and burgesses of Newcastle being seised in fee of the town, the soil of the streets is in them. The toll, therefore, paid to them for passing over their soil is a

toll traverse, and their lessee is rateable in respect of such tolls constituting the profits of the land. This is something like Rickards v. Bennett, 1 B. & C. 223, where in trespass against a lord of a manor, he, in his plea, set out various burdens borne by him; and then prescribed, not by reason of those burthens, but generally as lord of the manor, for a toll upon all goods bought and delivered, or bought elsewhere and brought into and delivered in a town within the manor, which from time immemorial had been parcel of the manor; and it was held, after verdict, that this was good as a claim of toll traverse, although the burthens set out did not constitute a sufficient consideration for a toll thorough. It is true the sessions have found that it is called and that the corporation claim it as a toll thorough; but it is manifestly a toll traverse, being taken for passage over the soil which is in the corporation. [PARKE, J. Assuming it to be a toll traverse, the lessee is not an occupier of \*any part of the soil, in respect of which the tolls arise.] The act of parliament authorizes the corporation or their lessees to take from all persons, who shall bring or conveyinto or out of the town, by any of the avenues or passages leading into or out of it, any goods, &c., such tolls as the corporation are by law entitled to receive in respect of the toll called thorough toll or great toll, in consideration of their keeping in repair the public streets. It also authorizes the corporation to erect and maintain toll-houses, and requires every collector of the said toll dues and duties, to place his Christian and surname, painted on a board, in legible characters on the said toll-house. Here the appellant's name was affixed to the toll-house, and he, by his servant, occupied the toll-house, and received the tolls; and he is rateable for both. If this were a toll thorough, the question might be different; but in Rex v. Eyre, 12 East, 416, where it was held that the lessee of the tolls of a public bridge was not rateable to the poor in respect of them, it was not stated that he was the occupier of a toll-house. Here the lessee, by his servant, was the occupier of a toll-house erected at one of the avenues where toll was demandable. [PARKE, J. That occupation makes him liable to be rated in respect to the profits of the toll-house; but if that were pulled down, or he did not occupy it, he would be entitled to receive the tolls. Assuming the toll to be a toll traverse, it would be paid for passing over the soil of another. The lessee of the tolls here does not occupy any portion of the soil in respect of which the toll is payable; he is rateable, therefore, for his house, but not for the tolls.]

\*The Court, without hearing Ingham on the other side, directed the rate to be amended, by striking out the tolls and substituting 101. for 5001.

Rate amended accordingly.

# The KING v. The Inhabitants of St. HELENS AUCKLAND. April 27.

A pauper agreed with the owners of a colliery to work constantly in the said collier; from the 4th of February, 1815, to the 4th of February, 1816, or to forfeit and pay to his master 1s. for each and every day he should absent himself from his work or not work a reasonable day's work to the satisfaction of his master: Held, not an exceptive hiring.

Upon appeal against an order of two justices, whereby George Riley was removed from the township of Coundon in the county of Durham, to the township of St. Helens Auckland in the same county, the sessions confirmed the order of removal subject to the opinion of this Court on the following case:—

The pauper was bound as a pitman to Dixon and Co., the owners of the Eden Main Colliery, situate in the township of West Auckland in the county of Durham, by bond or memorandum of the 4th of February, 1815, between G. D., J. D., and E. D., as copartners in the said colliery of the one part, and the several pitmen whose names were thereunder written on the other part, whereby

it was witnessed that the said pitmen, in consideration of the wages to be paid as after-mentioned, did thereby severally agree with the said co-partners or masters to hew, pit, and work coals within the said colliery, from the day of the date thereof for and unto the 4th day of February, 1816, in the manner and at the prices following; that is to say, to hew coals at 2s. 6d. a score of twenty-five corves to each score; the said pitmen also agreed to give to the said masters the usual fire coal corf for each day they were at work, over and \*above the \*719] said number of twenty-five corves to each score; and further to drive their boards of such a breadth, and to prop and maintain their own work, and to work in a workmanlike manner, properly, fairly, and orderly, as directed by their said masters, or their agent for the time being; and to drive headways at 8d. a yard, and headways walls at 6d. a yard, when, where, and in such a manner as directed by the said masters or their said agent: and further, the pitmen agreed to send as many setters to bank as the seam would admit and afford; and also to put coals in their course at the prices then given, and to have the liberty to hew half a score of coals in the putting morning, which were to come back the "And the said pitmen do hereby further severally undertake, promise, and agree, to work constantly at the said colliery until the said 4th day of February, 1816, or to forfeit and pay, each man, to the said masters or their said agent, one shilling for each and every day that he shall absent himself from the said work, or not work a reasonable day's work, to the satisfaction of the said masters or their said agent. And on the other hand, the said masters, for themselves, agree to pay each said pitman one shilling a day for each and every day they shall wilfully, or without just cause, lay any of them off work."

The pauper served under this bond for a whole year, and received his wages; and during that period there was no forfeit incurred either by him or his employers, by reason of any interruption of the work in the colliery, or otherwise. He remained in the service of the same employers as a pitman for eleven months after the expiration of the bond, and from the date of the bond to the time of his finally quitting the colliery, \*a period of nearly two years, he slept in the appellant parish. The question for the opinion of the Court was, whether this was a service under such a yearly hiring as would confer a settle-

ment?

Ingham in support of the order of sessions. This was clearly a hiring for a year, and not exceptive. The case falls within Rex v. Byker, 2 B. & C. 114. There the pauper was hired by indenture, for a year, as a driver in a colliery at the wages of 1s. 10d. for a day's work not exceeding fourteen hours, and 2d. a day more when the time was exceeded; and he was to forfeit 10s. 6d. for every act of disobedience, and 2s. 6d. a day for lying idle, or for absence on working days, to be deducted out of his wages; and there was a covenant that in case the master, about Christmas, should wish to repair any engine belonging to the colliery, he might stop the workings for any period not exceeding seven days, without paying any wages; and it was held that this was a conditional and not an exceptive hiring. Here, if the agreement was conditional, the condition has not been acted upon: but it appears clearly to have been absolute. The case is even stronger than Rex v. Byker, for the pitman to agree to work constantly during the whole year, which gives the master a right to their service at all times, subject only to the implied exception of hours for food and rest, Rex v. All Saints Worcester, 1 B. & A. 322. And the daily work is to be "a reasonable day's work, to the satisfaction of the masters." In Rex v. Gateshead, 2 B.

\*721] & C. 117, note, which will be relied on by the other side, it was \*stipulated that each man should on each working day, do such a quantity of work as should be deemed equal to a full day's work; and not leave the pit until that quantity was completed, or in default therefore, he should forfeit 2s. 6d.; and the Court held it to be an exceptive contract, because the pauper was not to be under the control of the master for the whole of every day. In that case, as reported in 3 Dowling and Ryland, 333, note b, there was an express exception in the contract, for the labourers were to work for the whole year except ten days during the Christmas holidays. If that be correct, the case differs essentially from this. The proviso there (which appears also in Rex v. Byker, but not in the present case,) that the jurisdiction of the justices should

not to be ousted, was held to be immaterial.

Stephen Temple contrà. This was an exceptive hiring, for the agreement did not give the master a control over the servant during the whole year. If it was not an exceptive it was a conditional hiring. But in Rex v. Byker, 2 B. & C. 120, Bayley, J. says, "If the bargain be originally made for an entire year, and terms are introduced applicable to a continuance of the relation of master and servant during the whole year, but there is also a provision, that in a given event it shall be competent to the parties to put an end to or suspend the service for a part of the year; still a settlement is gained if the service is actually performed for a whole year, and neither party avails himself of the condition. A conditional hiring is, for this purpose, the same as an absolute hiring, unless the condition is acted upon." \*Here there was no absolute agreement by the pitman to work for a whole year, but he had the option either to work or to absent himself at any time, on paying 1s. per day. [PARKE, J. That is like the stipulation in Rex v. Byker to forfeit 2s. 6d. for lying idle.] By the first clause of the indenture in that case, the master hired, and the other parties hired and bound themselves as workmen or servants, for a whole year to serve in the colliery for certain wages; and the master then covenanted to pay for every good and sufficient day's work not exceeding fourteen hours (and 2d. a day when that time was exceeded) 1s. 10d.; and then the several persons hired, covenanted with the master to obey his orders as to the manner of working, and to work the colliery fairly and regularly, or in default thereof, to forfeit 10s. 6d. for every act of disobedience, and 2s. 6d. per day for lying idle, and the same sum for every working day when they should absent themselves from their employment; and the Court were of opinion that the mention of fourteen hours in the master's covenant was introduced there for the purpose of measuring the wages payable by him; and that the stipulation in the covenant of the workmen, that they should forfeit 2s. 6d. per day for every day they should be idle or absent themselves, did not authorize them to absent themselves if they thought fit, but was inserted merely to enforce regular attendance. But the present is a very different case; for here the pitmen do not contract to serve the master absolutely for a year, but they agree to hew and work coal from the 4th of February, 1815, to the 4th of February, 1816, in the manner following, and afterwards they stipulate to work constantly at the colliery until \*the [\*723 4th of February 1816, or to forfeit 1s. a day for absence or not doing a reasonable day's work. They have an option, therefore, to work constantly at the colliery, or to absent themselves on payment of the fine. This case falls precisely within Rex v. Gateshead, 2 B. & C. 117, note, where the pauper was hired to work in a colliery from the 5th of April, 1813, to the 5th of April, 1814, and it was stipulated that each man should, on each working day, do such a quantity of work as should be deemed equal to a full day's work; and should not leave the pit until that quantity was completed, or in default thereof should forfeit 2s. 6d. The expression each working day imported that there were days when the pitmen might absent themselves; and it was held to be an exceptive hiring because the pauper had not subjected himself to the control of his master for the whole year.

DENMAN, C. J. The decisions in Rex v. Byker, 2 B. & C. 114, and Rex v. Gateshead, 2 B. & C. 117, note, run very near each other; but there is a distinction between them, and I think the former case an authority in favour of a settlement here. It is said that in this contract there is an exception, because an option is given to the pauper, either to work or to forfeit and pay 1s. upon each day that he absents himself or does not work a reasonable day's work to the satisfaction of the master. In Rex v. Byker, the pauper, by indenture, was

hired for a year as a driver in a colliery, and the master covenanted to pay wages at the rate of 1s. 10d. for a good day's work, not exceeding fourteen \*724] hours, and 2d. a day more when that time was exceeded, \*and the pauper was to forfeit 2s. 6d. per day for lying idle, to be deducted out of his wages. It was contended, that that was an exceptive contract, because the master could not compel the pauper to work more than fourteen hours a day, and also because the pauper, on the payment of 2s. 6d. per day, was at liberty to absent himself. But the Court held, that the fourteen hours was only mentioned in the master's covenant to regulate the amount of the wages, and that the relation of master and servant continued during the whole twenty-four hours of every day, and consequently during the whole year; and that the clause as to forfeitures was intended not to give the servants a liberty to absent themselves, but merely to enforce regular attendance. The same observation applies to the clause of forfeiture in this case. In Rex v. Gateshead it was stipulated, that each man should, on each working day, do such a quantity of work as should be equal to a full day's work, and should not leave the pit until that quantity was completed, or, in default thereof, should forfeit 2s. 6d. There, as soon as each man completed his full day's work, he was at liberty to quit, and was no longer under the control of his master. According to the report of that case in 3 Dowling & Ryland, it was part of the contract of hiring, that the labourers were to work for the whole year, except ten days during the Christmas holidays, when they were not to work, nor to be liable to any penalties for not working. If that were a correct statement of the contract, there would be a clear exception of ten days. It appears, however, from the reasoning of the Judges there given, that the hiring was held to be exceptive, not because the pauper was not bound to work for his master during the ten days, but \*725] because he was \*not bound to work during the whole of every day, but during such part of the day only as might be required to complete a full day's work. The contract, as stated in 2 Barnewall & Cresswell, 117, was, that the master should find work for the men during the whole year, and forfeit 2s. 6d. for every day that he should oblige them to be idle, except at the Christmas holidays, which were not to exceed ten days. According to that statement, the stipulation, as to the ten days, would appear not to be an exception in the contract of hiring, intended to give a privilege to the servant, but to be a provision introduced for the benefit of the master; and, considering the reasons on which the judgment of the Court was founded, that must be taken as the correct report of the case. I think, therefore, this case falls within Rex v. Byker, and that a settlement was gained in the parish of St. Helens Auckland. The order of sessions must be confirmed.

LITTLEDALE, J. If the cases referred to had never been decided, I should not have had the slightest doubt on this case. By the agreement of the 4th of February 1815, the pauper agreed to hew, pit, and work coal till the 4th of February 1816, and to work constantly at the colliery or to forfeit 1s. for each and every day he should absent himself or not work a reasonable day's work. Now, the latter stipulation bound the pauper to pay 1s. per day, if he did not perform his part of the contract. There was a contract to work for a whole year and every day in the year, and the master had a right to call on the pitmen so to work. The mere agreement to pay 1s. per day as a forfeiture does not make the contract exceptive, because neither party can be supposed to have contem\*7261 plated, \*at the time when the contract was entered into, that there should be an absence or neglect to work.

PARKE, J. I felt some little difficulty, at first, in distinguishing this case from Rex v. Gateshead, 2 B. & C. 117, note, but I think it falls within Rex v. Byker, 2 B. & C. 114. In the first of those cases there was a stipulation that each man should, on each working day, do a full day's work, and that he should not leave the pit until that quantity of work was completed, and that, on default thereof, he should forfeit 2s. 6d. It was therefore stipulated by implication,

that the men were not to be under the control of the master on days which were not working days, nor on any day as soon as a full day's work was completed.

Order of sessions confirmed.(a)

#### ROWE v. SHILSON and Another.

An embankment company was by an act of parliament (not limited in duration) empowered to make a road, and to erect turnpikes upon or across "any lanes or veys leading or that might thereafter lead out of the same;" and to take tolls at such turnpikes. By subsequent acts, another company was empowered to make a railway, and it was enacted, that all persons should have free liberty to use the same, with carriages properly constructed, upon payment only of such rates and tolls as should be demanded by the railway company, not exceeding the sums mentioned in that act. The railway was afterwards made, and it crossed the embankment company's road:

Held, first, that the railway, though made and opened to the public by act of parliament, was a "way" within the meaning of the first mentioned act. Secondly, that the clause in favour of the public in the railway act, did not take away the vested right of the embankment company to their tolls; and, consequently, that they might take toll of

persons crossing their road upon the railway.

INDEBITATUS assumpsit for tolls. At the trial before Parke, J., at the spring assizes for the county of Devon, 1832, a verdict was found for the plaintiff,

subject to the opinion of this Court upon the following case:-

\*By act of parliament 42 G. 3, c. 32, certain persons were incorporated by the name and style of "The Company of Proprietors for embanking Part of the Lairy near Plymouth;" (see Lowe v. Govett, 3 B. & Ad. 863,) and the embankment was accordingly made by the company. By an act 43 G. 3, c. xv., the company were empowered to make and maintain a road from Efford Quay in the said county to the borough of Plymouth; and it was also enacted as follows:--"That it shall and may be lawful to and for the said company to erect or cause to be erected such and so many turnpikes to receive the tolls hereby granted upon or across the said road, and on or near the sides thereof, or in, near, upon, or across any lanes or ways leading or that may hereafter lead out of the same, as they shall think proper." And that in consideration of the great expenses the said company must incur by making, maintaining, and supporting the said road, it was enacted "that it should be lawful for the said company to demand and take or cause to be demanded and taken at the said turnpikes, amongst other tolls therein mentioned, for every wagon," &c. And that the company might let the tolls to farm. The road was soon after made pursuant to the act.

By an act, 59 G. 3, c. cxv., for making and maintaining a railway or tranroad from Crabtree, in the parish of Egg Buckland, in the said county, to communicate with the prison of war on the forest of Dartmoor, in the said county,
reciting that such railway would be of material benefit and convenience to the
neighbourhood and the country at large, a company was incorporated for making
completing, and maintaining the same, \*under the name of "The Plymouth and Dartmoor Railway Company," and was invested with certain
powers for that purpose. The act provided, among other things, that when the
said railway should cross any turnpike-road or public highway, the ledge or
flank of such railway, for the purpose of guiding the wheels of the carriages,
should not exceed one inch in height above the level of such road: and it is
thereby further enacted, in consideration of the great charge and expense which
the said company must incur and sustain in making and maintaining the said
railway and other the works thereby authorized to be made and maintained;
that it shall and may be lawful for the same company, from time to time, and at

<sup>(</sup>a) See R. v. Ossett cum Gawthorpe, ante, 216.

all times thereafter, to ask, demand, take, recover, and receive, for the use of the same company, for the tonnage of all goods, wares, merchandizes, and other things which shall be carried or conveyed upon the said railway, or upon any part thereof, certain rates and duties therein mentioned: And it is thereby further enacted that all persons shall have free liberty to pass upon and use the said railway, with carts, wagons, or other carriages, properly constructed, as thereinafter mentioned, and to employ the said company's wharfs and quays for loading and unloading such goods and other things, upon payment only of such rates and tolls as shall be demanded by the same company, not exceeding the respective sums therein mentioned, subject to the rules and regulations which shall, from time to time, be made by the said company, by virtue of the powers therein granted. The railway was completed by the company at a great expense, the time being somewhat varied afterwards by an act of 2 G. 4, which it is unnecessary to notice further.

\*By an act, 1 G. 4, c. liv., reciting that a branch railway, to join the Plymouth and Dartmoor railway, and to communicate with certain places there mentioned, would be of public utility, the Railway Company were empowered to make, complete, and maintain such branch railway, and to execute and perform all such works, matters, and things as should be requisite and convenient for that purpose. And it was enacted, that the said statute of 59 G. 3, and the several powers, authorities, directions, restrictions, provisions, rates, duties, and other matters and things therein contained, should be used and exercised by the said Railway Company, and be applied, enforced, and put in execution for making, completing, preserving, and maintaining the said branch railway, and also for making, erecting, doing, and performing all such other works, matters, and things as they should think necessary or expedient for the benefit of such railway, and for defraying the expenses thereof; and should and might also be used and exercised by the owners and proprietors of lands lying near or adjoining to the said branch railway, in such and the like manner, and as fully and effectually, as if the several powers, authorities, restrictions, provisions, rates of tonnage, and other matters and things contained in the same act, had been repeated and re-enacted in the body of that present act, and as if the branch railway and other works, by the same act authorized to be made, completed, and maintained, had been described in the said act passed in the fifty-ninth year aforesaid, as part of the works to be made and done by virtue of that act.

The branch railway was made accordingly, and it crossed the Embankment Company's road in two places; at one of which, on the side of their turnpike \*730] road, the \*company erected a toll-bar. The toll, fixed by the act 43 G. 3, c. xv., was demanded on behalf of the company's lessee (the plaintiff in this cause), from a servant of the defendant, who passed with a wagon on the railway across the Embankment Company's road, and through the turnpikegate. He had paid the regular tolls for passing along the railway. If the Court were of opinion that the plaintiff was entitled to recover, a verdict was to be entered for him for such sum as they should think proper; otherwise a nonsuit. This case was now argued by

R. Bayly for the plaintiff; who relied upon the words of the act 43 G. 3, c. xv. (empowering the Embankment Company to make the road and receive tolls), and contended that the branch railway in question was a way leading into and out of the Embankment Company's road, within the meaning of that act, and across which they were authorized to place bars for the receipt of toll; that there was nothing in the acts for making the principal and the branch railway to supersede this right of the company; and that there could be no argument, on the ground of hardship, against the right of taking toll for merely crossing a road, since the general exemption in this case only existed by an express provision in the Turnpike Act, 3 G. 4, c. 126, s. 32, and that, by 4 G. 4, 95, s. 90, did not extend to roads maintained under acts of parlia-

ment passed for an unlimited period, which was the case with the Embankment road.

Butt, contrà. A railway like this is a public highway. Rex v. The Seven and Wye Railway Company, 2 B. & A. 646; and \*the acts establishing it have given the public a right to pass along it, "upon payment [\*731 only of such rates and tolls as shall be demanded by the Railway Company, not exceeding the sums mentioned" in the act 59 G. 3, c. cxv. That right, according to the settled rules on such subjects, cannot be fettered with a new pecuniary imposition, unless by clear and unequivocal words of an act of parliament. Now, by the act just referred to, the only tolls to be paid on the railway are those demandable by the Railway Company. It is true, that at that time the branch was not formed; but, by 1 G. 4, c. liv., all the provisions of the former act are made applicable to the branch road, as if that road had been therein described; and beyond this there is nothing in the act of 1 G. 4, to impose any charge on the public in respect of the branch road. Besides, the words (43 6. 3, c. xv.) enacting that the Embankment Company may erect turnpikes on their road "in, near, upon, or across any lanes or ways leading, or that may hereafter lead, out of the same, as they shall think proper," does not, by the terms used, apply to public highways, established by act of parliament.

DENMAN, C. J. There is no doubt that parties who seek to burden the public with an imposition of this kind must establish a clear title to do so. The authority here relied upon is in the words of 43 G. 3, c. xv., enacting, that it shall be lawful for the Embankment Company to erect turnpikes for receipt of tolls, upon or across the road to be made by them, and on or near the sides thereof, or in, near, upon, or across any lanes or ways leading, or that may thereafter lead, out of the same, as they shall think proper; and to demand and take at such turnpikes the tolls mentioned in the act. I think \*this, [\*792 if nothing followed, would give a clear right of taking toll for passage upon roads crossing the Embankment Company's road. It is said, indeed, that the clause does not apply to roads made by public authority; but there is nothing in the words themselves to support such a distinction; and although the road in question is made by public authority, it is for the advantage of the company who obtain the act. Then, does the statute 59 G. 3, c. cxv. make any alteration in the case? That only enacts, that all persons shall have liberty to use the railway with carriages properly constructed, upon payment only of such rates and tolls as shall be demanded by the Railway Company, not exceeding the sums mentioned in the act. That appears to me not to take away the former right of the embankment company, but only to prescribe what amount of toll shall be taken by the proprietors of the railway. If it had been intended by the statute to do what would certainly be a violent act, namely, to deprive the Embankment Company of tolls which they before enjoyed in the manner here suggested, that purpose would, I think, have been more clearly expressed.

EITTLEDALE, J. I think the clause imposing the tolls in 43 G. 3, c. xv., extends to all roads, whether made by private individuals or by authority of parliament. If it was meant that any kind of road to be thereafter made should be exempted from the tolls granted to the Embankment Company, that should have been done by express words. I am also of opinion, that those tolls are not taken away by the subsequent act, which gives liberty to all persons, with carriages of a certain description, to use the railway, on payment only of the tolls "there mentioned. The object of that enactment is only to point out payment only of the tolls that persons shall use the railway, and what they shall pay the Railway company for so doing. It is true that, if plaintiff's claim is well founded they cannot cross the Embankment Company's road without paying other tolls; but we cannot, on that account, say that the Railway Act takes away the tolls

before granted to the Embankment Company.

PARKE, J. I am of the same opinion, though I have entertained some doubts. I agree in what has been urged, that the Embankment Company, as

a private body, could not acquire the rights in question against the public unless the legislature expressly gave them. The clause which has been relied upon by the plaintiff in 43 G. 3, c. xv. does clearly give such rights; the only question is, how far they operate upon roads afterwards made. There is no doubt that if the Railway Company had by contract, without the intervention of parliament, acquired the power of making their road to lead into the embankment road, that would have been a way within the express meaning of the clause in question. But it is necessary to go a step further. A railway leading into that road is made by an act of parliament, which confers certain rights upon the public: and the question then is, as to the effect of the former act upon such new public way. Upon this point I had some doubt; but I am of opinion that unless the subsequent act expressly takes away the vested right which the Embankment Company had in the tolls before granted, the public are not entitled to cross their road without paying toll. Then, what is there to give the public that right? The liberties they are to enjoy in respect of the principal \*railway are stated in the act 59 G. 3, c. cxv.; and although that clause \*734] is not expressly re-enacted, as to the branch road, in 1 G. 4, c. liv., yet this latter statute provides that the several powers, authorities, directions, restrictions, provisions, rates, duties and other matters and things, contained in the first Railway Act shall be used and exercised by the Railway Company, and shall be applied, enforced, and put in execution, for making, completing, preserving and maintaining the branch railway, and for doing what shall be necessary for the benefit and for defraying the expenses thereof, as if the several powers and authorities, rates and other matters, contained in the former act, had been re-enacted in this, or as if the branch railway had been described in that act. The latter act, therefore, incorporates and explains the clause in question in 59 G. 3, c. cxv. I think that clause was merely a bargain between the Railway Company and the public, that the public should use the railway upon certain terms, but not subject to any greater tolls than were stated in the act. The company were to be prevented from enhancing the duties above the original rate. But this does not enable persons to cross the road of another company without paying the rates before claimable by them; and unless the act did take away the vested right of that company, the public would not be entitled to resist the present demand. On the whole, therefore, I agree that the plaintiff ought to recover.

Postea to the plaintiff.

\*735] \*OGLE v. STORY, Gent., One, &c. April 29.

Held, that the attorney might enforce his lien on the deeds against A. to the whole extent of the bill; and that A. having been obliged to pay it for the purpose of re-leasing the deeds, could not recover back from the attorney the amount unduly charged.

Assumpsit for money had and received, &c. At the trial before Lord Tenterden, C. J., at the sittings in London after Trinity term 1832, the facts of the case appeared to be as follows:—The plaintiff had purchased an estate upon which one Fullwood held a mortgage, with a proviso for re-conveyance to the mortgagor, his assigns, &c., at the costs and expenses of the mortgagor, on payment of principal and interest. The plaintiff afterwards contracted to sell the estate, clear of the mortgage, to a Mr. Pemberton, and a day was appointed for completing the purchase. The plaintiff sent a release of the mortgage to the de-Vol. XXIV.—21

A. purchased premises which were mortgaged to B. with a proviso for re-conveyance, at the costs of the mortgagor, on payment of principal and interest. A. sold the premises, and was to pay off the mortgage on the completion of the purchase; but B.'s attorney, who held the title-deeds, would not deliver them to A. till his own bill was also paid. The bill contained some items fairly chargeable on the occasion as costs due from the mortgagor, and others which were properly payable by the mortgagee:

Held that the attorney might enforce his lieu on the deeds against A. to the whole extent

fendant, who was the mortgagee's solicitor, for approval, and also requested several times to know what would be the amount of his bill of costs on the re-conveyance of the premises; but no bill was sent till the parties met for the completion of the purchase, as appointed. The defendant's clerk then attended and brought with him the deeds which Fullwood held as mortgagee, and the defendant's bill of costs. The plaintiff's brother, who acted as his solicitor, observed that the bill was large, and that its correctness could not be ascertained then; and he asked if payment was required at that time. The clerk said his instructions were to receive the money. The plaintiff's solicitor then said that he would pay it if he was obliged to do so, but should reserve the right of taxing it on a future occasion. The bill \*was then paid, the purchaser, with the [\*736 assent of all parties, giving one check, in part of the purchase-money, for Fullwood's principal and interest, and the defendant's costs. The clerk gave the following receipt:—"Received of Mr. Pemberton, by the direction of J. W. Ogle, Esq., (the plaintiff,) the sum of," &c. "for costs, as by bill annexed." The deeds were then handed over, and the purchase completed. The plaintiff having afterwards ascertained that the bill was not such as a mortgagor could fairly have been called upon to pay (which was admitted at the trial,) brought this action to recover back the excess, which he had been compelled to pay in order to obtain possession of the deeds. For the defendant it was insisted, that, as an attorney holding deeds of his client, he had a lien upon them for the whole of his bill of costs, against all the world; that it was immaterial to him by whom the bill was paid, but without payment he was not bound to hand them over, or even bring them to the meeting; that the complaint was, not so much that the bill was exorbitant, as that a mortgagor ought not to pay it: if the bill was in itself excessive, that was a question between Fullwood (the mortgagee) and the defendant; and the present action if maintainable by the plaintiff, should have been brought against Fullwood himself. Lord Tenterden, however, was of opinion that the plaintiff was entitled to recover, and he directed a verdict accordingly, but gave leave to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

Sir James Scarlett and Platt now showed cause. The defendant could not enforce any lien for more than the amount he was entitled to receive from the plaintiff; \*and that amount is measured by the terms of the mortgage [\*\*737 deed. When the mortgage was redeemed, the deeds in question were no longer Fullwood's. As soon as his principal, interest, and reasonable costs were paid, he was bound to hand them over. The defendant then could not claim to retain one man's title-deeds for another's debt. His lien upon them was commensurate with Fullwood's right. Whether the defendant's charges were just or not, as between him and Fullwood, is nothing to the plaintiff. The defendant might have desired the plaintiff to settle the costs with Fullwood, who could not have claimed more of the plaintiff than the proper costs as between these parties; but, instead of that, he has chosen to stand in Fullwood's place, and receive the costs himself from the plaintiff. He was not, then, entitled to de-He made himself, in fact, his mand more than would have satisfied Fullwood. agent in that transaction. [PARKE, J. Fullwood had a legal interest in the deeds, and might pledge them. He did pledge them with his own attorney for the amount of his bill. Could not the attorney retain them till that was paid?] He knew, when he received them, what was the extent of the depositor's interest. If the defendant is not liable in the present action, there is no opportunity of taxing his bill; and that might be alleged by Fullwood, if the plaintiff

sued him on account of these charges.

F. Pollock and Kelly, contrà, were not heard.

DENMAN, C. J. It is not contended that the mortgagee had not a right to pledge these deeds. Then a party who takes property subject to a mortgage, must \*ask where the title-deeds are: he must take care to secure himsolf. It makes no difference that the person with whom they are pledged
was the mortgagee's attorney. The rule must be absolute.

LITTLEDALE, J. I am of the same opinion. The plaintiff should have ascertained before in whose hands the deeds were.

PARKE, J. The defendant had a lien for the amount to which he was entitled against Fullwood. He, as mortgagee of the property, was competent to pledge the deeds with the defendant for that sum. The fact is, that the plaintiff has overpaid Fullwood; and he should have taken his remedy against him.

Rule absolute.

# \*739] \*JOHN NURSE and MARY, his Wife, J. HARRIS, and Two Others v. C. WILLS, Gent. One, &c. April 29.

Declaration by husband and wife, stated that by agreement between the plaintiffs and the defendant, - reciting that one J. L. had been arrested at the suit of the plaintiffs; that the defendant had become bail to the sheriff; that the bail had been forfeited; and that J. L. had given a cognovit for the debt and costs,—it was understood and agreed between the plaintiffs and defendant, and the defendant undertook and promised, in consideration that the plaintiffs would not enter up judgment, or sue out execution against J. L. until a certain day, that he, the defendant, would render J. L. on that day, or, in default, pay the debt and costs. Averment, that the plaintiffs had not entered up judgment or sued out execution against J. L. before that day. Breach, that the defendant did not render J. L. on the day, or pay the debt and costs:

Held, on motion in arrest of judgment, after verdict for the plaintiffs,

First, that, as the agreement was stated to be with the plaintiffs, the promise must be

taken, after verdict, to have been made to them.

Secondly, that it sufficiently appeared that the wife had a joint interest, because the recital in the agreement of a cognovit by J. L. to all the plaintiffs, was an admission by the defendant of such joint interest.

Thirdly, that, though the agreement by the wife was void, it might be rejected as surplusage, and that the count would then be good, as stating a promise to pay the debt and costs to the plaintiffs, in consideration that they would not enter up judgment, or sue out execution until a given day.

THE declaration stated, that, by agreement between the plaintiffs and the defendant,-reciting that one James Lang had been arrested at the suit of the plaintiffs; that the defendant had become bail to the sheriff; that the bail bond had been forfeited; that Lang had confessed the action, and damage sustained by the plaintiffs to the amount of 2001, and had consented that judgment should be entered up, and execution should issue for the debt and costs due to the plaintiffs from Lang,—it was agreed between the plaintiffs and the defendant, and the defendant undertook and promised, in consideration that the plaintiffs should not nor would enter up judgment, or sue out execution, or proceed further in the suit, or take any further steps therein against Lang, the sheriff, or the bail, until a certain day,—that the defendant should render Lang on that day, so that the plaintiffs might have the full security of his body, or, in default, \*740] should pay to the plaintiffs 137l. 15s. 2d., \*being the debt and costs aforesaid. The declaration then proceeded to state a further agreement between the plaintiffs and the defendant, that the time for rendering Lang should be extended to the first day of Easter term, it being fully understood, and the defendant, in consideration of the premises and of such extension, promising and agreeing that he, the defendant, would render Lang on the lastmentioned day, or, in default thereof, would pay to the plaintiffs the abovementioned sum, being the debt and costs aforesaid. The declaration then stated a further agreement between the said parties, in similar words, to extend the time until the first day of Trinity term. It then stated, that the plaintiffs had not entered up judgment, nor sued out execution, nor proceeded further in the said suit, until the first day of Trinity term, nor hitherto; and assigned for a breach, that the defendant had not rendered Lang, nor paid the plaintiffs the said sum of money.

In a second count, the two extensions of time were omitted; and it was stated that, in consideration that the plaintiffs should not nor would enter up judgment or sue out execution, or proceed further in the suit against Lang, the sheriff, or the bail, until the 20th of February, the defendant undertook, &c. that he would then duly render Lang into custody, or, in default, pay the said sum to the plaintiffs, being the debt and costs in the said action; and a similar

breach was assigned.

Judgment having been signed after a verdict for the plaintiffs, with general damages, a rule nisi was obtained for arresting the judgment, on the ground that one or both of the counts were bad; first, because the promises upon the extensions of time mentioned in the first count were not averred to have been made to the \*plaintiffs: and secondly, because the consideration for the promises in each count, supposing them rightly stated, was an agreement by the wife, jointly with her husband and others, and, as she was not capable of making a contract in point of law, she ought not to have joined in the action.

Kelly and Hayward now shewed cause. It may be collected from the decisions that, wherever the action will survive to the wife, the husband and wife may join. Now, here, Lang, by his cognovit, admitted the joint interest of the husband and wife, and that would have survived to her. In debt on bond made to the wife during coverture, Howell v. Maine, 3 Lev. 403, (see 1 Selv. N. P. 288, n. (12,)) or in assumpsit on a promissory note given to the wife during coverture, Philliskirk v. Pluckwell, 2 M. & S. 393, husband and wife may join. So, where husband and wife have recovered judgment on a bond made to the wife dum sola, husband and wife may join in an action on such judgment, or husband may sue alone, for that which was before a chose in action transit in rem judicatam, and is of another nature from what it was before the coverture, Woolverston v. Fynnimore, Trin. 18 & 19 G. 2; 1 Selv.

wyn, N. P. 288.

The Solicitor General and White, contra. The first count is bad; first, because no promise to the wife is alleged: there is nothing but a promise resulting in law, and that is to the husband. In Buckley v. Collier, 1 Salk 114, it was held, that the husband must sue alone for work done by the wife during coverture, unless an express promise to the wife be alleged. PARKE, J. That was \*on demurrer: here, the agreement is stated to have been [17742] between the plaintiffs and defendant, and that being so, the promise, after verdict, must be taken to have been made to them.] It does not appear that the wife here had any joint interest which would have entitled her to maintain the original action. [PARKE, J. The cognovit is given to all the plaintiffs and that being recited in the agreement to which the defendant is a party, is a sufficient admission of the joint interest of the wife.] Assuming that to be so, this differs entirely from the case of a bond or promissory note given to the wife while sole, because she is then capable of contracting; the action here is brought on a contract which the wife, under coverture, was incapable of making, for a married woman cannot contract; a promise, express or implied, gives no interest to her; the whole results to the husband, and the action ought to be brought in his name; Bigwood v. Way, 2 Bl. Rep. 1236. A feme covert cannot even have goods with her husband, Abbot v. Blofield, Oro. Jac. 644. In this case it is necessary to state a consideration for the promise, and that distinguishes it from Philliskirk v. Pluckwell, 2 M. & S. 393, where it was held, that husband and wife might sue on a promissory note made to the wife during coverture. Here, the forbearance to enter up judgment, or sue out execution, was the act of the husband, and not of the wife. In Rumsey v. George, 1 M. & S. 176, Lord Ellenborough said, "A consideration of forbearance by the husband is a consideration arising during coverture, and expressly moving from the husband, who has the power of immediately enforcing the claim; and is, therefore, sufficient to support a promise made to \*him alone, who is the instrument of forbearance." [PARKE, J. May not what is alleged to be the contract of the wife be treated as wholly void? In Brashford v. Buckingham, Cro. Jac. 205, assumpsit was held to lie by husband and wife, on a promise, in consideration that she would cure a wound, it being alleged that she had cured it.] There the cure was the act of the wife. Here, the forbearance is the act of the husband. If the agreement with the wife be rejected as surplusage, the right of the wife is entirely gone. In Yard v. Eland, 1 Ld. Raym. 368, where a debtor to the wife as executrix, promised to pay to the husband, in consideration of the husband's giving time, it was held that the husband ought to sue alone, because the wife was not a party to the agreement between him and the defendant. So, here, if the agreement with the wife be considered as struck out of the declaration, she is improperly joined, not being a party to the husband's promise to forbear.

\*\*Cur. adv. vult.\*\*

DENMAN, C. J. now delivered the judgment of the Court. After stating the substance of the two counts in the declaration, his Lordship proceeded as

follows :---

It was argued that both the promises on extensions of time in the first count were insufficiently stated; because no promise to the plaintiffs was averred in either; but on the argument, the Court intimated its opinion, that, as the agreement in both cases was stated to be with the plaintiffs, the promise must be taken, after verdict, to have been made to them.

It was then objected that, even supposing the promise to have been made to \*741] the plaintiffs, the count was bad \*in law. It was not disputed that, where a wife is the meritorious cause of action, or there is a consideration moving from her, the husband and wife may join; that they might have joined in an action upon a judgment obtained by both;—but it was insisted, first, that a joint interest in the wife was not stated with sufficient clearness: and secondly, that, as the consideration in this case was an agreement by the wife (jointly with her husband and others), and as she was incompetent to agree in point of law, the consideration was altogether void.

The first objection was disposed of by the Court in the course of the argument: it is clear that the cognovit by Lang to all the plaintiffs, which is recited in, and admitted by, the agreement, is a sufficient admission by the de-

fendant of a joint interest in the wife.

With respect to the second objection, the agreement by the wife is undoubtedly void; but it does not follow that the count is therefore bad. It states an agreement by all, and then a promise by the defendant, in consideration of the plaintiffs not taking out execution until a certain time. Supposing all mention of the agreement had been omitted, and the count had stated that the defendant had promised to pay to the plaintiffs, in consideration that they should not nor would take out execution until that time, and that no execution was accordingly taken out, would not such a count have been good? Or, supposing that the mention of the wife's agreement had been omitted, and that of the other parties stated, and that the consideration for the promise had been alleged, as before, to be the forbearance of the plaintiffs to sue out execution; -would such a count be objectionable? In either case, the forbearance by all is \*a sufficient consideration for the promise; and it is not rendered less sufficient by the addition of the agreement of all, which, in point of law, would be binding on all the plaintiffs, except the wife. The same reason applies to the other parts of the first count, which state the agreement of all to extend the time, and the promise by the defendant in consideration of the premises, that is, of such agreement of such extension. In each part, there is a sufficient consideration moving from the wife, as well as the other plaintiffs, namely the forbearance by all, and the extension of the time by all; and this cannot be vitiated by the additional averment that all agreed; which, on the face of the declaration, would amount, in law, to the agreement of all but the wife. For these reasons, we are of opinion that the first count is good, and if so, the second is equally unobjectionable.

Judgment for the plaintiffs.

#### WILLIAM TUCKER, surviving Executor of GEORGE TUCKER, v. EM-MELINE TUCKER, Executrix of CHARLOTTE TUCKER. April 30.

8. gave a bond, conditioned for the payment of money. The obligee made C. his executrix and residuary legatee, and died. C. proved the will, assented to the bequest, and died, not having fully administered, leaving E. executrix of the executrix C., in trust for her (E.'s) own benefit. A sum due on the bond in the first testator's time remained unpaid. C., during her lifetime, in consideration of a marriage about to take place between her and the father of S., gave a bond to a trustee, conditioned for payment of a sum of money to the use of S. if C. should marry and survive her intended husband. She did marry and survive him, and the money not having been paid in her lifetime, the trustee's executor sued E., the executrix of C., upon that bond:

Held, that in this action the claim of E. upon S.'s bond could not be set-off.

Quære, Whether an equitable demand can be set-off at law? Per Littledale, J., it cannot

DEBT on bond of the 16th of November, 1774, in the penal sum of 400l, given to George Tucker the testator, by the testratrix Charlotte Tucker, then Charlotte \*Smale, but who afterwards intermarried with William Tucker, and survived him. The bond, which was set out on oyer, recited that a marriage was about to be solemnized between William Tucker and Charlotte Smale, and that the said Charlotte, in consideration thereof, and of the settlement to be made upon her by the said William, had agreed, in case such marriage should take effect, and she should survive the said William, to pay to George Tucker, his executors, &c., within twelve months of William's death the sum of 200l., upon trust, for the sole use, benefit, &c. of Sarah, daughter of the said William, her executors, &c.; and the bond was conditioned for the payment of that sum to George Tucker as agreed, upon trust for such use, &c., in the above events. The defendant pleaded non est factum, and several other pleas, the last of which was a set-off in substance as follows:—

"That the said Sarah Tucker, by her writing obligatory on the 23d of May, 1791, acknowledged herself bound to one William Tucker, deceased, in the penal sum of 490l., on condition that, if she duly paid certain annual sums during the periods there specified, to the said William Tucker in his lifetime, and to his executors, &c., after his death, the said writing obligatory should be That there was due from the said Sarah Tucker to the said William Tucker, on the 25th of March, 1796, the sum of 160L; that he, by his will, bequeathed all his personal estate to the said Charlotte Tucker, and appointed her executrix; that he died in 1817; that she proved the will and assented to the bequest; that at the commencement of this action 2001. only was due upon the writing obligatory in the declaration mentioned; and that at that time "there was, and still is, \*due and owing to the said defendant as executrix of the said Charlotte Tucker, who was executrix of the said William Tucker, in trust for the benefit of herself, the said defendant, as executrix of the said Charlotte Tucker, for and on account of the said sum of 160l. and interest thereon, a large sum of money, to wit the sum of 440%, which said sum of money so due and owing upon the said writing obligatory of the said Sarah Tucker exceeds the moneys due and owing from the said defendant, executrix as aforesaid, to the said plaintiff, executor as aforesaid, upon the said writing obligatory in the said declaration mentioned, by the condition thereof, &c."

To this plea there was a special demurrer, assigning several grounds, and, among others, that it does not appear by the plea that any interest was due or payable to the defendant as executrix, &c. for the said sum of 160l.; that it is not alleged in the plea from whom the 440l. therein mentioned is due to the

defendant, executrix as aforesaid; that it appears by the plea that the said supposed debt of 440l., if any such there be, is due to the defendant as executrix of the said Charlotte Tucker, who was executrix of the said William Tucker, and is attempted to be set off against a debt due from the said defendant as executrix of the said Charlotte Tucker: and that the said plea attempts to set off against the debt claimed by the plaintiff, a debt which cannot by law be set

off against it. Joinder in demurrer.

Erle, in support of the demurrer. A mere equitable interest cannot be set off; and the attempt here is to set off one equitable interest against another. The defendant in her plea treats the plaintiff as trustee for Sarah Tucker, in \*748] respect of the claim advanced in \*this action; and she also, in the same pleading, acknowledges the debt which she sets off to be due to herself in trust. Now, in the first place, she has no right to treat Sarah as the real plaintiff on a bond given to George Tucker as trustee for Sarah. Bottomley v. Brook, 1 T. R. 621, and Rudge v. Birch, 1 T. R. 622, will be cited on the other side; but in those cases the interest of the cestui que trust was not merely equitable. In Bottomley v. Brook the bond was given to the plaintiff by the direction of E. Chancellor, to secure to her, Chancellor, a sum of 100%, which she had lent the defendant, the obligor, and for which, therefore, she had a legal cause of action. The trust was founded on a liability known to the courts of law, and capable of being enforced there. The same observations apply to Rudge v. Birch. And the law laid down in those cases has been looked upon with jealousy since. In Wake v. Tinkler, 16 East, 86, Lord Ellenborough said he was "much more inclined to restrain than to extend the doctrine of those cases;" and Bayley, J., said "We have nothing to do in this place with any other than legal rights." In Carpenter v. Thornton, 3 B. & A. 52, it was held that a decree in chancery, founded merely on an equitable obligation and not upon any legal liability, could not be enforced by action at law. Secondly, the claim which is the subject of set-off in this case is not in respect of anything actually due to any supposed cestui que trust. Charlotte was executrix and residuary legatee; if she had got in all the property and discharged the debts, and there had then been a residue, her legatee might have been a cestui que trust for that residue; but this is not shewn to have been \*done, either by Charlotte or by the defendant. Under those circumstances the defendant appears only as executrix of an executrix, and, as such, executrix of the original testator. The debt she now sets up is merely a chose in action, demandable originally by William Tucker, and then by Charlotte and the defendant successively, as his personal representatives. When, therefore, the defendant attempts to set off this debt against a claim upon herself as executrix of Charlotte Tucker, it is setting off a debt due in auter droit, which cannot be done. The ultimate interest which the defendant herself might have is but the merest equitable right. Besides, this is not a case in which interest could be claimed; Higgins v. Sargent, 2 B. & C. 348; Page v. Newman, 9 B. & C. 378; and if so, the set-off actually maintainable would at all events be insufficient in

Follett contrà. At any rate, 160l. is claimable. There is no doubt that the bond declared upon as given to George Tucker was in reality given for Sarah; nor that Sarah is the debtor upon that bond on which the set off arises; and the persons actually interested in the debt so set off, after the death of William Tucker, were, first Charlotte, and then the defendant. The plaintiff has no interest in the bond declared upon, except being the party in whose name the action upon it is brought. Then, when a mere trustee sues a trustee, may not the latter set off a debt due to his cestui que trust? On this point Bottomley v. Brook, 1 T. R. 621, and Rudge v. Birch, 1 T. R. 622, are authorities which \*750 have never been overruled. \*[PARKE, J. In Scholey v. Mearns, 7 East, 153, a case is referred to by counsel which is said to have overruled them.] It was also said in argument, in Coppin v. Craig, 7 Taunt. 243, that

the decision in Bottomley v. Brook had been much questioned; but both cases are treated as authority in Wake v. Tinkler, 16 East, 36; and Ashhurst, J. so considers them in Winch v. Keeley, 1 T. R. 619, where they are first cited. In the present case as in Bottomley v. Brook and Rudge v. Birch, the plaintiff has the legal interest and no other; the beneficial interest is in the cestui que trust, and that interest was taken notice of by the Court in the two last mentioned cases. The courts of law did not formerly notice trusts, but of late years, when they have come in question, the disposition has been, not to send parties to the other side of the hall if the justice of the case was manifest. Carr v. Hinchliff, 4 B. & C. 547, and other cases of the same class, show that the Court will take notice of the real debtor, where the action is brought in the name of another party, and will allow a defendant to set off a debt due to him from any person who may be identified with the plaintiff; Coppin v. Craig, 7 Taunt. 243, is a similar case. [PARKE, J. The plaintiff in Carr v. Hinchliff had allowed another person to appear as the real contracting party. That is the ground of decision there, and in other similar cases, as George v. Clagett, 7 T. R. 359, Rabone v. Williams, 7 T. R. 360, note (a).] As to the argument that the defendant here is setting off a debt in auter droit, the law on that subject is not disputed; but the defendant does not claim as executrix, \*to set off what would be assets of the testator: her case is that she has a beneficial [\*751] interest of her own, which entitles her to set off in her own right.

DENMAN, C. J. It is enough to say that the set-off contended for in this case goes beyond the authorities of Bottomley v. Brook, 1 T. R. 621, and Rudge v. Birch, 1 T. R. 622. Charlotte Tucker was only an executrix who was residuary legatee and had assented to the bequest: non constat that she or the defendant might have any beneficial interest at all in the debt attempted to be

set-off.

LITTLEDALE, J. I think Bottomley v. Brook, 1 T. R. 621, was not properly decided, and that under the statutes of set-off the Court can only notice an interest at law. In George v. Clagett, 7 T. R. 359, the defence was not a set-off under the acts of parliament, but was an answer to the action upon the general issue, that the defendant did not undertake or promise, &c. So it is where the contract has been made with a factor, who was the representative of the party afterwards suing, and who might himself have been the plaintiff in the cause. But in the action upon this bond the defendant could have no benefit of set-off except under the statutes, and the present case is not within them.

Parke, J. This case must be governed by the statute 2 G. 2, c. 22, s. 13, which enacts, "that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the \*testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar," so that in the former case notice be given of the particular sum or debt intended to be insisted on. The object was to prevent cross actions. If the words of the statute had been looked at, Bottomley v. Brook, 1 T. R. 621, and Rudge v. Birch, 1 T. R. 622, would hardly have been decided as they were. At all events the doctrine of those cases is not to be extended; and the present case certainly goes beyond those, for there was no debt due from Charlotte Tucker to Sarah Tucker, before the bond was given to the plaintiff's testator as her trustee.

Judgment for the plaintiff.

### BODDINGTON and DAVIS v. SCHLENCKER. May 1

By the usage in the city of London, a person receiving a check with his banker's name written across it, pays it in at the banker's, and the banker, if he receives it in time,

presents it at the clearing-house, and obtains payment the same day. A debtor paid his creditor by a crossed check, and the latter, on the same day, transmitted it to his banker. The banker negligently (as was alleged) omitted to present it at the clearing-house in time for that day (when it would have been paid), and on the next it was dishonoured, the firm on which it was drawn having stopped payment:

Held, that the supposed negligence of the banker, though it might render him liable to his customer, did not discharge the drawer; the holder of the check being entitled, by the general law, to present it the day after he receives it; and no custom of the city being proved, as between debtor and creditor, that a crossed check, if received by the latter and sent by him to his banker in sufficient time, must be cleared the same day.

Assumpsir for non-payment of a check, made by the defendant, payable to the plaintiffs or bearer. Plea, non-assumpsit. At the trial before Lord Tenterden, C. J. at the sittings in London after Trinity term 1832, the facts appeared to be as follows: - Messrs. Boddington and Davis sold sugars to the \*753] defendant, to be paid for on the 28th of March 1831. On Saturday, \*the 26th of that month, between one and half-past one, the defendant gave them in payment a check dated the same day, drawn by him on Messrs. John Bond, Sons and Pattisal, for 8301. Across the face of the check he had written the name of Martin and Co., who were the plaintiffs' bankers. A check so crossed, if presented by any person but the banker whose name is written across, is not paid without further inquiry. On the same 26th of March the plaintiffs paid the check into the hands of Mr. Stone at the house of Martin, Stone, and Co., about seven minutes before four o'clock. Martin and Co. did not present it at the clearing-house in time to be paid that day, but it was presented to Mr. Pattisal, and he put his initials upon it. If it had been presented in time for payment that day, it would have been paid; Bond, Sons and Pattisal never opened their house after the 26th: they stopped payment on the 28th; the check was therefore not presented, and was never paid, of which the defendant had due notice. Bond and Co. afterwards became bankrupt.

The clearing-house at which the bankers' clerks meet to exchange their checks is in Lombard street; Martin's and Co. is in the same street. The practice is, that each banker sends to the clearing-house the checks upon other bankers which he receives in the course of the day; they are there delivered to a clerk of the firm on which they are drawn (each house having a clerk in attendance there for the purpose), and he enters them in a book to the credit of the bankers paying them in. When the clock at the clearing-house strikes four, no more checks are taken; and at the end of the day the clerks settle their balances; if a check comes too late \*for the clearing-house, it is usually sent to the bankers' on whom it is drawn, and they mark it with their initials, which is considered an undertaking to pay it the next day; it not being usual for bankers to pay each other after four. The defendant gave evidence for the purpose of shewing that, by an established usage in that business, a banker, receiving a check upon another, was bound to pass it at the clearing-house the same day, if there were time; and that, under the circumstances of this case, Martin, Stone and Co. had time to clear the check in question. On this point it was stated that a check paid in at the banker's, and requiring to be cleared, must be entered in two books at least, before it is sent out; it has then to go to the clearing-house and to be there entered in a third; if Martin and Co. had had only a single check to clear, it would have been in time though paid in as late as seven minutes before four; but Mr. Stone stated that, on the 26th of March, 1831, they had ninety-one checks paid in shortly before, and after, four o'clock, including the check on Bond and Co.; and that all of these were too late to be cleared. The question when a check should be considered as too late, or in time to be cleared, did not appear to be settled by any positive rule; but, under the present circumstances, Campbell, for the defendant, contended that Martin and Co. had been guilty of laches in not passing the check at the clearing-house, and that having, after such default, accepted the undertaking of Bond

and Co., for payment on the Monday, they had made the check their own and discharged the defendant. Lord Tenterden, in summing up, told the Jury that the plaintiffs must suffer for the neglect of Martin and Co. their agents, if \*they had not done their duty; and that the question was, whether or the check was paid in to Martin's and Co. in time for them to have that if the clearing-house. He observed upon the evidence of Mr. Stone, that if that gentleman spoke the truth, there was not time to pass the check, and then there was no laches on the part of Martin and Co., and the defendant was not relieved from liability. The jury found a verdict for the defendant. In the following term Sir James Scarlett obtained a rule to shew cause why there should not be a new trial, on the ground of misdirection; contending, that as the plaintiffs themselves were not obliged to present the check till Monday, their agent could not have been guilty of laches in not procuring

payment on Saturday; and this should have been stated to the jury. The Solicitor-General and Comyn now shewed cause. Martin and Co. were guilty of negligence, and the loss must fall upon them, not the defendant. It is true that, by the general custom, if a party keeps a check in his own hands, he need not present it till the following day; but there is a custom also that if he receives a cross check and hands it to his banker, the banker (if it comes in sufficient time) must present it the same day; the custom, and that only, rules in each case. Its existence is a matter of fact to be determined by the jury. [PARKE, J. Assuming the custom, each way, to be as it is stated, the debtor has no right to presume that one course or the other will be adopted; it is at the option of the party receiving the check.] If a bill of exchange is payable at a day certain, the holder has his option whether he will present it for acceptance or not in the mean time; but if he does, and acceptance is \*refused he must give notice to the drawer or indorser, or lose his remedy by [\*756] omitting to do so. What is due diligence, in general, may be a mixed question of law and fact; but where this depends upon the custom of trade in a particular place, the jury must decide it. Appleton v. Sweetapple, Bayley on Bills, 239, Hankey v. Trotman, 1 W. Bl. 1. Local customs have been held good with respect to insurances and may at least have equal authority in the case of bills. [LITTLEDALE, J. How far do you say the custom in this case extends?] To all the bankers in the city who use the clearing-house. Robson v. Bennett,? Taunt. 388, which may be cited on the other side, it is no authority against the defendant, but rather the contrary; for there the custom of the city bankers was complied with as far as the circumstances allowed; the plaintiffs' bankers did not receive the check till after four, and they sent it that day to be marked for payment by the bankers on whom it was drawn, and presented it on the following day at the clearing-house. Lord Tenterden, in the present case, considered the custom as established, and only left it to the jury whether there had been sufficient time to clear the check. [PARKE, J. There may be a custom of the nature contended for, as between the banker and his customer, but whether it prevails between the creditor and debtor is a very different question; and that distinction should have been pointed out to the jury.] The check was a bill of exchange payable on demand; if the bankers received it, and neglected their duty in presenting it, they have their remedy against the drawer; but they are bound to give credit to the customer from whom they took it, and \*he, therefore, must be considered as having received payment from the party who drew and delivered it to him. [PARKE, J. If the customer had given the bankers a bill payable on the same day, with a special direction to present it at ten o'clock, in which case it would have been paid, and they had not presented it till five, would that have discharged the drawer? The question is, whether this supposed general custom amounts to anything more than such a direction by the customer.] A banker is not a mere porter, he is a holder; he would have a lien. A porter or clerk has no interest in the sum delivered to him; he is to carry the very paper or money—he is the mere conduit. But a banker receives

a bill or check as his own, subject to an account for the proceeds. Martin and Co. were to place the amount of the check to the plaintiffs' credit. If the plaintiffs' account with them had been overdrawn, Martin and Co. would have received the amount of this check for their own benefit. [PARKE, J. You have to make out an exception in the case of bankers receiving a crossed check, to the general rule that a check may be presented the day after it is received.] The question turns entirely on mercantile usage, and that contended for, and which has been recognised by the jury, is not unreasonable. The custom of the clearing-house (and presentment there, at all is merely matter of custom) is perfectly understood between the debtor and the creditor; the latter knows, if a check is sent to him crossed, that the earliest payment is to be obtained by presenting it, through his banker, at the clearing-house the same day. If he takes the step authorized by custom for obtaining that early payment, he must abide the consequence as between himself and the debtor, if he fails to do all that the \*758] custom requires. \*If the banker is in fault, the consequence falls on him and he must seek his remedy against the debtor.

Sir James Scarlett (with whom was F. Robinson), contra. The Lord Chief Justice misdirected the jury, in not telling them that the plaintiffs had a right to present the check at any time during Monday. (Here he was stopped by the

Court.)

DENMAN, C. J. I am of that opinion; and I may also say that, in order to support the defendant's case, the custom relied upon ought to be much better

established, as between debtor and creditor.

LITTLEDALE, J. The rule in question may exist, as between the banker and his customer, and may be regarded as a convenient practice settled between them, rather than as a custom. I must say, although it is not now the subject for our consideration, that I think seven minutes not a reasonable time for a banker to enter a check and send it to the clearing-house, or else to be liable for the consequences in case of default. But, at all events, the custom contended for is not established as between the creditor and his debtor. Boddington and Co., as holders of the check, had a right to present it at any period of the day after that on which they received it. That has been held a reasonable time; and I do not see upon what principle it can be contended that, under the circumstances of this case, the rule so established ought not to prevail. Boddington and Co., if they had held the check in their own hands, were not bound to present it before Monday; and, if they had not, the defendant would have been in the same situation as he is now.

\*PARKE, J. There is no doubt that the receiver of a check has till the close of the banking hours on the following day to present it. It is said, however, that there is a particular custom qualifying this rule. The question on that point was not distinctly submitted to the jury, inasmuch as the difference between the usage as affecting the relation of creditors and debtors, and that of customer and banker, was not pointed out: if it had been, I should say that the jury had come to a wrong conclusion on the evidence. The custom contended for, if it could be supposed set out on the record, would appear a very complicated one. It would be a custom as between debtor and creditor, that if the creditor receives a crossed check from his debtor, he is not bound to present it till the following day; but that if he hands it to his own banker on the same day, within a reasonable time before four o'clock for the banker to send it to the clearing-house, and the banker neglects to do so, the creditor is answerable for that neglect, as between himself and the debtor, and the debtor is discharged; or that the banker becomes a holder in this special situation, that if he does not present the check at the clearing-house before four, the debtor is discharged, and the banker must take the consequences of the non payment. No such custom was established, and it seems to me that the whole of the evidence comes to this point: that if the holder of a crossed check delivers it to his banker on the day he receives it, within a convenient time before the

clearing hours, the banker is liable as between him and his customer for neglecting the usual practice, as he would for disobedience of a special direction to present it for payment on that day; but the respective situations of the \*debtor and creditor are not altered. It comes to the case I put during the argument, that if the holder of a bill places it in his banker's hands on the day on which it is payable, with directions to present it at ten o'clock, and he does not present it till five, in consequence of which it is not paid, that does not discharge the drawer. It has been decided that the holder of a check may present it at any time he pleases during banking hours on the day after he receives it; and it is much the best to abide by that general rule as between creditor and debtor.

Rule absolute. (a)

### WILSON and Others v. WILLIAM HIRST the Elder, and WILLAM HIRST the Younger.

In an action against B. and C. to recover the balance of a banking account which commenced in 1822 and ended on the 1st of November 1831, the right of the plaintiffs to recover depended on the rate of interest which they were entitled to charge by the understanding between the parties during their transactions together. The defendants, to prove their case on this point, proposed to call D., who stated on the voir dire, that he was a partner with B. and C. from 1822 to the 23d of June 1831, and that the partnership accounts as between himself and them were still unsettled. Between the witness's retirement and November 1831, considerable sums had been paid in and drawn out by the defendants, but the general balance had not been materially altered. Since the witness's retirement, B. and C. had asked time of their creditors to pay their debts. General releases inter alia of "all demands" from B. and C. to D., and from D. to B. and C., were executed: Held, that by these releases D. was rendered a competent witness.

Assumpsit on the money counts, and account stated, and for interest. Plea, general issue. At the trial before Alderson, J., at the York Spring assizes 1832, it appeared that the action was brought to recover the balance of a banking account. The balance in the pass-book on the 1st of November 1831 was 4831. 12s. 4d., for which sum the plaintiffs sought a verdict. Their right to recover turned upon the question, at what rate interest ought to be calculated. The account commenced \*in 1822 or 1823, and, in the pass-book, interest at 5 per cent. was charged throughout. The defendants proposed [\*761] to prove that in 1825, after a remonstrance, the plaintiffs agreed to charge only 4 per cent.; that in 1826 it was increased again to 5 per cent., and that in 1827 the plaintiffs promised that they would charge what Messrs. Beckett of Leeds charged, and they offered to prove that Messrs. Beckett charged only 4 per cent. To establish this case, the defendants called Joseph Hirst, who being examined on the voir dire, stated that he was a partner with the two defendants during the period when the above transactions occurred, and that the partnership accounts, as between the then partners, were still unsettled. On his examination in chief he stated, that he ceased to be a partner on the 22d or 23d of June 1831, at which time the balance due to the plaintiffs did not materially differ from the balance on the 1st of November 1831. Since the retirement of the witness from the partnership, sums, to the amount of about 2000l., had been paid by the defendants to the banking-house of the plaintiffs, and nearly the same amount drawn out by the defendants. The defendants had since asked time from their creditors to pay their debts. General releases from the defendants to the witness, and from the witness to the defendants, had been given. The release from the witness to the defendants was of all actions, causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, accompts, sums of money, judgments, extents, executions, quarrels, controversies, tres-

<sup>(</sup>a) The defendant paid the amount of the check, and the cause was not tried again.

passes, damages, and demands whatsoever, both in law and equity, or otherwise howsoever, which against the defendants, or either of them, Joseph Hirst ever \*762] had or might thereafter \*have, &c. It was objected that he was not a competent witness on the ground that a verdict against the defendants would diminish the assets of the partnership, which was the security the witness had against the debts due from the firm; and it was urged, that the firm were in difficulties, and, if so, then this interest must continue till all the debts due from the firm were paid, and was not affected by the releases. It was said, that this had been so determined by Lord Tenterden at Nisi Prius, but the name of the case was not mentioned, and it was not acted upon as an authority. The learned Judge thought that, on principle, the objection was valid, but that the question could not depend on the insolvency of the firm, even if that had been more distinctly made out. He rejected the witness, and the plaintiff had a verdict. A rule nisi having been obtained for a new trial, on the ground that the testimony had been improperly rejected, in the course of this term.

the testimony had been improperly rejected, in the course of this term,

\*Coltman and Cressoell\* showed cause. Joseph Hirst was not a competent witness. The effect of his testimony might be to increase the surplus of the partnership funds, in which he was interested, and the release given by him to his partners does not extinguish his right to that surplus; because it is something which is to arise in future, and it is laid down in Vin. Abr. Release, G. 18, that a future right or possibility which may be released ought to have foundation and original inception, and to be a necessary and common possibility; as stated in Lampet's case, 10 Rep. 50 b, Hoe's case, 5 Rep. 70, b, Briscoe v. Aier, 2 Roll. Abr. 407, tit. Release (A) pl. 23, Neale v. Sheffield, Yelv. 193. There ought to have been, \*in addition to the release, an assignment by Joseph Hirst of all his interest in the partnership effects. Besides, if the defendants obtained a verdict, and the plaintiffs should afterwards bring an action against Joseph Hirst, the judgment entered up on that verdict would be an answer to such action: for if an action is brought against two of three partners, and the defendants recover a verdict, and afterwards a new action is brought against the third partner for the same demand, he may plead the former judgment in answer to the action; because otherwise, if a verdict should be recovered against him, he might call on his partners for contribution, and they would thus be made circuitously to pay the plaintiff, after having obtained a verdict in the action brought directly against them. It is clear, therefore, that the witness has a direct personal interest in the event of the verdict, as he will thereby be furnished with an available defence against any demand by the plaintiffs against It may indeed be said that he has another defence; because, according to the principle of Clayton's case, 1 Mer. 585, the balance due when the witness ceased to be a partner, must be considered as discharged by the subsequent payments which the defendants have made to the plaintiffs. But this is no answer to the objection. It depends on circumstances whether that will be a defence or not; and in consideration of law it cannot but be an advantage and benefit to him that a verdict should be obtained by the defendants, since that verdict will form a clear legal answer to a demand which, it is admitted, did once exist against him, and to which it is by no means certain that he has any other de-\*764] fence; for \*the rule in Clayton's case, 1 Mer. 585, is but a rule of evidence, and such evidence is liable to be controverted even by slight circumstances.

F. Pollock and Starkie contra. Joseph Hirst was a competent witness, first, because, from the course of dealing between the plaintiffs and the defendants, and the payments made, the debt due to the plaintiffs while the witness was a partner, according to the rule laid down in Clayton's case, 1 Mer. 585, is discharged; and as Joseph Hirst is no longer liable to the demand of the plaintiffs, there is no objection to his testimony. But assuming that to be otherwise, he is not incompetent on the ground of interest. If he be interested at all, it must be either because if the plaintiffs recover a verdict he may be liable to an action

by his partners for contribution, or because the judgment and execution in this suit would diminish the partnership funds, in which he has an interest, or because he might still be liable in equity notwithstanding the release. But the release given by the defendants would be an answer to any action brought by them against him for contribution. And then, as to the judgment and execution in this suit diminishing the partnership funds, out of which the joint creditors are to be paid, in which case, it is said those creditors may resort to him; assuming that to be so, he will then become a creditor of his partners, but that will not render him incompetent. If the joint funds are sufficient, or more than sufficient, to pay the debts of the firm, he clearly would be a competent witness. But if those funds be insufficient, and the joint creditors \*resort to him, then [\*765] he becomes a creditor of his partners, and they must pay him. The possibility of their being unable to do so is a mere contingency, and cannot affect

his competency. Thirdly, it may be said that he is still liable in equity to the joint creditors; but he will be so only in the case of the insolvency of his two partners. is a mere contingency, and is not to be presumed, and no evidence was given to shew that they were insolvent. In Carter v. Pearce, 1 T. R. 163, a co-obligor in a bond to the ordinary under the 22d & 23d Car. 2, c. 10, was held to be a competent witness to prove a tender by the administratrix, and it was said by the Court, that the bare possibility of an action being brought against a witness is no objection to his competency; and Buller, J. said, that in order to render a witness incompetent, it is necessary to prove that he must derive a certain benefit from the determination of the cause one way or the other. It may be questionable whether evidence of the insolvency of the partners would disqualify the witness: but here, at all events, he does not become immediately liable, but only on failure of funds. The case resembles that of a creditor, who is equally liable to loss from failure of a debtor's funds. In Simons v. Smith, Ry. & M. 29, Lord Tenterden, in an action against one of several partners, held that the defendant could not, by a release, make him a competent witness; and in Cheyne v. Koops, 4 Esp. N. P. C. 112, Lord Alvanley expressed an opinion, that a copartner could not be made competent by a release from the defendant, because there was an interest which could not be released in the manner proposed; for if the defendant died \*or was insolvent, the plaintiff would have a right to a bill in equity to compel all the partners to contribute; he however reserved the point, and offered to allow the witness to be released; but the defendant not being present, no release was given. In both those cases, the liability of the witness, as a partner, was admitted. Here it is denied. of the witness must be taken as at the time of the dissolution of the partner-He was then, at most, a debtor or a creditor of the defendants as to the balance which should afterwards appear to be due on either side on the winding up of the affairs. A suit in equity would not lie to compel him to pay any It may be questionable, whether this Court will notice an equitable liability, contingent on the default of funds on the part of the defendants. To constitute such a liability, there must first be a failure of the joint funds; and secondly, of separate funds. A court of law will not notice equitable defects of title. Boyman v. Gutch, 7 Bing. 379, Alpass v. Watkins, 8 T. R. 516.

Cur. adv. vult.

Denman, C. J., in the same term, delivered the judgment of the Court. After stating the facts his Lordship proceeded as follows. On shewing cause against the rule, it was contended on the part of the defendants among other things, that from the course of the dealing between the plaintiffs and the partnership, and the receipts and payments that had taken place, the debt due to the plaintiffs whilst the witness was a partner had been discharged, according to the rule in Clayton's case, 1 Mer. 585, and that as the witness was no longer liable to the plaintiffs' demand, \*there could be no objection to his testimony; but though the payment of money on account generally, without

making a specific appropriation, would in many cases go to discharge the first part of an account, yet that rule cannot be taken to be conclusive; it is evidence of an appropriation, only; and other evidence may be adduced which may vary the application of the rule, and therefore we cannot say to a certainty that the debt owing by the witness to the plaintiffs has been discharged, and indeed the defence proceeds upon the ground that the moneys paid in are not to be appropriated to the payment of this debt, but only to part of it, viz. that part in which there is no overcharge of interest.

But we are of opinion that the mutual releases which have been executed by the defendants to the witness, and by him to the defendants have made him a

competent witness.

It was contended on the part of the plaintiffs that the witness comes to increase the surplus of the partnership effects, and that he is interested in that, and that his release does not release his right to that surplus, as it is something which is to arise in future; and cases were cited to shew that things which rest in contingency and possibility are not released by this general form, which only

applies to what exists at the time when the release is given.

There will be found in Lampet's case, 10 Rep. 50 b. some instances where a release does not extend to things in future; and in Co. Lit. 290, and 291, and in 2 Rolle's Abr. 201, and several of the following pages, and in the additional cases to Rolle, given in 18 Viner's Abridgment, beginning at page 299, will be found other instances to \*the same point; many of these however are upon the construction of single particular words, as duties, or debts, or actions.

But in Littleton, s. 508, and Coke's commentary upon it, 291, b, the release of all demands is treated as having a most extensive operation; and in these releases in the present case there is not only the word demands, but also all the other words which in the various cases are of themselves only taken as having a limited operation.

But in fact the claim of any surplus that may arise had an existence at the

time of the release.

At that time the partnership had money due to them, and they owed money, and amongst the debts claimed from them, was this to the plaintiffs; the amount of which depended upon the question of the rate of interest: the facts which raised that question were capable of being ascertained, and there was an ultimate, if not an immediate certainty, how the law would attach on such a state of facts. The amount of the balance though uncertain as far as it depended upon the funds to be realized, did not depend on any new state of things to arise thereafter, but merely whether the funds would be available, and it falls within the rule laid down in Lampet's case, 10 Rep. 50 b. that a future right or possibility which may be released, ought to have a foundation and an original inception, and ought to be a necessary and common possibility, which appears to us to be the case here.

It has been urged, that the partnership have asked for time to pay their debts,

and that shews them to be insolvent, and the surplus will be less.

\*769] We think that forms no objection. In the first place, \*the asking for time does not necessarily shew them to be insolvent, though it is a circumstance of suspicion.

In the next place, it does not appear that these debts, in respect of which

they have asked for time, are such as the witness is liable to.

But even if these things were so, the releases completely prevent the witness from having any claim upon the partnership effects, and also bar the partnership from having any claim upon him.

And as to the other creditors making a claim upon the witness for any deficiency that may arise if the defendants should turn out to be insolvent, that cannot make the witness incompetent, as far as relates to the plaintiffs.

But the plaintiffs have now made another objection to the witness, which does

not appear to have been urged at the trial; viz., that if the defendants should obtain a verdict, and the plaintiffs should afterwards bring an action against the witness for the same debt, that verdict, and judgment upon it, might be pleaded in bar to such an action, and he therefore comes to relieve himself from a liability to pay the debt. But he is equally relieved from liability to pay the debt if the plaintiffs obtain a verdict; because the defendants, having released him, cannot call on him for contribution, and consequently, in a legal point of view, he stands equally indifferent whichever way the verdict is. There is no doubt, however, but the witness would feel himself more safe from future liability if the defendants were to obtain a verdict; but that would only affect his credit, and does not create any legal incompetency.

It is, however, to be observed that the case of Cheyne v. Koops, 4 Esp. 112. seems contrary to this; from the statement in the early part of the case, it appears that mutual \*releases were proposed to be given, but that Lord Alvanley thought that was not sufficient to make the partner competent; but in the latter part of the case he said, if the defendant gave a release to the witness, he would allow him to be examined and a verdict taken, subject to the opinion of the Court; but the defendant was not in court, and the witness were

not examined.

We think, however, the reasoning of Lord Alvanley would not make the witness incompetent, and we are therefore of opinion that Joseph Hirst was a competent witness, and that consequently the rule for a new trial must be made absolute.

Rule absolute.

By the stat. 3 & 4 W. 4, c. 42, s. 26, in order to render the rejection of witnesses on the ground of interest less frequent, it is enacted, that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall, nevertheless, be examined; but in that case a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined shall not be admissible in evidence for him or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him, or any one claiming under him; and by s. 27, the names of the witness and of the party for whom he was examined are to be indorsed on the record, and entered on the record of the judgment, and such indorsement or entry is made sufficient evidence in any subsequent proceeding in which the verdict or judgment shall be offered in evidence, that the witness was so examined.

#### \*DOE dem. TEMPLEMAN v. MARTIN and RICHARDS. [\*771

Testator devised to J. T. his messuage or dwelling-house and mill, with the garden and cottage adjoining, with the mill pond, rights, and privileges thereto belonging; and also his messuage, the Ark Cottage, garden, and lands at Shatterwell, in Wincanton rented by Mrs. Sly and others; and his messuage, dwelling-house, shop, garden, and orchard at Whitehall, in Wincanton aforesaid, rented by A. B. and others, with their respective appurtenances. He also devised to J. T. his orchard by the side of the river. in W., near the foregoing premises, for all his (testator's) estate and interest therein: charged nevertheless, as to the whole of the premises, with the payment of 500l. to his executors in aid of and towards his residuary personal estate.

In ejectment by the devisee, to recover certain lands called Shatterwell Close, as part of the lands intended by the testator to pass by the above devise, it was proved by the defendant that the testator was entitled to the following premises at Shatterwell, in

Wincanton.

The principal messuage and two closes of land, rented by Mrs. S. The Ark Cottage, occupied by P., and the garden rented by W. L.

The messuage, garden, and orchard called Whitehall, rented by A. B. and C. D., and

Motion's Orchard, described in the will as the little orchard, occupied by the testator himself.

These premises, with the exception of Motion's Orchard, were conveyed to the testator in 1928, by one conveyance, and were therein described to comprise a messuage, Ark Cottage, a garden, and closes, by name, formerly in the occupation of, &c., but then untenanted; and also a messuage called Whitehall, with a garden and orchard, rented by A. B.

Motion's Orchard was purchased by the testator in 1827, before which time it had been

united with the foregoing premises, in the possession of one person.

The testator in 1824 purchased other premises in Shatterwell, and at the date of his will and of his death, their situation was as follows: Shatterwell Close was rented by W. with several other closes, at the rent of 170l. per annum. An orchard, called Cold Bath Orchard, was also rented by W., but under a separate rent. A messuage adjoining was rented by the said W. L., and Lewis's orchard was occupied by the testator himself. No part of the premises purchased in 1828, had ever been let with any part of the premises were separated from the former by a lane, from which there was no entrance to Shatterwell Close.

licld, that all these facts were admissible in evidence, but that they raised no ambiguity as to the meaning of the devise of the messuage, the Ark Cottage, garden, and lands at Shatterwell, in Wincanton, rented by Mrs. Sly and others, that being sufficiently explicit to pass all the lands of the testator situate at Shatterwell, in Wincanton, rented by any

tenant.

EJECTMENT for twelve acros of land, called Shatterwell Close, at Shatterwell, in the parish of Wincanton, in the county of Somerset. At the trial before Gaselee, J., at the Taunton assizes, 1832, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

Charles Thorn, by his will, dated September 1829, duly executed to pass real estates, devised as follows:--"I give to John Templeman my messuage or \*772] dwelling-house, and mill, with the garden and cottage adjoining the \*same, in Wincanton aforesaid, with the mill pond, rights, and privileges thereto belonging; and also my messuage, the Ark Cottage, garden and lands, at Shatterwell, in Wincanton aforesaid, rented by Mrs. Sly and others; and my messuage, dwelling-house, shop, garden, and orchard at Whitehall, in Wincanton aforesaid, rented by John Tulk and others, with their respective appurtenances, to hold to the said John Templeman, his heirs and assigns for ever, charged as after mentioned; and I also give to the said John Templeman my little orchard by the side of the river in Wincanton aforesaid, near the foregoing premises, for all my estate and interest therein, charged, nevertheless, as to the whole of the premises, with the payment of 500l. within twelve months next after my decease, to my executors and trustees, in aid of and towards my residuary personal estate. All other my messuages, lands, tenements, and hereditaments, and also all my moneys and securities for money, goods, chattels, and personal effects, as well as the said 500l., to be so paid as aforesaid by the said J. Templeman, I give, devise, and bequeath unto my friends, John Martin and John Richards, to hold to them, the said John Martin and John Richards, and the survivors of them, and the heirs, executors, administrators, and assigns of such survivors, upon trust for sale to pay debts and legacies."

The testator died on the 9th of January, 1830. At the date of his will and at his death he was entitled to certain premises at Shatterwell in Wincanton. Of these there were, on the eastern side of Shatterwell Lane, at the date of the

will:-

1. The principal messuage. This, and

2. Two closes of land, were rented by Mrs. Sly, who \*had taken them from the testator at Christmas 1828, at 30/. per annum, and who, in 1829, after mowing the grass, let the after-grass to her son William Sly, until Christmas, for 3/.

3. The Ark Cottage, occupied by Prior and another; the former paying the

rent to the testator, and the latter being Prior's under-tenant.

Vol XXIV.—22

4. The garden rented by William Linton, who became tenant of it within a year before the testator's death, at an annual rent of 10s.

5. The messuage, garden, and orchard called Whitehall, rented by Tulk and Daw, who were the sole tenants of them at the time of the conveyance thereof,

hereinafter mentioned; and

6. The orchard called Motion's Orchard, described in the will as "the little orchard" by the side of the river, near the foregoing premises, which was occu-

pied by the testator himself.

The first five parcels were purchased by the testator of Mr. and Mrs. Surrage in 1828, and were conveyed by one conveyance, and described as "all that messuage or dwelling house, formerly divided into two tenements, lying in Wincanton aforesaid, at a place called Shatterwell, near Grove Hill, with a buckinghouse, garden, and stable thereto belonging:" one acre and three roods of ground called Willis Hill, a cottage called Ark Cottage, and a close called Crooch Grove Close, all which premises were particularly described in the conveyance, and were stated to have been formerly in the possession of certain persons therein named, but to be then untenanted: and also all that messuage, &c., commonly known by the name of Whitehall, with the outhouses, &c., garden, and orchard thereto adjoining and belonging, \*situate at the town's end, towards Bruton, in the parish of Wincanton aforesaid, containing, by estimation, one acre, formerly in the possession of, &c., and now of John Tulk and others as tenants; all which messuages, &c., are situate in the parish of Wincanton The remaining portion called Motion's Orchard, was purchased by the testator in 1827, of Mrs. Jane Pitman. The whole six parcels, for some years before, and down to 1826, belonged to one Pitman, and upon his dying intestate, Motion's Orchard, being leasehold, passed to his mother, Mrs. Jane Pitman, and the other five parcels, being freehold, to his heir at law, Mrs. Sur-

The whole of the premises on the western side of the lane were purchased in 1824 by the testator, at one time, of W. Messiter, and for some years before, and at the date of the testator's will, and of his death, were occupied as follows:—First, Shatterwell Close was rented by Charles Warren, under a lease dated 1821, by which the testator demised to him a farm-house, garden, and orchard, and several closes by name, and, amongst others, Shatterwell Close, at the rent of 1701. per annum. Secondly, the orchard, called Cold Bath Orchard, was also rented by Charles Warren, but under a separate rent. Thirdly, the messuage adjoining was rented by William Linton; and fourthly, Lewis's Orchard was occupied by the testator himself. No part of the premises on the western side of Shatterwell Lane had ever been let with any part of the premises on the eastern side, except the small garden on the eastern side which Linton, the tenant of the messuage, rented for about three quarters of a year as afore-

eai l

The usual entrance to Shatterwell Close, going from Motion's Orchard, from which it is separated only by \*Shatterwell Lane, is not by that lane, but [\*775] by another lane called Wright's Lane, and by going round Lewis's Orchard; the lands abutting on the west side of Shatterwell Lane, opposite Motion's Orchard, being too steep to allow of any passage across the lane into Shatterwell Close.

In any case, there would be a small deficiency of assets for the payment of debts and legacies under the will. If Shatterwell Close, and the other premises, claimed by the lessor of the plaintiff, did pass by the devise to him, the esti-

mated deficiency would be very considerable.

The question for the opinion of the Court was, whether the above facts were admissible in evidence on the part of the defendants; secondly, whether under the devise in question, Shatterwell Close passed to the lessor of the plaintiff. The case was argued this term.

Follett for the plaintiff. Evidence to shew of what description the pie-

mises were, and that they were actually occupied by tenants, so as to bring them within the description of the words of devise, was admissible; but evidence of a description of the premises in former conveyances was not admissible to shew that the testator could not intend the land on the west side of Shatterwell Lane to pass by the devise of his "lands in Shatterwell, rented by Mrs. Sly and others." To satisfy the devise, two things are necessary: first, that the property should be situate at Shatterwell in Wincanton; secondly, that it should be rented by Mrs. Sly or other persons. Now all the closes here sought to be recovered were rented by some person. There is, therefore, no ambiguity on the face of the will. In 2 Stark. 2d edit. 561, it is \*776] said, "where a subject-matter exists which satisfies the terms \*of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object;" and on this principle, the Court of Common Pleas, in Doe v. Oxenden, 3 Taunt. 147, (see 4 Dow. P. C. 65,) decided that parol evidence was not admissible to shew that a testator, by a devise of his estate at Ashton, intended to devise all his maternal estate, consisting of two manors in the parish of Ashton, and one in the adjoining parish. In Miller v. Travers, 8 Bingh. 244, the testator devised his freehold and real estates in the county of Limerick and city of Limerick. He had no real estate in the county, and only a small one in the city, but had large real estates in the county of Clare. draft of the will was offered in evidence, to shew that he intended to pass his estates in Clare, and Lord Chancellor Brougham, assisted by Lord Lyndhurst and Tindal, C. J., decided that the evidence was inadmissible. latter, in delivering his opinion, divides the cases in which parol evidence is admissible into two classes; the first, where the description of the thing devised or of the devisee is clear upon the face of the will, but upon the death of the testator it is found that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will; the second, when the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. The present case comes within neither of those classes. Assuming that all the evidence be admissible, it does not show that the testator did not intend \*to devise all his lands at Shatterwell to Templeman. If the arguments on the other side were to prevail, the will would operate, not as a devise of all the testator's lands at Shatterwell in Wincanton, but of all his property at Shatterwell in Wincanton, situate on one side of the lane.

Erle contra. Shatterwell Close did not pass to the lessor of the plaintiff by the devise of lands at Shatterwell in Wincanton, rented by Mrs. Sly and others. The testator, by those words, does not make a general devise of all his lands within certain local limits, but refers to particular lands within those limits, which can be ascertained by the description in the will. If he had intended all his rented lands in Shatterwell to pass, it would have been superfluous to specify the messuage, the Ark Cottage, and the garden, as the devise of all lands would have been sufficient without that description; and besides, if he had intended all lands, by whomsoever rented, it would have been superfluous to specify Mrs. Sly and others. These extrinsic facts were given by the testator to indicate what particular lands in Shatterwell he intended; and if the construction of the plantiff is adopted, no effect will be given to these facts. The situation of the clause is important. It is placed between two devises of property described with great minuteness. In the first, the testator devises his messuage or dwelling-house and mill, with the garden and cottage adjoining the same, in Wincanton aforesaid, with the mill-pond, rights, and privileges thereto belonging. The word lands does not occur here, nor is the subject-matter of the devise described by stating the name of the occupier. Then comes the devise in question "my messuage, the Ark Cottage, garden, and lands at \*Shatterwell in Wincanton, rented by Mrs. Sly and others." Here, the testator evidently meant, when he used the word lands, to donote one particular property or estate at Shatterwell, of which Mrs. Sly was the principal tenant, and of which other persons rented some parts. He did not intend to devise all he possessed within any specific local limits. Then follows a third devise of the messuage, garden, and orchard at Whitehall, described specifically and by the name of an occupier; and the three devises are united together by the words "with their respective appurtenances." These circumstances, of the devise in question being placed between two devises of specific estates, and being referred to by the testator as united with them in one class, favour the construction which would confine this devise also to a specific estate, satisfying the whole description, rather than a construction which would extend it to all lands generally within the local limits, although dispersed among various estates.

Now, it is a general rule, that where the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence is admissible to ascertain the fact, and so ascertain the subject of the devise; the object of the evidence, in that case, being to ascertain what is included in the description which the testator has given of the thing devised. Sandford v. Raikes, 1 Mer. 653. The word lands, in the devise in question, must be construed with reference to the words messuage, Ark Cottage, &c. and to the tenancy of Mrs. Sly. Many cases establish that, where there is any doubt as to the extent of the thing devised by a will, or demised, or sold, it is matter of extrinsic \*evidence to shew what is included under the description as parcel of it. Doe v. Burt, 1 T. R. 701, Doe v. Collins, 2 T. R. 498, Goodtitle v. Paul, 2 Burr. 1089, Marshall v. Hopkins, 15 East, 309, Doe v. Bower, 3 B. & Ad. 453. On the other hand, where a testator devises all his property within certain specific local limits, that is considered in effect as a description of the property by a local name, and then parol evidence is not admissible to shew that any property beyond the specified limits was intended to pass. Thttesham v. Roberts, Cro. Jac. 21, Doe v. Greening, 3 M. & S. 171, Doe v. Lyford, 4 M. & S. 550, Doe v. Oxenden, 3 Taunt. 147. But here the devise is not of that description.

There is another class of cases, where the description consists of different parts, and all the parts are material to render it certain. Thus, in Bro. Abr. tit. Grants, pl. 92, it is said, "if a man grants all his land in D., which he has of the gift and feoffment of J. S., there nothing shall pass but that which he has of the gift of J. S. But if he grants all his land in D. called N., which was J. S.'s, then his land called N. shall pass, though it never was J. S.'s, by reason of the special name called N.;" and the same rule is adopted in Plowden, 191, Doddington's case, 2 Rep. 33 a., Doe dem. Beach v. The Earl of Jersey, 1 B. & A. 550, 3 B. & C. 870, and Goodtitle v. Southern, 1 M. & S. 299.

The testator here has not described the tenements by any proper name, nor has he used words which shew an intention to pass all his lands within the local limits of Shatterwell, but he devises his messuage and lands at Shatterwell, rented by Mrs. Sly and others; viz. specific \*lands at Shatterwell, Mrs. [\*780] being the tenant of the principal part of them, and other persons of the remainder; he does not say all my lands at S., by whomsoever rented. The evidence of occupation was undoubtedly admissible and most material. It shewed that the messuage and two closes, being the principal part of the premises on the eastern side of Shatterwell Lane, were rented by Mrs. Sly, and that the Ark Cottage and garden were rented by other persons, and that they, consequently, satisfy all the words of the will. The testator afterwards gives to the same devisee premises at Whitehall, which is situate in Shatterwell. According to the plaintiff's argument, that gift was unnecessary; for those premises had been already devised by him, by the gift of those lands at Shatterwell in Wincanton, rented by Mrs. Sly and others. Evidence of the mode by which the testator acquired the property was also admissible; and here it ap-

pears that he acquired, by one conveyance, in 1828, the messuage, Ark Cottage, garden, and lands, at Shatterwell (afterwards rented by Mrs. Sly and others), and the messuage at Whitehall: and in the conveyance to him they were described as making two separate portions or estates; the first being described as a messuage or dwelling-house at Shatterwell, a cottage called Ark Cottage, with a garden and certain fields by name, in the deed stated to be untenanted, though at the date of the will they were tenanted by Mrs. Sly and others; the second portion or estate being described in the deed as the messuage, dwelling-house, garden and orchard in Whitehall, rented by Tulk and others; which description is adopted in the will. It was natural, if the testator intended to devise the property which he purchased in 1828, that he should describe it as consisting of the \*same parcels by which it was described in the deed of conveyance to him, and also, that he should in his will give a further description of the first parcel, by adding the name of the principal tenant; and he may properly have added the word others, inasmuch as some small portion of that property was not in her occupation. If the testator had intended to pass Shatterwell Close, which forms part of a large farm running into another district, and rented at 170l. a year, he would surely have described it by adding the name of the tenant in whose occupation it was. It is not to be supposed that he intended to separate so large a property from the rest of the estate, without more specific words. The fact, also, of Motion's Orchard being described in the will as "near the foregoing premises," confirms the construction contended for by the defendant; for it is contiguous to the estate at Whitehall and the estate rented by Tulk and Daw; whereas it is divided from Shatterwell Close by a road and a steep hill, so that to go from Motion's Orchard to Shatterwell Close, a considerable circuit is necessary; whereas the passage from it to either of the other estates is immediate. It must also be remembered that if Shatterwell Close does not pass by the will, the residue of the property is insufficient to satisfy the debts and legacies charged upon it. A similar argument was adopted by the Court in Doe v. Lord Lucan, East, 448.

Follett in reply. It is not disputed that evidence is admissible to apply the description in the will to the subject-matter of the devise; but when that is done, extrinsic evidence is not admissible to shew that property \*answering that description did not pass. Here the terms of the devise shew that the testator intended his whole property in Shatterwell to pass. It is said that the word lands applies to some specific lands rented by Mrs. Sly and others. Mrs. Sly rented the messuage and two closes of land only, not the Ark Cottage and garden. But the devise is of the messuage, the Ark Cottage, garden, and lands at Shatterwell, rented by Mrs. Sly and others. According to the argument on the other side, the clause must be read, "the messuage, the Ark Cottage, and garden, rented by Mrs. Sly and others, and the land rented therewith;" but, construing the devise in that manner would be altering the will. Then it is argued, that inasmuch as Whitehall is situate at Shatterwell, the devise of the messuage at Whitehall was unnecessary, because it passed by the former clause. But though Whitehall may be locally situate within Shatterwell, in common parlance it may not be so considered. [Denman, C. J. Whitehall and Shatterwell might both be hamlets.] Then as to the devise of Motion's Orchard, "near the foregoing premises," it is, in fact, near all the property in question. As to the alleged deficiency of assets for payment of debts and legacies, that cannot affect the construction of this devise. Other lands, besides

Shatterwell Close, are devised by the residuary clause.

Denman, C. J. The lessor of the plaintiff claims as devisee of lands, under the following clause in the will of Charles Thorn :- "I give John Templeman my messuage, the Ark Cottage, garden and lands, at Shatterwell in Wincanton aforesaid, rented by Mrs. Sly and others." The plaintiff makes out a prima \*783] facie claim to the particular \*lands in question when he shews that they are lands at Shatterwell in Wincanton, which, at the date of the will, belonged to the testator, not being, however, in his occupation, but in that of a tenant. It is said there are clauses in the will which shew the testator could not have intended all his lands at Shatterwell, except those in his own occupation, to pass; but I do not see any which are inconsistent with the devise of all the lands at Shatterwell. Then evidence is offered to shew from extrinsic circumstances that there is an ambiguity in the devise, and almost any evidence would be admissible for that purpose. But the question still is, whether the evidence adduced with this view be clear enough for us to say, that the testator intended some of the land at Shatterwell, in the occupation of tenants, not to pass. There are indeed circumstances which make it appear probable, but they all admit of an answer: and there is nothing, in my opinion, to raise such an ambiguity as would make the evidence admissible for the purpose of narrowing the construction of the devise. I think, therefore, that all the lands in question, being lands at Shatterwell in Wincanton, rented by some person, passed to the lessor of the plaintiff.

LITTLEDALE, J. I think it not improbable that if the testator had been asked whether he intended the closes on the western side of the lane to pass by the will, he would have answered in the negative. But the question here, is not what his actual intention was, but what is the intention expressed in his will, or in other words, the meaning and effect of the terms used? It seems to me that the lessor of the plaintiff is entitled to recover. The first question raised, is, whether the facts stated in \*the special case are admissible in evidence on the part of the defendant; I think that any evidence was admissible, to shew what was the state of the testator's property at the date of his will, and from whom it was purchased; but I think that that evidence when admitted, is not sufficient to create any ambiguity as to the meaning of the will. The testator, after devising a messuage, &c., proceeds, "and also my messuage, the Ark Cottage, garden, and lands at Shatterwell, rented by Mrs. Sly and others; and my messuage, dwelling-house, shop, garden, and orchard, at Whitehall in Wincanton, rented by John Tulk and others." The question turns on the first of those clauses; if the words there had been, "all my lands at Shatterwell," it is quite clear the lands in question, being situated in Shatterwell, would have passed. The absence of the word all makes no difference; the clause should be read as if he had devised all his lands at Shatterwell in Wincanton rented by Mrs. Sly and others. It has been argued from the collocation of the words that the testator intended to devise lands in Shatterwell, of which Mrs. Sly was the tenant of the principal part, and other persons tenants, of the smaller; but I think there is no legal ground for making such a distinction. In the clause in question, the messuage is the first subject-matter of devise, and then the Ark Cottage, and garden are mentioned before "lands." The word messuage is separated from the word lands, by the intervening words Ark Cottage and Garden, and then Mrs. Sly is named before others, because the messuage which she rented had been first named; the word lands being separated from the word messuage, cannot be confined in construction to lands in the occupation of Mrs.

\*Then it is contended by the defendant, that if the testator intended all his lands in Shatterwell to pass by the first devise, there was no occasion for a specific devise of his messuage, &c. at Whitehall. But that argument fails for two reasons: first, because Whitehall is not mentioned there as the name of the property devised but as the name of some hamlet or district, which he called Whitehall in Wincanton, as he speaks of Shatterwell in Wincanton, secondly, he does not merely use the same words as in the devise of property at Shatterwell, but the words messuage, dwelling-house, shop, garden, and orchard: lands are not mentioned. Then it is observed that the testator, by another clause, devises his little orchard, by the side of the river at Wincanton, "near the foregoing premises." But that orchard is as near to the property on one side of the lane as the other.

It is also said, that unless Shatterwell Close passes to the defendant, there is not sufficient to satisfy the residuary devise; but the testator had other lands and property to which that clause applies. It is, however, unnecessary to rely

on this, the expressions of the will being otherwise sufficiently clear.

PARKE, J. I am of opinion that the lessor of the plaintiff is entitled to recover. The first question is, whether the parol evidence was admissible. It may be laid down as a general rule, that all facts relating to think it was. the subject-matter and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property are admissible to aid in ascertaining what is meant by the words used in the will.

\*Then, as to the construction of those words, we are to consider, \*786] not what the testator intended to insert in the will, but what the words actually inserted in it do pass. If I were at liberty to conjecture, I should probably come to the conclusion that the testator did not intend to pass property on the western side of the lane; but, taking the clause by itself, there can be no doubt, that under a devise of the testator's lands at Shatterwell, all lands answering that description, both on the eastern and western side of the lane, would pass. The testator goes on to describe the lands he intended to pass as lands rented by Mrs. Sly and others. The lands in question were rented by others; therefore in ordinary construction they would pass by the words of the clause. Then what is there to oblige us to put a different construction on the word "lands" in this case? It is said, that from the context we ought to do so; and that the testator could not mean all his lands in Shatterwell to pass, because he afterwards makes a specific devise to the same devisee of his lands at Whitehall, which is in Shatterwell; but it is probable that the testator may have used the word Whitehall as the designation of a district. At all events, the wording of that clause is not sufficient to alter the meaning of the word "lands" in the former one. Nor is there any thing in the extrinsic circumstances here to lead us to put a different construction on the word; to warrant such a construction, it must appear that, without it, there would be some absurdity or incongruity, or the words would be insensible; but there is nothing of that kind here to oblige the Court to understand by the words lands at Shatterwell something different from their natural meaning. Postea to the plaintiff.

#### JOHN RICHARDSON v. JOHN WATSON. \*7871

Testator by will, dated April, 1827, after devising his closes, lands, hereditaments, and real estates at H., in the occupation of J. W., to the use of P. R., his heirs and assigns for ever, devised his messuage or tenement, closes, lands, hereditaments, and real estates situate at Kirton, which were then in the occupation of J. A., and also the close in Kirton aforesaid, then in the occupation of the said J. W., to the use of his great nephew J. R., his heirs and assigns for ever. At the time of making this and the next mentioned will, and of the testator's death, J. W. occupied two closes in Kirton, as tenant to the

In 1825 the testator had made another will, whereby he devised "the close in K., occupied by J. W.," to certain persons, in trust for his said great nephew J. R., when he should attain the age of twenty-three years. The attorney who made that will, stated he received instructions in writing from the testator, to give to J. R. all the land in Kirton, occupied at that time by J. W., but received also verbal instructions, whereby the testator described the land in the occupation of J. W. as a close: that the testator not being certain what land J. W. occupied, inquiry was made of a person supposed to know, who stated to the witness, in the presence of the testator, that it was all in one close; and that the witness in consequence of that information, so described it in the will of 1825:

Held, that from the use of the word closes in the other parts of the will of 1827, the word close in the devise to J. R. must be construed in its ordinary sense as denoting an inclosure, and as the parol evidence shewed that the testator had two closes in

belonged to the testator, not being, however, in his occupation, but in that of a tenant. It is said there are clauses in the will which shew the testator could not have intended all his lands at Shatterwell, except those in his own occupation, to pass; but I do not see any which are inconsistent with the devise of all the lands at Shatterwell. Then evidence is offered to shew from extrinsic circumstances that there is an ambiguity in the devise, and almost any evidence would be admissible for that purpose. But the question still is, whether the evidence adduced with this view be clear enough for us to say, that the testator intended some of the land at Shatterwell, in the occupation of tenants, not to pass. There are indeed circumstances which make it appear probable, but they all admit of an answer: and there is nothing, in my opinion, to raise such an ambiguity as would make the evidence admissible for the purpose of narrowing the construction of the devise. I think, therefore, that all the lands in question, being lands at Shatterwell in Wincanton, rented by some person, passed to the

lessor of the plaintiff. LITTLEDALE. J. I think it not improbable that if the testator had been asked whether he intended the closes on the western side of the lane to pass by the will, he would have answered in the negative. But the question here, is not what his actual intention was, but what is the intention expressed in his will, or in other words, the meaning and effect of the terms used? It seems to me that the lessor of the plaintiff is entitled to recover. The first question raised, is, whether the facts stated in \*the special case are admissible in evidence on the part of the defendant; I think that any evidence was admissible, to shew what was the state of the testator's property at the date of his will, and from whom it was purchased; but I think that that evidence when admitted, is not sufficient to create any ambiguity as to the meaning of the will. The testator, after devising a messuage, &c., proceeds, "and also my messuage, the Ark Cottage, garden, and lands at Shatterwell, rented by Mrs. Sly and others; and my messuage, dwelling-house, shop, garden, and orchard, at Whitehall in Wincanton, rented by John Tulk and others." The question turns on the first of those clauses; if the words there had been, "all my lands at Shatterwell," it is quite clear the lands in question, being situated in Shatterwell, would have The absence of the word all makes no difference; the clause should be read as if he had devised all his lands at Shatterwell in Wincanton rented by Mrs. Sly and others. It has been argued from the collocation of the words that the testator intended to devise lands in Shatterwell, of which Mrs. Sly was the tenant of the principal part, and other persons tenants, of the smaller; but I think there is no legal ground for making such a distinction. In the clause in question, the messuage is the first subject-matter of devise, and then the Ark Cottage, and garden are mentioned before "lands." The word messuage is separated from the word lands, by the intervening words Ark Cottage and Garden, and then Mrs. Sly is named before others, because the messuage which she rented had been first named; the word lands being separated from the word messuage, cannot be confined in construction to lands in the occupation of Mrs.

\*Then it is contended by the defendant, that if the testator intended all his lands in Shatterwell to pass by the first devise, there was no occasion for a specific devise of his messuage, &c. at Whitehall. But that argument fails for two reasons: first, because Whitehall is not mentioned there as the name of the property devised but as the name of some hamlet or district, which he called Whitehall in Wincanton, as he speaks of Shatterwell in Wincanton, secondly, he does not merely use the same words as in the devise of property at Shatterwell, but the words messuage, dwelling-house, shop, garden, and orchard: lands are not mentioned. Then it is observed that the testator, by another clause, devises his little orchard, by the side of the river at Wincanton, "near the foregoing premises." But that orchard is as near to the property on one

side of the lane as the other.

It is also said, that unless Shatterwell Close passes to the defendant, there is not sufficient to satisfy the residuary devise; but the testator had other lands and property to which that clause applies. It is, however, unnecessary to rely

on this, the expressions of the will being otherwise sufficiently clear.

PARKE, J. I am of opinion that the lessor of the plaintiff is entitled to recover. The first question is, whether the parol evidence was admissible. I think it was. It may be laid down as a general rule, that all facts relating to the subject-matter and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property are admissible to aid in ascertaining what is meant by the words used in the will.

\*Then, as to the construction of those words, we are to consider, not what the testator intended to insert in the will, but what the words actually inserted in it do pass. If I were at liberty to conjecture, I should probably come to the conclusion that the testator did not intend to pass property on the western side of the lane; but, taking the clause by itself, there can be no doubt, that under a devise of the testator's lands at Shatterwell, all lands answering that description, both on the eastern and western side of the lane, would pass. The testator goes on to describe the lands he intended to pass as lands rented by Mrs. Sly and others. The lands in question were rented by others; therefore in ordinary construction they would pass by the words of the clause. Then what is there to oblige us to put a different construction on the word "lands" in this case? It is said, that from the context we ought to do so; and that the testator could not mean all his lands in Shatterwell to pass, because he afterwards makes a specific devise to the same devisee of his lands at Whitehall, which is in Shatterwell; but it is probable that the testator may have used the word Whitehall as the designation of a district. At all events, the wording of that clause is not sufficient to alter the meaning of the word "lands" in the former one. Nor is there any thing in the extrinsic circumstances here to lead us to put a different construction on the word; to warrant such a construction, it must appear that, without it, there would be some absurdity or incongruity, or the words would be insensible; but there is nothing of that kind here to oblige the Court to understand by the words lands at Shatterwell something different from their natural meaning. Postea to the plaintiff.

### \*787] JOHN RICHARDSON v. JOHN WATSON. May 3.

Testator by will, dated April, 1827, after devising his closes, lands, hereditaments, and real estates at H., in the occupation of J. W., to the use of P. R., his heirs and assigns for ever, devised his messuage or tenement, closes, lands, hereditaments, and real estates situate at Kirton, which were then in the occupation of J. A., and also the close in Kirton aforesaid, then in the occupation of the said J. W., to the use of his great nephew J. R., his heirs and assigns for ever. At the time of making this and the next mentioned will, and of the testator's death, J. W. occupied two closes in Kirton, as tenant to the testator.

In 1825 the testator had made another will, whereby he devised "the close in K., occupied by J. W.," to certain persons, in trust for his said great nephew J. R., when he should attain the age of twenty-three years. The attorney who made that will, stated he received instructions in writing from the testator, to give to J. R. all the land in Kirton, occupied at that time by J. W., but received also verbal instructions, whereby the testator described the land in the occupation of J. W. as a close: that the testator not being certain what land J. W. occupied, inquiry was made of a person supposed to know, who stated to the witness, in the presence of the testator, that it was all in one close; and that the witness in consequence of that information, so described it in the will of 1825:

Held, that from the use of the word closes in the other parts of the will of 1827, the word close in the devise to J. R. must be construed in its ordinary sense as denoting an inclosure, and as the parol evidence shewed that the testator had two closes in

Kirton in the occupation of J. W., it was uncertain which was intended, and in the absence of the evidence as to the former will, the devise would have been void for

uncertainty.

Secondly, assuming that this evidence was admissible, (which was very doubtful,) that did not remove the ambiguity; but left it uncertain what the testator intended to pass under the name of "the close in K. in the occupation of J. W.," and consequently that the devise was at all events void for uncertainty.

ACTION for use and occupation by the defendant of two closes of land, situation the parish of Kirton in the county of Lincoln: plea, general issue. At the trial before Bayley, B. at the Lincolnshire Spring assizes 1832, the jury found a verdict for the plaintiff for 121. 11s. 7d. subject to the opinion of this Court on the following case:—

The plaintiff was entitled as heir at law of one William Richardson (who had theretofore demised the said closes by parol from year to year to the said John Watson, to recover 12*l*. 11s. 7d. for the half year's rent of the same two closes, provided they did not pass by the will of the said William Richardson, to his great

nephew, one other John Richardson.

The will of the said William Richardson, dated the 17th of April 1827, is in

the following terms.

After giving and devising certain estates at Imingham, \*East Halton, 1878 Killingholme, and Halbrough, to his wife (now his widow) Catherine, for life, and subject thereto, his estate at Imingham to his great nephew William Richardson in tail, and his estates at East Halton, Killingholme, and Halbrough to him in fee, the testator gave and devised "All that his messuage, or tenement, closes, lands, hereditaments, and real estates, situate, lying, and being at Hibaldstow in the said county of Lincoln, which were then in the occupation of John Watson, unto and to the use of his great nephew Percival Richardson, his heirs, and assigns, for ever," and he then devised as follows :- "I give and devise all that my messuage, or tenement, closes, lands, hereditaments, and real estates situate at Kirton in the said county of Lincoln, which are now in the cocupation of Joseph Atkinson, and also the close in Kirton aforesaid, now in the occupation of the said John Watson, unto and to the use of my said great nephew John Richardson, his heirs and assigns for ever. I give and devise all that my messuage or tenement, closes, lands, hereditaments, and real estates situate at Kirton aforesaid, which are now in the occupation of Thomas Curtis, unto and to the use of my said great nephew Thomas Richardson, his heirs and assigns I give and devise all that my messuage or tenements, closes, lands, hereditaments, and real estate situate at Kirton aforesaid, which are now in the occupation of Joseph Wharton, unto and to the use of my said great nephew Richard Richardson, his heirs and assigns for ever." There was no residuary devise.

For two or three years previous to, and in the year 1825, and thenceuntil the death of the said William Richardson, the said John Watson occupied two closes in the parish of Kirton, as tenant of the said William Richardson,\* being [\*789] the same two closes for the use and occupation of which the present action was brought. One of the said closes contains ten acres three roods, and has always been called Low Firwells; the other contains eleven acres, one rood, and has always been called Low Sweet Hills. These were separated from each other

by several intervening properties.

Evidence was received on the part of the defendant, of a will made in the year 1825, in which the devise corresponding to that on which the present question arises, is as follows: "And I give all those messuages, cottages, farms, closes, lands, tenements, and hereditaments whatsoever, situate and being in Hibaldstow and Kirton in the said county of Lincoln, as well freehold as copyhold according to the customary nature and quality of the same estates, unto the said William Teal Welfitt, Samuel Welfitt, and Charles Morris and their heirs, to hold to the use of them the said W. T. Welfitt, Samuel Welfitt, and Charles Morris, and their heirs upon the trusts and to and for the said intents

and purposes hereinafter declared of and concerning the same, that is to say: As to a farm and lands in Hibaldstow in the occupation of John Watson," to certain uses therein mentioned: "And as to, for, and concerning all that messuage or tenement, with the closes, lands, and hereditaments situate and being in Kirton aforesaid, now in the occupation of Joseph Atkinson, together with the close in Kirton aforesaid, occupied by the said John Watson, upon trust for my said great nephew John Richardson, when he shall attain the age of twenty-three years, and for the heirs of his body lawfully issuing." The \*790] testator then proceeds in the said will of \*1825 to carve out by name the other estates so devised to the trustees. The attorney who made the will in 1825, but who did not make the will in 1827, stated that he received instructions in writing from the testator for the will of 1825, which he produced, and which, amongst other instructions, contained the following:-" I also wish the farm in Joseph Atkinson's occupation to be the property of John Richardson, my great nephew, taking also the land in Kirton, occupied at this moment by Mr. Watson (all) only to be entered on at twenty-three." The witness stated in explanation of his having mentioned in the will only one close in the occupation of Watson, that the testator gave him certain verbal instructions for the will, and in those verbal instructions (which the witness took down in writing, and afterwards destroyed that writing) described the land in the occupation of Watson as a "close," but added, that he hardly knew what Watson occupied. The will was made from the written and verbal instructions. That he, the witness, from what passed, understood it to be the testator's intention to give all the land in the occupation of Watson, to his great nephew John Richardson. That in consequence of the testator not being certain what land Watson occupied, one Neale, who was supposed to know the testator's land, was called in, and asked by the witness in the testator's presence, whether the land in the occupation of Watson was in one close or two, and that Neale said it was all in one close, and that he, the witness, in consequence of this information described it in the will as above mentioned. The closes in question had formed a part of Atkinson's farm twenty-four years before, and until they came into the possession \*791] \*of Watson. The learned Judge thought this evidence as to the former will could not be submitted to the jury, and directed them to find for the plaintiff.

Amos for the plaintiff. The evidence, if admissible, would not have the effect contended for by the defendant. The statute of wills, 32 H. 8, c. 1, and the statute of frauds 29 Car. 2, c. 3, require that a will shall be in writing. The judgment of the court in expounding a will must be simply declaratory of what is in such written instrument; and evidence merely explanatory of what the testator has written, is admissible, but not to shew what he intended to have written; in other words the question in expounding a will is not what the testator meant as distinguished from what his words express, but simply what is the meaning of his words?(a) The defendant must rely on the maxim ambiguitas verborum latens verificatione suppletur, and it will be said that this is a latent ambiguity, and as it arises from parol evidence, it may be removed by parol evidence. The meaning and extent of this maxim is defined with great care by Tindal, C. J. in the late case of Miller v. Travers, 8 Bingh. 244. This is not within the first class of cases mentioned by him, where the description of the thing devised is clear on the face of the will, but on the death of the testator, it is found that there is more than one estate, or person, whose description follows out and fills the words used in the will, for here the description, taken alone, is inapplicable to two closes. It is now unnecessary to \*inquire whether, under the terms "the close in the possession of Watson," parol evidence would be admissible to shew which was intended, because all the parol evidence, if admitted, goes to shew that both were equally intended. Nor does it come

<sup>(</sup>a) See Mr. Wigram's Observations on the case of Goblet v. Beechey.

within the second class of cases, as a description accurate in part and inaccurate in part, for in order to make out the testator's intention to devise any of the premises in the occupation of Watson, the word close in the will must be changed from the singular to the plural; an entire new description must be substituted; and that would be calling in extrinsic evidence to introduce into the will an intention to devise a plurality of closes; the intention apparent on the will being to devise a single close. Then, after rejecting a part of the description, there is not sufficient to ascertain the thing devised. The general expression in Lord Bacon's Maxims, as to latent ambiguity, (see 4 Bacon, 79, 80, Ed. 1803,) is very much limited by his examples. He says there are two kinds of "ambiguits" latens;" first, where one name and appellation doth denominate divers things, and, secondly, where the same thing is called by divers names. In the instance which he gives of the first, namely, "if I grant my manor of S., and I have North S. and South S.," the name S. would include both North S. and South S.: "the general intent," he says, "includes both the special, and therefore stands with the words." But, here, the words "the close" will not apply to either exclusively, or to both. In Altham's case, 8 Rep. 155, a. 1, Lord Coke, speaking of cases of averment of matter of fact, dehors a fine, says, that such averment is good, which well stands \*with the words of the fine." And in Druce r. Dennison, 6 Ves. jun. 397, Lord Eldon says, "When a man devises to his son John, and happens to have two sons of that name, supposing one to be dead, there is a latent ambiguity, letting in parol evidence, but parol evidence perfectly consistent with the description in the instrument." Here the result of the parol evidence is to shew that "the close" means two closes of different names, and separated from each other: that is not consistent with the words of the will. If the parol evidence had shewn that only one close was meant, as if the testator was seised of one only, then the result would have stood with the It may be said the devisee has an election, and that the will operated as a devise of whichever close the devisee should please. Thus, when a man grants ten acres of wood in a particular parish, where he has a hundred acres: the presumption then is, where the thing is nominated by quantity, that the intention of the grantor was indifferent which ten acres the grantee should take. Or when, after a recital in a deed that he has North S. and South S., he leases unum manerium de S. Bac. Max. 80. Here no such intention of the testator is disclosed.

But, secondly, the parol evidence of what passed in 1825, when the testator made a former will, is inadmissible: the wills in 1825 and 1827 are not facsimiles of each other; they are not drawn by the same person: even in the very clauses relating to property in the possession of Watson the language is different. Besides, declarations of the testator not made at the time of the making of the will are inadmissible, Thomas v. Thomas, 6 T. R. 671. The Court will be very cautions in admitting \*evidence which is not used to apply the words of the will, but which, setting aside the words, is used to prove an intention which does not stand well with the words in the will do express the intention ascribed to the testator?

N. R. Clarke, contra. The Court will, if possible, give effect to the intention of the testator apparent on the face of the will. First, even without reference to any extrinsic evidence, except that which shows that there were in fact two closes occupied by Watson in Kirton, the case ought not to be considered as if the devise had been of two closes, and it could not be ascertained by the will which of the two it was. The testator meant to give all that which Watson occupied. The principal farm was occupied by Atkinson, and these two closes were parcel of that farm. The word "close" was used by the testator in the same sense as land, and it was devised as a parcel of Atkinson's farm. The word close does not necessarily mean a field inclosed by four hedges, but, in legal signification, has a much larger meaning, and extends to parcel of a

common or forest. By a devise of all the testator's messuage then in the occupation of E., a coal-cellar within the boundary of a messuage in E.'s occupation, and always used with it, was held to pass, Press v. Parker, 2 Bingh. 456. In Lane v. Earl Stanhope, 6 T. R. 345, leasehold property was held to pass under the words, "manors, messuages, houses, farms, lands and real estate." Here there is no circumstances to show that the testator did not mean to pass all the \*795 aland to Kirton occupied by \*Watson. This falls within the second class of cases mentioned by Tindal, C. J. in Miller v. Travers, 8 Bingh. 241; because the description is true in part, the land being occupied by Watson; but it is not true in every particular: it does not consist of one but of two closes.

It is objected that evidence of declarations not made at the time of the will was inadmissible, but evidence was offered to show what the testator considered to be the land occupied by Watson. There are many cases where land, though not under the precise denomination given by the testator, has been held to pass; thus in Goodtitle v. Southern, 1 M. & S. 299, by a devise of "all that my farm called Trogues Farm, now in the occupation of A. C.," lands parcel of Trogues Farm not in the occupation of A. C., were held to pass. [PARKE, J. There the land passed under the first of the description, and that decision proceeded on the principle, falsa demonstratio non nocet.] Here the word close has no technical meaning. In Doe v. Roberts, 5 B. & A. 407, the testator devised all his messuage or dwelling-house, with the appurtenances, in High Street, and all and every his buildings and hereditaments in the same street, to C. D. A. had only one house in High Street; but behind that house he had two cottages, fronting a back lane. There was no thoroughfare through the lane, the only entrance being from High Street: and it was held that the two cottages passed under the will. [PARKE, J. Unless the cottages in the lane were included in that devise, the words of will would have been inoperative; and there an enlarged sense was given to the word "in." DENMAN, C. J. The word was held to include premises not actually situate in the street, but to \*796] which the only \*access was from the street. It may be a question, at all events, whether the devisee is not entitled to one of the two closes.

Amos, in reply. In Goodlittle v. Southern, 1 M. & S. 299, the description in the will was true in part, and the rest might have been struck out. Here, if you strike out any part of the description, nothing remains. Lane v. The Earl of Stanhope, 6 T. R. 345, turned on the meaning of the word "farm." In Press r. Parker, 2 Bingh. 456, the coal-cellar might be considered parcel of the "messuage." A distinction must be drawn between evidence offered to show what the testator intended, and evidence to show, from the circumstances of the

property, what he understood by the terms he employed.

DENMAN, C. J. I think there was in this will, a latent ambiguity, which might be explained by parol evidence; but the evidence which has been given leaves it in doubt what the testator, meant to pass by the words "the close in the occupation of Watson." If it had been shown that there was only one close in his occupation, the supplementary evidence would have made it clear that that close was intended; but here it appears there were two closes in his occupation, and therefore the evidence leaves it doubtful which was meant to Pass. As, therefore, it is not ascertained, either by the words of the will, or by the evidence given to explain them, what the testator intended, the devise is void for uncertainty, and the heir at law is entitled to recover. This is not a case of election; for an election can take place only where the intention of \*797] the devisor or \*grantor is clear, that out of a mass, a certain portion should be selected. Assuming that the evidence of the former will, and what took place preparatory to it, was admissible, (which is very doubtful), it appears that the testator, on that occasion, gave instructions to his attorney, desiring that all the land in Kirton occupied by Watson should go to his great nephew; that the testator afterwards gave him verbal instructions, and described the land in the occupation of Watson as a close; and that, not being certain what land Watson occupied, he made inquiry of one Neale, who, in the testator's presence, stated that the land in the occupation of Watson was in one close; and that, in consequence of that information, the attorney so described it in the will. If Neale said that it was in two closes, it is possible the testator might not have left both closes. We cannot, from that evidence, say that the

testator meant to give either one or the other close. LITTLEDALE, J. I am of opinion that the parol evidence does not show which of the two closes the testator intended to devise; and, consequently, it does not explain the ambiguity of the will. The evidence as to the former will, only shews that the testator intended to devise some close in the occupation of Watson. In Goodtitle v. Southern, 1 M. & S. 299, the devise was of "all that my farm, called Trogues Farm, now in the occupation of A." There the first part of the description was certain; and it was held that the subsequent defective description of the occupation would not vitiate the previous correct one. The word close, in this will, is not synonymous with the word land, for the \*word closes occurs frequently in it. Independently of that, the word close is not so comprehensive a term as land. This is not a case of election, because it does not appear, from the context of the will, that the testator intended that the devisee should have an election. In the case put in Co. Lit. 145, a, where a gift is made of one of the donor's horses in his stable, it is manifest that the donor intends that the donee should select. So in the case put in Bacon's Maxims, of the grant of ten acres of wood, in a place where the grantor has 100. Here, then, the devisee having no election, and it being impossible to discover by the words of the will, or by the parol evidence, what was intended to be given, the devise is void for uncertainty. In Lord Cheyney's case, 5 Rep. 68, b., it was resolved, "that if a man has two sons, both baptized by the name of John, and, conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son John generally; and, in truth, the elder is living; in this case the younger son may, in pleading, or in evidence, allege the devise to him; and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead." And it is afterwards said, "if no direct proof can be made of his intent, the devise is void for the uncertainty." So in Doe dem. Hayter v. Joinville, 3 East, 172, where, by the dubious use of the word family (viz., brother and sister's family) in a will, the testator having had two sisters, one of whom was dead leaving children, it could not certainly be collected to what person he meant to apply it, the heir at law was held entitled to take. And in Mohun v. Mohun, 1 Swanst. 201, where the whole will consisted of \*these words, "I leave and bequeath to all my grand-children, and share and share alike," and by a codicil the testator appointed certain persons to be trustees for all his grandchildren and nieces, Sir Thomas Plumer held, that the devise was void, "there being uncertainty both in the subject and objects of the bequest." In the present case, therefore, I think that the devise is void, and the heir at law is

PARKE, J. I am of the same opinion; and I have formed that opinion with some regret, because I am satisfied that the testator intended to do something which he has not done. But I should be much more sorry to break in upon the established rule of law, that the heir at law is entitled to the estate of his ancestor, unless there be a good devise by the latter. Parol evidence was undoubtedly admissible to shew that Watson occupied two closes in Kirton, at a distance from each other. And, generally speaking, evidence might be given to shew that the testator used the word close in the sense which it bore in the county where the property was situate, as denoting a farm; but here such evidence was not admissible, because it is manifest that, in this will, the testator used the word close in its ordinary sense, as denoting an inclosure; for the word closes occurs in other parts of the will: If the parol evidence had been confined

o the fact of there being two closes in Kirton in Watson's occupation, and to heir situation, it would not have removed the uncertainty which of the two loses the testator meant to pass; but still the case would have fallen within the irst class of those mentioned by Tindal, C. J. in Miller v. Travers, 8 Bingh. 248, as "where the testator devises \*his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name:" n each of which cases parol evidence is admissible, to shew which manor was intended to pass, and which son was intended to take. Such evidence is admissible to shew (as Mr. Amos properly pointed out,) not what the testator intended, but what he understood to be signified by the words he used in the will. Then as to the evidence of what passed at the time of preparing the first will, that loes not shew which of the two closes the testator meant to devise. It appears he was mistaken in supposing that he had only one close in Kirton in Watson's possession; but that does not remove the doubt as to which close he intended to devise, and it being, then, impossible to say which of the two closes he intended to give, the devise is void for uncertainty. The devisee clearly had no election That exists only where, on the natural construction of the instrument, there is a clear intent in the testator or grantor that there shall be an election in the devisee or grantee, as in the instances put in Bacon's Maxims, the reason of which is there given. Here it cannot be collected, on the face of the will, that the testator intended that the devisee should have a right to elect; for he devises the close (not one of the two closes) in the occupation of Watson. The judgment must, therefore, be for the defendant.

Judgment for the defendant.

## \*801] \*SHAW and Others, Assignees of RICHARD BATLEY, v. THOMAS BATLEY. May 3.

A bankrupt made a purchase of timber by two agreements, one before and one after the act of bankruptcy, and, after the act of bankruptcy, received part of the timber without paying for it, but was not entitled to receive the remainder without giving security for the whole. After the act of bankruptcy the defendant became security, and purchased from the bankrupt the benefit of the contract; which purchase was recited in the instrument by which the defendant became security. The bankrupt afterwards agreed with the defendant, that he, the bankrupt, would pay the money due to the vendor for the timber purchased by the first agreement and in part received, and should be entitled to retain the timber so purchased. The bankrupt then delivered the money and bills to the defendant, to be paid to the vendor for the timber first purchased. The defendant paid the cash to his own bankers, and indorsed the bills to them; and afterwards paid the amount of the cash and of the bills to the vendor, by a single draft on those bankers. After this the commission issued.

Held, that the defendant was not liable to repay the cash to the assignees, nor to indemnify the bankrupt's estate against the bills; for the defendant was the mere agent of the vendor, and neither the cash nor the proceeds of the bills could have been recovered back from him, the transaction on his part being a bona fide one, protected by 6 G. 4, c. 16, s. 82.

At the sittings in Middlesex after Michaelmas term, 1830, this cause, with all matters in difference, was referred to a barrister. The arbitrator made his award, dated 1st of June, 1832; by which, after deciding upon the cause (as to which no question arose before the Court), he found the following facts:—That Richard Batley committed an act of bankruptcy, and became bankrupt on the 29th of March, 1828; and that a valid commission of bankruptcy was issued against him on the 29th of July in the same year, under which the plaintiffs were duly appointed assignees. That on the 26th of March, 1828, the Earl of Stradbroke agreed with Richard to sell him certain marked oak-trees on credit, expiring on the 1st of February, 1829; but Richard was to give security if re-

That on the 25th of April, 1828, Earl Stradbroke agreed to sell to Richard a further quantity of marked trees on credit, but on the terms that no part of the timber (except the bark and top-wood) should be removed until actually paid for or secured to the satisfaction of the Earl. That Richard took possession of, and sold, the bark and top, of the value of 2000l.; and paid the Earl, on account of the said purchase, \*600%. only; that the Earl thereupon required security for the residue of the purchase-money, and refused to permit any part of the timber to be removed before such security had been given; and that the defendant (Richard's father) agreed to become such surely. That on the 5th of June, 1828, an agreement in writing was executed between Richard and the defendant, by which, after reciting the before-mentioned transactions, and also that the whole of the timber trees had been felled and remained there (except the bark and top-wood), and that Richard had applied to the defendant to become surety for him to the Earl, and, to indemnify him for so doing, had agreed to assign and make over to him all the timber-trees, and the contracts for the purchase thereof; to which the defendant had consented; Richard agreed to sell the timber to the defendant, and also the said contracts; and the defendant agreed to buy the timber at 71. per load (the price to be paid to the Earl by Richard, after deducting the value of the bark and top-wood), w be paid or allowed by the defendant to Richard; and the defendant agreed to accept bills, to be drawn upon him by Richard, for the amount of the sum which

That on the same 5th of June, 1828, the defendant, on the requisition of the Earl, executed and delivered to him an instrument, by which he undertook to guarantee to the Earl the payment of all sum and sums of money then due and payable to him from Richard for the timber-trees lately sold to him by the Earl, namely, the sum of 650l. and 750l. upon the said timber being \*measured to, the sum of 1000l. on the first day of December then next, one moiety of the balance which should then remain due on the 1st of February then next, and the residue of the said purchase-money on the 6th of January, 1830, he "the said Thomas Batley having purchased the said timber, and all benefit of the contracts entered into by the said Richard Batley with his Lordship for the

should remain due to the said Earl after payment of the sums of 650% and 75%, payable to the Earl or his order, and to give such other guarantee as the said Earl

purchase thereof."

That on the 16th of June, 1828, it was further agreed between the defendant and Richard Batley, that Richard should be allowed to have and take all the timber-trees and other trees, first purchased by the said Richard, and afterwards purchased by the defendant of the Earl, or of the said Richard, and felled from the estates of the Earl, at such a price or prices, and on such terms, as the same had been so purchased of the Earl by Richard and the defendant, or one of them. That the defendant should retain in his hands certain effects of Richard & a security to him, and as a set-off for any sum he might pay or lose in consequence of the engagements above mentioned. That the property in the said timber should still remain and continue in the defendant, until the whole of the purchase-money for the same should be paid to the Earl; and that the said defendant should have the right of stopping the removal of the said timber, or any part thereof, from the estate of the Earl, or other places, and keep the same uni such purchase-money should be paid, and should be at liberty himself to sell any part of such timber, in order to raise money for payment of the same. That the defendant should receive all sums payable by certain persons who had pure chased a part of the timber from Richard; that the defendant's receipt should be a good discharge for the same; and \*that such money should be by 1804 him paid or retained on account or in discharge of the purchase-money to the said Earl; and that the sum of 1400l., which the Earl was to receive on the 23d of June then instant, should be paid by the said Richard Batley. The arbitrator further found, that it was so agreed that Richard should A he sum of 1400l. (being the amount of the said sums of 650l. and 750l.) on the 3d of June, because he had already received and sold the bark and tops of the aid trees to the value of 2000l. and upwards, and had only paid the Earl 600l.; hat the said Richard, between the said 16th of June, 1828, and the 21st of only in the same year, delivered to the defendant 4001. in cash, as being his wn proper money, and two bills of exchange for 500l. each, as his property, lrawn by the said Richard on one Smith, and not then due, for the purpose of he defendant paying the said sum of 1400l. to the said Earl; and the defendant said the said 400l. to his own bankers, and indorsed the said bills of exchange o the same bankers as his own property. That the defendant, on the 21st of July, 1828, paid the said sum of 1400l to the said Earl, by a draft on his said ankers, which was duly paid; and the said two bills not having been paid, the ame had been proved against the estate of the bankrupt; and that the defendint, besides the said sum of 1400l., had also paid other sums to the said Earl on account of the said timber, which, with the 600l. paid by Richard Batley, and the said 14001, amounted to 10,9861. 3s. 3d., the full price of the said timber, and bark and tops.

That the plaintiffs, as such assignees, had, upon the matter so proved before \*805] the arbitrator, claimed the said \*400 $\ell$ ; and required also that the bankrupt's estate should be indemnified against the said proof of the two

bills of exchange, and all dividends in respect thereof.

The arbitrator then awarded, that the claims of the assignees were not sustainable, but that if this Court were of a different opinion, the defendant should pay the 400*l*. to the assignees, and should pay to the plaintiffs the amount of any dividends which they had been, or should be, obliged to pay in respect of the proof of the bills of exchange, and that he should indemnify them in respect of those bills, and relinquish and assign to them all benefit to be derived in respect of them from the drawer.

In Trinity term 1832, the plaintiffs obtained a rule calling on the defendant to shew cause why he should not make the payments and give the indemnity, according to the terms of the award; and why the plaintiffs should not be at liberty to enter up judgment for the sums payable. In the following term the Court ordered the case to be set down in the special paper for argument on the

question raised by the award.

Sir James Scarlett for the plaintiffs. The defendant has, since the bankruptcy of Richard Batley, received from him 400% in cash, and two bills of 5001. This makes the defendant liable prima facie, and the plaintiffs must recover, unless the case fall within a class of decisions to which the arbitrator has probably referred it. These decisions, whether correctly or not, establish that the assignees of a bankrupt cannot recover money from the agent of a third party, where such agent has merely delivered it in that character to a bankrupt, <sup>\*806</sup> Coles v. Wright, 4 Taunt. 198; \*and that money paid by a mere agent of the bankrupt to a third party cannot be recovered from such agent by the assignees, Tope v. Hockin, 7 B. & C. 101. But the defendant is not a mere agent. He guarantees the debt of Richard Batley, and he expressly declares that he has himself become the purchaser of the timber. He therefore becomes Lord Stradbroke's debtor; and accordingly, in his agreement with Lord Stradbroke, he recites the agreement of 5th June, 1828, made between himself and Richard, by which the defendant had become the purchaser of the timber and of all benefit of the contracts made between Lord Stradbroke and Richard. Richard had, indeed, received timber to the value of 1400l. beyond the sums which he had paid; so that the defendant could not have the benefit of the contract until Richard should pay the 1400l. He therefore contracts with Richard that the latter shall pay that sum; but, as between Lord Stradbroke and the defendant, the defendant is bound to pay Lord Stradbroke the 1400% at all events. As between Richard and the defendant, Richard was bound to furnish the defendant with the money, and he did so furnish him; but the defendant

did not receive it as agent to Lord Stradbroke. The defendant places the cash with his own banker, and treats the bills of exchange as his own property, Lord Stradbroke never indorsing them at all; and he afterwards pays Lord Stradbroke by his own draft. In the cases referred to, the party making the payment had no personal liability or right; but here Lord Stradbroke was entitled to sue the defendant, and the defendant to sue Richard. Each of the three parties stood on his \*own contract. It follows that Richard paid the defendant for his own use, not as Lord Stradbroke's agent. Had this money been paid to the defendant even before the act of bankruptcy, in contemplation of bankruptcy, a jury would have found that the payment was an act bankruptcy and a preference of the defendant. They never would have considered Lerd Stradbroke liable. Here the case goes farther, for there is an antecedent bankruptcy. There might perhaps have been some pretext for the defence, if the defendant had paid over to Lord Stradbroke the identical money received from Richard. But, instead of doing so, he has taken a further credit between himself and Lord Stradbroke, which shews that he was in fact paying his own debt Now, if a party guarantee the debt of another, and that other become bankrup: and afterwards pay money to the warrantor to indemnify him, leaving the warrantor to pay the money over to the original creditor, the warrantor is clearly liable to refund to the assignees. In the present case the assignees might have brought trover for the bills; and it would have been no defence to say that the bills had been discounted, and the proceeds paid over. Coles v. Wright. 4 Taunt. 198, is distinguishable. There the defendant had delivered to the bank rupt money raised by the sale at auction of goods belonging to the bankrapt. which sale took place after the committal of the bankrupt to prison. The defendant had merely carried the money from the auctioneer to the bankrupt Sir James Mansfield, in his judgment, says, that the action might have been maintained against the auctioneer, but that it would be hard to apply the doctrine \*of relation to a mere agent for delivering the money. Where, then, a party is excused on the ground of his being a mere holder, the liability arising from an improper payment or receipt falls upon the person from when the money comes, or to whom it ultimately goes. But here, if the assignee sued Lord Stradbrooke, he would defend himself by shewing that he received the money, not from Richard, but from the defendant; the relation of the parties to each other is therefore different in all respects from that in Coles r. Wright.

F. Pollock for the defendant. The assignees cannot recover, unless they have an equitable as well as a legal title. The Court will look at the substance of the transaction rather than the form. The defendant has interfered to protect the credit of Richard Batley, his son, and the agreement substantially amounts to this:-that Richard having made the purchase, the defendant takes the property and gives a guarantee; the property is to be the defendant's, but Richard is to indemnify him, and, inasmuch as Richard had received 2000l. and paid only 600l., and the remaining 1400l. was to be paid on a given day to Leri Stradbroke, the defendant stipulates that Richard shall pay that 1400l. Therefore the money paid by Richard is not paid to the defendant, but to the original creditor, Lord Stradbroke. And this construction of the contract agrees with the finding of the arbitrator, who states expressly that the 1400l. was delivered by Richard to the defendant, for the purpose of the defendant paying it to Lerd Stradbroke. No particular form is required to protect such transaction; it cannot be said that the defendant should have required Richard to make the payment in person; such \*preciseness is rather a badge of fraud. Little tsop stress can be laid on the circumstance that the defendant did not pay over to Lord Stradbroke the identical sum delivered to him by Richard. Payments are seldom so made, and in the present case the bills required discounting before the payment could be made at all; and no reason can be assigned against the defendant's giving his own indorsement to the bankers for the purpose of

procuring the discount. The doctrine in Coles v. Wright, 4 Taunt. 198, which cas laid down with the view of relaxing a hard rule of law, is not to be narowed by laying an undue stress on such points. The present case would have seen different if the arbitrator had found that the object of the payment was to ecure the defendant himself. [DENMAN, C. J. It certainly is a circumstance n your favour that the arbitrator uses the term "delivered," not "paid."] And 10 doubt Lord Stradbroke might have sued the defendant for money had and received to his use. Cur. adv. vult.

DENMAN, C. J. during the term, delivered the judgment of the Court. The 400l. in cash, and the two bills of 500l. each on Smith, are found by the irbitrator to have been delivered to Thomas Batley for the purpose of his paying 1400% to Lord Stradbroke. As this 1400% was due to his lordship in cash t cannot be understood to be the finding of the arbitrator that the specific bills of exchange should be delivered to Lord Stradbroke, for these bills were not \*8107 then due; it must be intended that Thomas Batley was \*in some way to convert them into cash, and to pay the sum of 1400l. with that cash and the 400l. paid to him.

If this be so, Thomas Batley must be taken to have acted as the agent of the bankrupt in converting the bills into present cash, and paying the proceeds, to gether with the 400l., to Lord Stradbroke. Upon that supposition, the payment is protected under the eighty-second section of the 6 G. 4, c. 16.(a) But for the provisions of this statute and the 19 G. 2, c. 32, s. 1, the assignees could certainly have recovered back both sums from Lord Stradbroke, though the specific 400l. received from the bankrupt was not paid into his hands, (as to the last point, Allanson v. Atkinson, 1 M. & S. 583, is an authority), but the clause in the existing bankrupt act, if not that in 19 G. 2, clearly protects this payment, and prevents them from recovering it. If the assignees cannot recover from Lord Stradbroke, and the payment to him be good, it cannot be permitted that they should recover from the agent, who merely acts as agent in making a valid disposition of the bankrupt's property.

\*For these reasons we are of opinion that the awarded is right, and the defendant's rule must be discharged. Rule discharged.

#### In the Matter of BONNER, Gent, One, &c.

Where an attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate.

But if the attorney committed fraud in the receiving and not accounting, the Court, in the exercise of its general jurisdiction over its officer, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct.

The case of fraud, however, ought to be clear, and the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to shew cause why he should not pay over the money.

(a) Which enacts, "That all payments really and bona fide made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and bona fide made, or which shall hereafter be made to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

Vol XXIV.—23

A RULE had been obtained, calling on Mr. Bonner, an attorney of this Court to shew cause why he should not pay over certain sums of money to Matthew Robinson and Samuel Campain, executors of William Stokes deceased, with the costs of that application. It was stated on affidavit in support of the rule that the testator, Stokes, had agreed to purchase a farm of one Decamps, who employed Bonner as his attorney. Bonner drew the agreement for the purchase and the vendor and vendee paid him each a moiety of the charges. Part of the purchase money had been paid at that time; and on a communication from Bonner that the conveyance was prepared and the rest of the purchase money wanted, Stokes, on the 10th of April 1828, paid the money to Bonner's clerk, who gave a receipt, and said the title deeds should be sent. They, however, were not sent, though often called for by Stokes, and Bonner afterwards became bankrupt. It then appeared that Decamps had not received the purchase money; and Stokes, who had been let into possession, was turned out, incurred 50% costs in litigation, and, in order to regain possession of the property, was obliged to pay \*the residue of the purchase money a second time. He died in 1831. The executors, in making this application, charged Bonner with having fraudulently obtained the money so paid to his cleek.

In answer to this affidavit, Mr. Bonner swore that the delay in completing the conveyance had arisen from the premises being under mortgage, which Decamps, the vendor, had been unable to pay off. That before this had been effected, Stokes paid the residue of the purchase money to Bonner's clerk, but without any solicitation by, or notice to, Bonner himself. That in consequence of losses on a property in Wales, in which he had embarked a large sum of money, Bonner afterwards became bankrupt; a commission issued, and he subsequently obtained his certificate. That the amount now claimed as the residue of purchase money paid to Bonner's clerk, was a debt proveable under the commission. That the litigation in which Stokes incurred the costs above mentioned, was a suit brought by the mortgagee to recover possessien, and that Bonner was not answerable for such costs. That Stokes had never in his lifetime instituted any proceeding like the present against Bonner, nor charged him with fraud, and

that, in fact, he had not been guilty of any fraud.

The Solicitor-General, and Jeffery Williams shewed cause (May 2d.) This was a sum of money voluntarily paid by a purchaser to an attorney who acted both for him and for the vendor, and constituting a debt which might have been proved under the commission, if the money had not been paid over. ficate, therefore, is an answer to this application: Ex parte Culliford\* v. Warren, 8 B. & C. 220. It would have been a ground of discharge [\*813 from an attachment: Rex v. Edwards, 9 B. & C. 652. It is not even clear that when this money was paid to Bonner, the vendor did not become entitled to it as money paid to his use, and that he may not actually have taken steps to re-The decision of this Court, In the matter of Bonner, in Hilary term cover it. 1832,(a) when the rule was made absolute, was not well considered, nor is it applicable to this case. [PARKE, J. The decision there must have proceeded on the ground of improper conduct in an officer of the Court; and it cannot be contended, that the Court may not punish an attorney for misconduct committed before he obtained his certificate, by making him pay over sums of money, for which he was then liable, instead of inflicting the severer penalty of striking him off the roll.] This is not, in point of form, an application against an attorney for misconduct; and if it were, no case of fraud is established.

Humfrey contra. If the Court decided rightly on the former motion against this party, the present application cannot be refused. There the transaction, out of which the claim against hip arose, was of still older date, and the certifi-

<sup>(</sup>a) This was an application, callive upon the same party to repay sums of money under circumstances very similar to the present, but the case of fraud was more strongly and circumstantially stated. There were contradictory affidavits, but the Court, on the last day of Hilary term, made the rule absolute.

rate was relied on: but Lord Tenterden said, "Let the attorney dare to tell the Court that, having obtained this money in his professional character, he will not \*814] pay it over because he is protected by his certificate, \*and I shall know how to deal with him." Admitting that the certificate was a bar to this claim, the Court might compel the attorney to pay the money as a means of escaping heavier punishment: as a party, when brought up for judgment, is sometimes compelled in the same manner to pay the prosecutor's costs, though the Court has no power of enforcing such payment directly. And the conduct sworn to in the present case would clearly be punishable by the Court as a fraud in one of its officers. In the first two cases mentioned on the other side there had been a debt distinctly proveable under the commission; here, the vendee paid the money as to the vendor's attorney, and never heard, till a long time afterwards, that the vendor had not received it: it would have been difficult to say, under the circumstances, at what period a debt accrued as between Bonner and the vendee.

LITTLEDALE, J. I think the Court cannot interfere. Looking at this as the case of a person not an attorney of the Court, there can be no doubt that the demand in question was a debt which would have been proveable under the commission. It is clearly barred by the certificate. If the party, in his character of an attorney, has been guilty of fraud, an application may be made to punish him for that fraud. The former case, In the matter of Bonner, does not seem to have been deliberately considered by the Court.

PARKE, J. I am not disposed to dissent from the general proposition which appears to have been acted upon in the former case, that although an attorney may have obtained his certificate as a bankrupt, this Court may exercise the \*815] general jurisdiction which it has over its \*officers, to oblige him to do justice. But to warrant this, there should be a clear case of fraud. In

the present instance, I think the Court ought not to interfere.

Denman, C. J. This case is so like in its circumstances to the former case In the matter of Bonner, in which I was counsel, and the Court decided against me, that I am unwilling to give an opinion. I think, however, that the Court should have the power over its officers which has been ascribed to it; but if a punishment is to be inflicted on the attorney, which punishment is to be modified so as to make him pay over a sum of money that is demanded of him, he ought to have notice of what is intended, by a motion in a different form from the present.(a) The rule will, therefore, be discharged. Rule discharged.

# JOSEPH ARDEN and RICHARD EDWARD ARDEN, Gents., &c. v. TUCKER, Gent., One, &c. May 6.

Where a party has employed two attorneys, partners, to manage a cause for him in the Palace Court, an action in the common form lies against him at the suit of both, for the bill of costs, though one only was an attorney of the Court, and actually did the business there.

Although the client gave a written retainer to the latter attorney only, and he only was mentioned in the rule for taxing costs, these facts were held not conclusive, there being evidence, aliunde, of a contract with both.

Assumpsit for work and labour of the plaintiffs as attorneys, in prosecuting, defending, and soliciting divers causes, suits, and businesses for the defendant,

<sup>(</sup>a) In the former case, In re Bonner, the rule, granted on the affidavit of M. P. was that Bonner should shew cause why he should not pay over the sums of money specified, and the costs of that application; and that he should answer the matters of the said affidavit.

and for fees due in respect thereof, and for journeys. \*Money counts, &c. Plea, non-assumpsit. The particular of demand was, "Amount of plaintiffs' bill for business done by them for defendant in the Palace Court, in a cause, Tucker, Gent., v. Stevens, 25l." At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term 1832,(a) it appeared that the business was done upon the defendant's retainer, in a cause in the Palace Court. The plaintiffs were partners, but Joseph Arden only was an attorney of the Palace Court, and his name only was mentioned in the defendant's written retainer. The bill was signed by both, but in the order of the Palace Court for taxation, it was mentioned as the bill delivered by Mr. Arden. The defendant had written letters to both plaintiffs jointly on the subject of the cause and its charges, while it was depending; and after it was over he proposed to them to pay them 15%. in discharge of their costs, instead of 20% which they had demanded. For the defendant, it was objected that the plaintiffs, not being both attornies of the Palace Court, could not join in an action for business done there, to which point Brandon and Brown v. Hubbard, 2 B. & B. 11, was cited; and further, on the authority of Collins v. Godefroy, 1 B. & Ad. 950, that the promise to pay, under such circumstances, was not binding. Lord Tenterden was of opinion that the plaintiffs could not recover, and directed a nonsuit, giving leave to the plaintiffs to move to enter a verdict for them. A rule nisi having been obtained for this purpose,

\*The Solicitor-General and Kelly in the present term shewed cause,(b) and again relied on the above-mentioned cases. The retainer was an express contract with Joseph Arden singly. If he had misconducted himself in the cause, Tucker could not have brought an action against both partners. The client could only contract with the partner who could legally act upon the retainer; there was no consideration for an undertaking to the partner who, by the rules of the Palace Court, could not practise there. [PARKE, J. Is there such a restriction?] There is a roll of attorneys in that court, limited to six. The rule of court was, to tax the bill "delivered by Mr. Arden." [PARKE, J. It was the bill of both.] De facto, but not de jure. Heming v. Wilton, decided about two years ago in the Court of Exchequer, is the converse of the present case. There an attorney sued for business done by him as clerk in court in the Exchequer; the defence was, that he had a partner who ought to have joined in the action; and the defendant, to establish a joint contract with the two, proved that he had given instructions to both, and that their bill was delivered in the name of both. In answer, the plaintiff proved that he alone was entitled to practise in the Court of Exchequer: and the action was held to be Suppose in the present case neither partner had well brought. [PARKE, J. been an attorney of the Palace Court, but they had contracted with the plaintiff to get his business done there. Or suppose the case of an attorney employed to get business done in a Spiritual Court; which often happens.] No doubt there would be a right to recover, but the declaration must be framed \*according to the circumstances. Here the claim in the declaration is for prosecuting, defending, and soliciting causes; and the particular demand is, for business done in the Palace Court. As for the promise made after the business was done, that could only be prima facie evidence of a previous contract with the two plaintiffs; and the rest of the case rebuts it.

Sir James Scarlett contrà. Brandon and Brown v. Hubbard and another, 2 B. & B. 11, bears no analogy to this case. There the business (preparing a replevin bond) was done by one plaintiff, who was replevin clerk to the sheriff: the other, who was his partner, could not legally act in it. The defendants dealt with Brandon in his capacity of replevin clerk, and not as the partner of

<sup>(</sup>a) See 1 Moody and Robinson, 191, where the case is reported as to the present and another point.
(b) Before Denman, C. J., Littledale, and Parke, Js.

Brown. The point as to a joint retainer did not arise there. In Elkins v. Harding, 1 Tyrwhitt, 274, 1 Cro. & J. 345, it was held that an officer of the Court of Exchequer might sue jointly with an unprivileged person, his partner, for agency business done in that court by both: and instances of such proceedings are collected in Manning's Exchequer Practice there referred to. The point now taken by the defendant might have been raised in that case, but was not. It is not suggested here that the plaintiffs, by their practice, contemplated any fraud upon the statutes respecting attorneys. It very commonly happens that attorneys of this Court have a partner who is admitted in one of the other courts, and conducts the business there. As for the warrant to prosecute, that is always made to a single attorney. But where there are partners, if money is advanced, \*819] it comes out of a common \*fund, and if labour is bestowed, the remuneration belongs to that fund.

\*\*Cur. adv. vult.\*\*

DENMAN, C. J., now delivered the judgment of the Court. This case was argued before us on Wednesday last. The plaintiffs were in partnership together as attorneys; one of them only was an attorney in the Palace Court, and the action was brought by both, for business done in that court. There was sufficient evidence of a contract by the defendant with both the plaintiffs that they should do the business for him. But it was contended, first, that this evidence was clearly rebutted by proof of a written retainer of one of the plaintiffs alone, who was the attorney in the Palace Court, and the order to tax, and undertaking to pay his bill, which shewed a contract with that plaintiff alone; and, secondly, that if not, the contract with the plaintiffs was not binding in point of law.

As to the first objection, when it is recollected that the retainer filed in the Court is an authority quoad the proceedings in that court only, and is analogous to the warrant of attorney filed of record in this Court; and that the undertaking which is to be enforced in the Palace Court must necessarily be to the attorney in that Court; the evidence of a joint contract with both plaintiffs is very little affected by this species of proof. And on the whole, the weight of evidence is clearly in favour of the joint employment of both plaintiffs.

The second objection is, that such a joint contract is void in law, on the ground that the attorney in the Palace Court could alone sue for business done

in that court.

\*820] \*There is no act of parliament which regulates the proceedings in this Court, (a) and therefore the case must be considered as one at common law.

No authorities were cited in support of the position, except that of Brandon and Brown v. Hubbard, 2 Brod. & B. 11, and a case of Heming v. Wilton in the Exchequer. The former case has no bearing upon this, and in that there was no joint employment of the plaintiffs. The latter is, as far as we can learn, not reported. It is not in any of the published reports of the Court of Exchequer; and the decision that the clerk in court in the Exchequer might sue alone for business done in that Court, though he and his partner had delivered a bill as for business done by them, may have proceeded on the ground that the joint contract with both partners was not clearly made out.

In the absence of any enactment or decision to the contrary, which we must take to be the case, the question is, whether, upon any principle of law, there is an objection to this action at the suit of both, where the contract is with both,

and we think there is no objection.

Suppose neither of the plaintiffs had been attorneys of that Court, but that the defendant had employed them, and they had undertaken with him to do the business there for him, and for reward to be paid to them; and they had then employed an attorney of the Court on their own credit, there could have been

<sup>(</sup>a) See as to this court, 2 Bac. Abr. 510, in marg. 7th ed. and the authorities there died.

Rule absolute.

no objection to the action by both for the reward; it would be like the case of attorneys, who, upon their own credit, \*employed a proctor in the Spiritual Courts, or, before the recent alterations, (11 G. 4, & 1 W. 4, c. 70, 18. 10,) a clerk in court in the Exchequer, and who certainly might have sued their own client for their bill. If so, it can make no difference, that one of the plaintiffs is the person who himself transacts the business in the particular court, where the contract is clearly with both.

We are of opinion, therefore, that this action will lie; and the rule must be

absolute to enter a verdict for the plaintiffs.

### DIGBY v. THOMPSON and ANOTHER.

The following words, "D. has had a tolerable run of luck. He keeps a well-spread side-board, but I always consider myself in a family hotel when my legs are under his table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of ecarté or any other game. The fellow is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession," will support a declaration for libel without explanatory averments; for they tend generally to disgrace the plaintiff.

Quære, Whether defendant by demurring to a declaration for a libel, stated to have been published with intent to cause certain matters to be believed, admits particular words

in the libel to have been published with that intent.

The declaration stated, that the plaintiff was a person of good reputation, and had not ever been guilty, or, until the committing of the several grievances by the defendants as thereinafter mentioned, been suspected to have been guilty of the misconduct thereinafter mentioned to have been imputed to him. or of any other misconduct; yet the defendants, well knowing the premises, but contriving, &c., to injure the plaintiff in his said reputation and to bring him into public scandal and disgrace, and to cause it to be suspected and believed that the plaintiff had been guilty of unfair play at cards, and for defrauding persons of their money by means thereof, and by bettings, and that he had played \*unfairly and fraudulently at a certain game with cards called ecarté, and at certain other game swith cards, and had thereby won large sums of money from divers persons visiting the house of the plaintiff at Brighton, in the county of Sussex, and that the plaintiff invited persons to his house and entertained them there for the purpose of winning their money unfairly by gaming there; and that the plaintiff was a person of disreputable and bad character, and did in a great measure support and maintain himself by gaming and by unfair and fraudulent practices in gaming and betting, to wit, on, &c., at, &c. wrongfully, maliciously and injuriously published in a certain newspaper called the Satirist or Censor of the Times, a certain false, scandalous, maligious, and defamatory libel of and concerning the plaintiff, containing the false, scandalous, malicious, defamatory, and libellous matter following of and concerning the plaintiff; that is to say, "King Digby, (meaning the plaintiff,) as my friend Tom used to style him, has had a tolerable run of luck this season, (meaning thereby that the plaintiff had won divers large sums of money by gaming.) He (meaning the said plaintiff) is still here, (meaning at Brighton aforesaid,) and keeps, I assure you, friend Sat, a well spread sideboard; but, curse the fellow! I always consider myself in a family hotel when my legs are singing duets under his table; for the bill is sure to come in sooner or later, although, as you know, I rarely dabble in the mysteries of ecarté or any other game. The fellow (meaning the plaintiff) is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession." Demurrer, assigning for cause that the matter alleged did not amount to any libel on the plaintiff, and also that although the plaintiff \*had by an innuendo alleged that by the words of the libel, "King Digby (meaning the plaintiff), as my friend Tom used

to style him, has had a tolerable run of luck this season," the defendants meant that the plaintiff had won money by gaming, and had alleged as an inducement that the plaintiff was guilty of gaming; nevertheless it was not alleged or shewn that the libel was published of and concerning such gaming, or that such libel had any reference to the matters stated in the introductory part of the declaration, or any of them; and also for that the meaning and explanation by the plaintiff given to the words in the said libel, adds to, enlarges, and changes the sense of those words, and also for that the said meaning and explanation is not connected in any way by averment or otherwise with, or in any way applicable to the matters of inducement before stated, and also for that there is no averment that the defendant was used to employ, or did on the occasion of the publishing, employ the said words in the sense and meaning put upon them by the plaintiff in the said innuendo. No counsel appearing in sup-

port of the demurrer, the Court called upon

Wightman to support the declaration. The defendants have, by the demurrer, admitted that the words of the libel were used with the intention imputed in the declaration; the only question, therefore, is, whether the words set out will bear a sense corresponding with that intention. If the defendants had pleaded, the whole would have been a question for the jury; but after demurrer, if the words can possibly bear the sense ascribed to them, it must be taken that they were used in that sense, and the words "that the plaintiff had had a tolerable \*run of luck, &c.," certainly may mean (as stated in the innuendo) that he had won large sums of money by gaming. Besides, this declaration may be supported, because the matter charged as libellous, independently of any innuendo, has a tendency to disgrace the plaintiff, and the Court will understand the words used without any explanatory averment, if the sense is sufficiently obvious as it is here. In Peare v. Jones, Roll. Abr. Action on the case, 55, pl. 16, the plaintiff declared that he was an utter barrister of the Middle Temple, and a practiser of the common law for several years, and that the defendant, of purpose to defame him, maliciously said of him to J. S., his fatherin-law, Did Mr. Peare, (the plaintiff), marry your daughter? to which J. S. said, Yes; to which the defendant replied, He is a dunce and will get nothing by the law; to which J. S. answered, Other men have a better opinion of him; to which the defendant replied, He was never accounted otherwise in the House. It was held, on motion in arrest of judgment, that the action lay upon this declaration; for a man may be heavy, and not so pregnant as others are, and yet But here it appeared on the whole matter that it was spoken a good lawyer. maliciously, and he said, he would not get anything by the law, which disgraced him in his profession. The Court there took notice of the meaning of the word dunce, according to the common understanding, (Cro. Car. 382, S. C.) And in Goddart v. Haselfoot, Roll. Abr. 54, pl. 12, it is held, if a man says of a doctor of physic, "he is an empiric, and a mountebank," an action lies, without any averment of the signification of the words; for these are terms of disgrace well \*825] known, and in disgrace of his \*profession. In Peare's case, Roll. Abr. 55, pl. 15, (see Vin. Abr. Action for Word, S. a 10, 11, 12, 16, 17,) it is said to have been held that, if a man says of a councillor of law in the North, "Thou art a daffadowndilly," an action lies, with an averment that the words signify he is an ambodexter. The word "ambodexter," there, might have been said to require an explanatory averment, almost as much as the word it was intended to explain. Here the imputation that the plaintiff invited persons to his house, and entertained them there with a view of winning their money by gaming, has a tendency to disgrace the plaintiff, and no explanation was necessary.

DENMAN, C. J. I am very unwilling to decide this case on the ground that the defendant has, by demurring, admitted, on the record, that the libellous matter was published with the intent charged in the declaration; and that, if the words can, by possibility, bear the sense alleged, the Court are bound to hold that they were so used. But I think the declaration sufficient, on the more general ground that the matter charged as libellous imports something disgraceful to the plaintiff. The charge is, that the plaintiff invited persons to his house, and entertained them, and made them pay for such entertainment; and that, connected with the other words, may, I think, support the allegation, that the libel accused the plaintiff of making them pay by winning their money in gaming. I give this opinion, however, with reluctance, as I had rather the words had been distinctly explained by innuendoes, than that a jury, if the case had been tried, should have had to speculate on their meaning.

\*LITTLEDALE, J. I think the declaration may be supported, because the libel imputes what is disgraceful to the plaintiff. I am not prepared to say that we can import into this record the admission relied upon by Mr. Wightman, to give the words complained of the sense ascribed to them in the

declaration.

Parke, J. Rejecting all the innuendoes, I think the matter charged in the declaration is clearly actionable. No man of common sense could read it without seeing that it imputed fraudulent and dishonest conduct to the plaintiff. Without, therefore, adverting to the point made in argument, that the words here must be taken to have been used with the intent imputed in the declaration, I think the plaintiff is entitled to judgment.

Judgment for the plaintiff.

BIRD, Clerk, v. JOSEPH RELPH, and JANE, his Wife, Executrix of SMITH, Clerk.

Neglect to cultivate the glebe land in a husbandlike manner, is not a dilapidation for which an incumbent can recover.

Case for dilapidations. The first and second counts stated the parsonage house, &c. to be out of repair. The third count stated, that by the law and custom of England, the vicars of this kingdom for the time being ought not to manage, use, or cultivate the lands of and belonging to their respective vicarages, nor ought they to suffer or permit the same to be managed, used, or cultivated otherwise than in a good and husbandlike manner, and according to the custom of the country where the said lands are situate, and such vicars ought to leave the said lands managed, \*used, and cultivated in a good and husbandlike manner, and according to the custom of the country where the said lands are situate, to their successors; and that if such vicars do leave such lands to their successors impoverished, damaged, or lessened in value by reason of having been managed, used, and cultivated in a bad and unhusbandlike manner, and not according to the custom of the country where the said lands are situate, then the executors or administrators of the goods and chattels of such vicars, after their deaths, having sufficient of the goods and chattels of such vicars, are bound and ought to satisfy so much as shall be necessary to be expended or paid for repairing the damage done to the said lands by reason of their being so impoverished, damaged, or lessened in value by such improper management, usage, and cultivation. It then stated that W. Smith deceased in his lifetime was vicar of Ainstable, in the county of Cumberland, and was seised, in right of the vicarage, of certain lands in that county, and died; that the plaintiff after his death, to wit, on, &c. was presented, admitted, instituted, and inducted into the said vicarage, and thereby became vicar of the parish church of Ainstable, and the next successor of the said W. Smith; that at the time of his death the lands were and still are greatly damaged and lessened in value by reason of the same having been used, managed, and cultivated during the lifetime of the said W. Smith, and whilst he was such vicar, in a bad and

unhusbandlike manner, and contrary to the custom of the country where they were situate, and having been wrongfully left so impoverished, damaged, and lessened in value by the said W. Smith, at the time of his death, &c. At the \*828] trial before Gurney, B., at the Carlisle Spring assizes, \*1833, it appeared that the lands belonging to the vicarage consisted of ancient glebe land, and of lands allotted in lieu of tithes, under an inclosure act passed in 1820. The learned Judge refused to receive evidence that the allotments under the inclosure act had been impoverished by bad husbandry, but gave leave to the plaintiff to move to enter a verdict, if the Court thought the evidence admissible, for such an amount as should be certified by an arbitrator.

Coltman now moved accordingly. The action for dilapidations is founded on the common law, by which the incumbent of a living is required to leave the premises belonging to it in the same state he ought to keep them in, so that his successor may have the same beneficial enjoyment of them which he It is true that such actions are usually brought in respect of the buildings not being in that state of repair which the incumbent ought to have kept them in, and there is no express authority for saying, that such an action is maintainable against the executors of a deceased incumbent for not cultivating the lands in a husbandlike manner. But the principle on which the action is founded, viz., that the incumbent for the time being should have the beneficial use of the property belonging to the living, extends to the glebe lands as well as to the buildings; for, it is quite clear, that the successor will not have that beneficial enjoyment of the glebe lands which he ought to have, if his predecessor has not cultivated them in a husbandlike manner. In Liford's case, 11 Co. \*829] 49, a., it is said, "If a parson of a church, and one A., are \*tenants in common of a wood, and A. endeavours to commit waste, the parson, for the preservation of the timber trees, shall have a prohibition against him that he shall not commit waste; and the reason thereof, as the Chief Justice said, was, that if the parson of a church will waste the inheritance of his church to his private use in felling trees, the patron may have a prohibition against him; for the parson is seised as in the right of his church, and his glebe is the dower of his church, for of it he was endowed." And in Wise v. Metcalf, 10 B. & C. 299, where the question was, by what rule the dilapidations as to the rectory-house, buildings, and chancel were to be estimated, three rules were proposed for the consideration of the Court, the second rule being, that they were to be left as an outgoing lay tenant ought to leave his buildings, where he is under covenant to leave them in good and sufficient repair, order, and condition. Bayley, J., said, that although the Court were not prepared to say that any of those rules was precisely correct, the second approached most nearly to that which they considered as the proper one. In 2 Gibson's Codex, 752, in a note upon the 13 Eliz. c. 10, s. 1, it is said, "Although, in this preamble, nothing is referred to as dilapidation, but decayed or ruined buildings, yet it is certain that, under that name, are comprehended hedges, fences, &c., in the like condition; and it hath been particularly adjudged concerning wood and timber, that the felling of them by any incumbent, (otherwise than for repairs or for fuel) is dilapidation, from which he may be restrained by prohibition during his incumbency; and for which he or \*his executors are liable to be prosecuted, after he ceases to be incumbent."

DENMAN, C. J. This is an entirely new application. To render the executors of an incumbent liable to an action for dilapidations, there ought to be something of demolition. There is no ground for saying that executors are liable to such an action for mismanagement of the glebe land.

LITTLEDALE, J., concurred.

PARKE, J. An action lies by a landlord against a tenant for the mismanagement of his farm, on the implied contract between landlord and tenant that the latter shall cultivate the land in a husbandlike manner. Here no such contract can be implied between the parson and his successor; and there is no authority for saying that such an action is maintainable.

Patteson, J. The action against the executor of a parson for dilapidations is an anomalous action, and appears like an exception to the general rule, that actio personalis moritur cum persona. (a) The authorities shew that such an action is maintainable, where the buildings, hedges, and fences belonging to the benefice are left in a state of decay, or where there has been a felling of timber otherwise than for repairs or fuel. I am not disposed to extend the action to a case like the present.

Rule refused.

#### \*WEDGE v. NEWLYN and Others.

**\*831** 

A trader conveying away property to such an extent as will prevent him from continting his business, and render him insolvent, commits an act of bankruptcy. But those who rely upon such act of bankruptcy on a trial, must shew that it was calculated to harthe alleged effect, by evidence of the general state of the party's affairs at the time of such conveyance.

It is not sufficient to prove that the trader, under pecuniary pressure, disposed of some article essential to the carrying on of his business; as that a miller, by bill of sale,

transferred his wagon and horses to a creditor who had arrested him.

TROVER for horses and wagons, and various articles of furniture. Plea, net guilty. At the trial before Taunton, J., at the Winchester Summer assize, 1832, it appeared that the defendants seized the goods in question under the authority of a commission of bankrupt against one Smith, a miller. Before the time of the seizure, Smith, having been arrested at the suit of the plaintiff for 1951., gave him a bill of sale of the above-mentioned goods, defeasible on payment of the debt by Smith on a certain day; the debt was not then paid, and the plaintiff took possession. The defendants' counsel contended that the bill of sale was, substantially, a transfer of all Smith's property, and was, therefore, such a fraudulent conveyance of Smith's goods and chattels as constituted an act of bankruptcy, (b) and justified the seizure, which took place subsequently under the commission. No specific account was given in evidence of the amount of Smith's whole property at the time of the seizure. The premises, where it took place, were a house, mill, and stable. Lipscomb, the attorney who prepared the bill of sale and took possession under it, stated that he took it for granted Smith had no property except upon these premises. Nothing was seized in the mill, where there were some fixtures belonging to Smith \*(bought the bound bears 1\*502 six years before for 30l. or 40l.), and a few sacks of wheat and beans. The wagon and horses were taken from the stable, and were those which Smith used in his business of a miller, and were necessary for carrying it on. The whole of the goods seized produced, on the sale, 144l. When Smith was arrested at the plaintiff's suit, there was another writ out against him, and it appeared from his conversation with Lipscomb, the result of which was his giving the bill of sale, that he was in considerable pecuniary difficulty. in his summing up stated the law to be, that if a man dispose of his stock in trade or goods and chattels to such an extent as to disable himself from carrying on his business as a trader, and make himself insolvent, such conveyance is fraudulent; it need not be a transfer of all his goods and chattels; nor is it necessary to shew that he had bankruptcy in contemplation, if he knew that in making the conveyance he became insolvent and unable to go on with his busi-The result in that case must be that the creditors in general are delayed, and suffer injury in proportion as the particular creditor is benefited. The

(a) But is not so. See 1 Saund. 216, a. note (a), 5th ed.
(b) By 6 G. 4, c. 16, s. 3, it is an act of bankruptcy if the trader shall "make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels;" or "make or cause to be made any.

fraudulent gift, delivery, or transfer of any of his goods or chattels."

learned Judge left it to the jury whether Smith, in executing the bill of sale to the plaintiff, did so disable himself from carrying on his business as a miller. He adverted to the articles in the mill which were not taken, but desired the jury to consider what proportion they bore to the whole property, which was sold for 144l. The jury found a verdict for the defendants. A rule nisi was afterwards obtained for a new trial, on the ground that there was no sufficient evidence of an act of bankruptcy, and that the case had not been properly left to the jury.

\*Es33] all the property of Smith was transferred by the bill of sale. If there were exceptions, they were merely colourable; at least that point was left to the jury, for the learned Judge desired them to say what proportion the omitted articles bore to those included in the bill of sale. That was a point entirely for them, and their finding upon it was in favour of the defendants. It is clear that Smith disabled himself from carrying on business when he sold the wagon and horses, which were essential to his trade of a miller. [Denman, C. J. The same might be said of any part of the machinery of the mill. Parke, J. If they had taken a millstone, the same argument might have been used; but the answer would be, that the party was perhaps able to buy another.]

Follett contrà. To make the parting with these goods an act of bankruptcy, the general state of Smith's property should have been shewn. It is true that if a man conveys his whole property, with only a colourable exception, he commits an act of bankruptcy; but it is assumed here, without sufficient evidence, that the property conveyed was the whole, within this rule; if it was not, the conveying part only of a man's effects is no act of bankruptcy, unless it amount to a fraudulent preference, which was not proved here. It was asked, on the trial, whether or not a wagon and horses were necessary for carrying on the business of a miller; they might be so, but the question was, whether, having parted with them, he had not the means of procuring others. A conveyance of stock or goods, to constitute an act of bankruptcy within the rule relied upon, must \*834] \*be such as necessarily and immediately causes a stoppage of the trade.

The only evidence here, as to the general state of Smith's property, was the supposition of Lipscomb that he had none except at the mill, and on the

premises where the goods were taken.

PER CURIAM.(a) We think this rule should be absolute; perhaps, on another trial, the evidence may be more complete. On this occasion it rather fell short. It is incumbent on the party who sets up an act of bankruptcy of this description, to shew the general situation of the property to have been such that insolvency would be the effect of the transfer. Here it was not stated what the whole of Smith's property amounted to. For any thing that appeared in evidence, he may have had large sums of money due to him at the time of this conveyance.

Rule absolute.

The cause was tried a second time before Alderson, J., at the Summer assizes, 1833, when more particular evidence was given of the state of Smith's affairs at the time of his executing the bill of sale; and Alderson, J. left it to the jury whether he, by that instrument, conveyed away so much of his property as to incapacitate himself from carrying on his business by the insolvency which would ensue. The jury found for the defendants. A new trial was moved for in the ensuing term; but the learned Judge, on being referred to, expressed himself satisfied with the verdict, and the Court refused a rule.

\*8357

The \*KING v. GOLDSMITH. May 4.

By charter of Car. 2, there were to be in the borough of S. a mayor, aldermen, and
(a) Denman, C. J., Littledale and Parke, Js.

twenty-four capital burgesses. On the death or removal of an alderman the mayor and aldermen, or the greater part of them, were to elect a capital burgess to supply his place; when a capital burgess died, &c., the mayor, aldermen, and other capital burgesses, or the greater part of them, were to elect a successor from among the inhabitants and burgesses; and the mayor was to be annually elected on a certain day "by the burgesses of the said borough, or the greater number of them," with the consent of twenty-four freeholders and inhabitants to be chosen as directed by the charter. In practice, the mayor had always been elected by the capital burgesses only. At the election of Mayor on the charter day in 1832, there was not a majority of the number of twenty-four capital burgesses present, and no other burgesses attended:

Held, that this did not avoid the election, for that the word "burgesses" in the charter (where it treated of the election of mayor) could not be construed to mean only capital burgesses; that the right of election did not devolve upon the body of capital burgesses by the mere forbearance of the other burgesses to interfere; and that the capital burgesses

gesses, in electing the mayor, acted in the capacity of burgesses merely.

THE Solicitor-General in last Michaelmas term obtained a rule calling upon Thomas Goldsmith to shew cause why a quo warranto information should not be exhibited against him, to shew by what authority he claimed to be mayor of the borough of Sudbury, in the county of Suffolk; on the ground that there was not a majority of capital burgesses present at the meeting at which he was

elected, or the meeting at which he was sworn in.

The mayor, aldermen, and burgesses of the borough of Sudbury were incorporated by charter of 16 Car. 2., and it was thereby granted that in the said borough "there might and should be from time to time seven persons of the elder and principal, better and more honest inhabitants of the said borough, who should be called the aldermen of the said borough, out of which said seven aldermen one of them should be the mayor of the said be rough, and that there might and should be twenty-four persons of the better and more discreet and more honest men and inhabitants of the said borough who should be called the capital burgesses of the said borough for the time being." And that whenever any such alderman should die, be removed, or \*depart the borough, it should be lawful "for the mayor and other aldermen of the said borough then surviving or remaining, or the greater part of them, to elect, nominate, and appoint one other better, more honest and discreet man of the twenty-four capital burgesses of the said borough for the time being, to be an alderman in the place of him so dying," &c. And that whenever any of the twenty-four capital burgesses should die, &c., it should be lawful "for the mayor and aldermen and other capital burgesses of the said borough then surviving or remaining, or the greater part of them, to elect, nominate, and appoint one other better, more honest and discreet man of the inhabitants and burgesses of the borough aforesaid unto the aforesaid number of twenty-four capital burgesses, and to the place and office of capital burgess of the borough aforesaid, in the place of him so dying," &c. And it was further granted by the charter, "that the burgesses of the said borough for the time being, or the greater number of them, might, with the consent of twenty-four men who should be freeholders and inhabitants of the said borough, and chosen and nominated by the mayor and aldermen of the said borough, or the greater part of them for the time being, from thenceforth for ever yearly upon Monday next before the Feast of the Nativity of the blessed Virgin Mary, between the hours of nine and eleven in the forenoon of the same day, assemble, and might and should be able to assemble together in the common hall of the borough aforesaid, or in any other convenient place within the said borough of Sudbury, and should and might freely and lawfully elect and nominate one of the aforesaid aldermen of the \*borough aforesaid for the time being to be mayor, or into the office of mayor of the said borough, which alderman so elected into the office of mayor, should upon Monday next after the Feast of St. Dionysius immediately following the said election, take his corporal oath before the old mayor and the steward of the said borough, or his sufficient deputy, faithfully to execute the said office, and should remain and continue in the said

office from the said Monday next after the said Feast of St. Dionysius, for one

whole year."

The affidavits in support of this application stated, that on the 3d of September then last past (being the Monday next before the Nativity, &c.,) there were only five aldermen and sixteen capital burgesses of the said borough in existence; and that on that day, at a pretended court of the corporation, Thomas Goldsmith, now claiming to be mayor of the borough, was alleged to have been elected mayor: and that there were not then present thirteen capital burgesses of the borough, but only eleven; and that at a pretended court on the 10th of October following (being Monday next after, &c.,) at which the said T. G. was sworn in as mayor, there were only ten capital burgesses present. The affidavit in answer did not materially vary the state of facts.

Sir James Scarlett (with whom was B. Andrews,) now shewed cause. The objection is, that a majority of capital burgesses were not present at the election or swearing in. But by the express words of the charter the election is in the burgesses, with the assent of the twenty-four freeholders. Where capital burwesses are meant, as distinguished from burgesses, the charter designates them accordingly. As to the swearing in, the charter has no words to

support the present objection.

The Solicitor-General and Kelly, being here called upon to support the rule, contended, that on reference to the whole charter, the word buryesses must be taken to have been inaccurately used for capital burgesses; and that the Court would rectify such inaccuracy by a reasonable intendment. But,

PER CURIAM.(a). The words of the charter are too plain to be got over, and it is not even shewn that in practice the privilege of electing has been confined to the capital burgesses.

The rule was therefore discharged.

Kelly, on a subsequent day, (May 7th) moved again for an information to the effect above mentioned, on the affidavit of a burgess, who deposed, in addition to the matters above stated, with reference to the day of election, that during all the time he had lived at Sudbury and had been such burgess, and, as he was informed and believed, from the time of granting the charter, it had been, and still was, the invariable usage and custom of the borough for the mayor to be elected at a court of orders and decrees, consisting of the mayor, aldermen, and capital burgesses, assisted by the twenty-four freeholders in the charter mentioned, and consisting of and attended by no other persons whomsoever. And that the election of such mayor takes place by the majority of the said \*839] capital burgesses, with the assent of \*the said freeholders, and that none of the burgesses or free burgesses at large, who are several hundreds in number, ever attend or have notice to attend at such election of mayor: and the deponent verily believed that none but the mayor, aldermen, and capital burgesses and freeholders aforesaid attended the said supposed election on the 3d of September, or had notice to attend the same; and that the deponent himself received no such notice.

Kelly, on this statement, contended that the election could not be valid. By the words of the charter, the election is in the burgesses; but by usage, the capital burgesses have always elected. Let the right be supposed to reside in either body; if the capital burgesses are to elect, there was not a majority of them present; if the burgesses at large, none attended, or had notice. [Denman, C. J. Was any notice necessary, the election being on the charter day? Parke J. Are not the capital burgesses burgesses?] It may be questioned whether they are, for the purpose of this election. The charter distinguishes them, when it says that the capital burgesses shall be elected from among the burgesses.

PER CURIAM.(a) The capital burgesses do not cease to be burgesses. At most the case only amounts to this, that it has been the usage of the inferior

<sup>(</sup>a) Denman, C. J., Littledale, and Parke, Js.

burgesses not to take part in the election of mayor. But this usage is not to control the charter; and it is impossible to say that the general word burgesses there employed in \*reference to the election of mayor, is meant to signify capital burgesses, when these are so expressly distinguished in other parts of the charter. If the burgesses in general have been prejudiced by not exercising their rights, they should have known them better.

Rule refused.

# The KING v. ROLFE. May 4.

On motion for a quo warranto information, an affidavit stating the relator's information and belief that the officer was elected at a court held on a certain day, and there was not at the court where he was elected as aforesaid, a proper number of electors present, is answered if it be sworn that there was a proper number of electors at the court held on the specified day, and that the officer was not elected at that court. The officer is not bound to answer for the proceedings of any other day than that specified by the relator.

This was a motion for a quo warranto information, calling upon William Rowland Rolfe to show by what authority he claimed to be a capital burgess of Sudbury, on the grounds that there was not a majority of the aldermen or of the capital burgesses present at the meeting at which he was supposed to be elected, and that there was no proper notice of such meeting. The affidavit (sworn by a burgess) in support of the rule, set out the charter as in the preceding case

(ante, p. 835,) and the relator then stated as follows:—

"That he has been informed and verily believes that one W. R. Rolfe was nominated to be a capital burgess of the said borough at a court, or pretended court of the corporation, held on the 3d of September 1827, and that he was elected and sworn into the office of capital burgess aforesaid, at a court, or pretended court of the said corporation, held on the 15th of October 1827; that he has been informed and verily believes, that at the respective times of the nomination and election and swearing in of the said W. R. R. as aforesaid, there were in existence only five aldermen of the said borough, viz. &c., and that there were not present at the court, \*or pretended court, at which the said W. R. R. was nominated as aforesaid, or at the said court, or pretended court, at which the said W. R. R. was elected and sworn in a capital burgess as aforesaid, four of the said aldermen of the said borough." There was a statement similarly worded, with respect to the number of capital burgesses in existence and present when the two courts were holden.

The relator also stated his information and belief, that previous to the nomination or election, and swearing in of the said W. R. Rolfe as aforesaid, no summonses were issued to the members of the coporation to give them notice of courts to be holden for the above respective purposes, nor was the bell rung at the top of Moot Hall, to announce the holding of the said courts, as the practice

had been till within the last four years.

The affidavits in answer stated that, at the courts holden on the 3d of September and 15th of October, mentioned in the relator's affidavit, there were present on the first occasion four aldermen and fifteen capital burgesses, and, on the second, four aldermen and sixteen capital burgesses. But they added, that the said W. R. Rolfe was not nominated a capital burgess at the said court holden on the 3d of September, nor elected and sworn in at the said court holden on the 15th of October. There were also statements as to the notices of holding the courts, which it is not material to go into.

Sir James Scarlett and B. Andrews now shewed cause. The relator has sworn to his information and belief only, that Rolf was nominated, and elected, and sworn in on certain days, when there was not a sufficient number of electors

\*842] present. On the other hand, it is positively stated that there \*was a proper number present on those days! and, further, that those were not the days on which Rolfe was elected. The prima facie case made by the relator is answered, and he is not bound to go farther and prove his title, by shewing what passed on the days when he actually was nominated, elected, and sworn in.

The Solicitor-General and Kelly contrà. Sufficient ground is laid for granting the information. The rule, if granted, does not conclude the party. The relator cannot be expected to swear to more than his information and belief, not having the means of obtaining actual knowledge. He states that he is informed and believes that Rolfe was nominated, and elected, and sworn in at courts holden on certain days, and that, at the times of his nomination, and election, and swearing in as aforesaid, there were not present the proper numbers of aldermen and capital burgesses. The affidavits in answer do not say that the proper numbers were present on the days when he was actually nominated, elected, and sworn in. They do not, therefore, meet the prima facie case. The relator was obliged to assign certain days: but, as in the case of an indictment, he is nor bound to the days stated. The affidavits in answer ought to have shewn, that whenever the party was elected his election was regular.

DENMAN, C. J. The prima facie case is not supported. A relator cannot say to the Court, that whenever the officer was elected, he was not duly elected. He must know and state when the party was elected, and establish a prima facie \*843] case referable to that time. \*Here that has not been done. An officer ought not to be required. on such an application, to give an account of all that passed on any day. And I, for one, should be very slow to grant a rule of this kind after the lapse of five years, unless in a case which left the Court

no discretion.

LITTLEDALE, J. concurred.

PARKE, J. I think the days assigned were material. There might be a sufficient prima facie case to call on the party for an answer as to those particular days; but if that answer is given, enough is done to meet the application. As it has been put by my Lord, a relator is not entitled to say, that whenever an officer was elected, he was unduly elected. The rule will, therefore, be discharged.

Rule discharged.

# The KING v. MAY. May 4.

Where it is granted by charter, that a corporation shall have so many aldermen and so many capital burgesses; and that when one of the latter shall die, depart, or be removed, another shall be elected in his place by "the mayor and aldermen, and other capital burgesses then surviving or remaining, or the greater part of them;" the election must be made by a majority of the full numbers of aldermen and of capital burgesses: a mere majority of the members of both bodies, who happen to survive at the time, is not sufficient.

This was a motion for a quo warranto information, calling upon William Oliver May to shew by what authority he claimed to be a capital burgess of Sudbury, on the grounds that there was not a majority of the aldermen, nor of the capital burgesses, present at the meeting at which he was supposed to be elected, or at the meeting at which he was sworn in; and that due notice was not given of the former meeting.

\*841] \*The relator's affidavit was similar to that in Rex v. Rolfe, Ante, p. 840. It set out the charter as before, and then stated that May was nominated a capital burgess at a court, or pretended court, on the 6th of September 1830, and was elected and sworn in at a court, or pretended court, on the 11th of October 1830. That at those times there were in existence only

five aldemen of the borough; that there were not four of them present at either court, and at the latter only two. That at the said respective times there were only sixteen capital burgesses in existence, and that there were not thirteen present at either court.

In the affidavits on the other side it was sworn, that of five aldermen, (including the mayor), who were surviving at the times in question, three, including the mayor, were present at the first court, and all the five at the second, and that of sixteen capital burgesses, who were surviving at those times.

nine were present at each court.

Sir James Scarlett and B. Andrews now shewed cause. The words of the charter are, that capital burgesses shall be elected, nominated, and appointed by "the mayor and aldermen and other capital burgesses of the said borough then surviving or remaining, or the greater part of them." Here, it is true, there was not a majority of the full number of each elective body; but there was a majority of the survivors. Rex v. Devonshire, 1 B. & C. 609, was cited in moving for the rule; but there the Court, in interpreting the clause which is deemed analogous to this, was guided by other clauses of the charter (all relating to \*elections by one single class, the capital burgesses), which left no doubt of the intention, and which are not found here. The words here doubt of the intention, and which are not found here. import that the surviving members of the different elective bodies, or the majority of the whole number of survivors, shall elect. The mayor must, if course, be present, because he is specially named; but of the other parts of the corporation, the survivors, who are all thrown together into one class, or the greater part of them, are to elect. If it had been, "the greater part of them respectively," the case might have been different. The attempt on the other side is, to read the clause as if "then surviving or remaining" were struck out It was not intended by the charter that, if a majority of either elective body were lost, the corporation should be dissolved.

DENMAN, C. J. There may be distinctions drawn between this case and Rev. Devonshire, 1 B. & C. 609; but they are the same in principle. The rule

must be absolute.

LITTLEDALE and PARKE, Js. concurred. Rule absolute.

A similar rule was then made absolute on the same ground, in Rex v. Bridge man.

#### \*CLARKE v. POWELL.

**[\*846** 

A stockbroker is a broker within 6 Anne, c. 16, and 57 G. 3, c. lx., and liable to the practity imposed by the latter statute for acting as a broker without having been admitted by the court of mayor and aldermen of London.

DEBT for penalties for acting as a broker within the city of London, in purchasing 50%. 3 per cents., and procuring the same to be transferred in the books of the governor and company of the bank of England, the defendant, not being at the time of such purchase and transfer, or either of them, admitted by the court of mayor and aldermen of the city of London, to be a broker, or to act as a broker, within the said city. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term, 1830, the jury found a special verdict for one penalty of 100%, which stated, in substance is follows:—Since the making of the statute 6 Anne, c. 16, and the statute 57 % 3, c. lx., divers persons have taken upon themselves to act within the city of London and liberties thereof, in the buying and selling of the public and joint stock of government annuities, transferable at the bank of England, and other public securities, for others, for reward in that behalf, such persons so acting not having been admitted by the court of mayor and aldermen of the said city to be

rokers in pursuance of the said act of the 6 Anne; and since the passing of the aid acts, divers other persons have so taken upon themselves to act within the ity of London and liberties thereof, in the buying and selling of the public and oint stock of government annuities, transferable at the bank of England, and other public securities, for others, \*for reward in that behalf, and such last-mentioned persons have been admitted by the said court of mayor and ildermen to be brokers, and to act as brokers in pursuance of the said act of the Anne; and have been, and are, from time to time, required to make and exerute upon such admissions, the broker's bond of the city of London. Since the 27th day of June, 1817, viz., on the 8th of July, 1829, within the said city of London, the defendant did, for reward to him in that behalf, purchase for John Johnson, of one Norman Wilkinson, a certain interest or share, amounting to the sum of 50l., in a certain public joint stock government annuity, transferable at the bank of England, that is to say, in the capital or joint stock called the reduced 3 per cent. annuities, transferable at the bank of England; and did then and there procure the said sum of 50% interest or share in the said stock, to be transferred by N. W. to J. J., in the books of the governor and company of the bank of England, and did receive from J. J., as a reward and commission for such purchase and transfer, the sum of 1s. 3d., (a) [and did, from time to time, both before and since the said 27th day of June, on various occasions, buy divers shares in the government securities, transferable at the bank of England, for divers other persons, for reward in that behalf, and was not, at the time of the said purchases and transfers, or of any of them, admitted by the court of mayor and aldermen of the city of London to be a broker, or to act as a broker, within the said city, nor had he obtained any admission by or from such court. \*The bond before 1818 was in the penalty of 500l., conditioned as follows:—"That the party whose admission is recited should faithfully execute his office and employment without fraud, and should, upon every contract, bargain, or agreement made by him, declare and make known to such person or persons with whom such agreement was made, the name of his principal, if required; and should keep a book or register, and therein fairly enter all such contracts, &c. within three days, and should, upon demand made by either of the parties, buyer or seller, produce such entry, and prove the truth and certainty of such contracts, &c.: and, for satisfaction of all such persons as should doubt whether he was a lawful and sworn broker, should produce a certain medal; and should not, directly or indirectly, by himself or any other, deal for himself or any other broker in the exchange or remittance of money, or in buying any tally or tallies, order or orders, bill or bills, share or shares, or interest in any joint stock to be transferred or assigned to himself or any broker, or to any other in trust for him or them; or in buying any goods, wares, and merchandises to bargain or sell again upon his own account, or for his own or for any other broker's benefit or advantage; or to make any gain or profit in buying or selling any goods over and above the usual brokerage;" and should discover any person whom he should know to be acting as broker, not being duly authorised, and should not employ any one under him to act as a broker, not being duly admitted; and should not presume to meet and assemble in Exchange Alley, or other public passage or passages within the city, and liber-\*849] ties thereof, other than upon the Royal Exchange, to negotiate his \*busi-

ness and affairs of brokerage to the annoyance or obstruction of any of his Majesty's subjects, or any other, in their business or passage about their occasions."

The form of bond after 1818 was in 1000*l*., and conditioned as the former bond conditioned as the former bond conditioned as the former bond.

The form of bond after 1818 was in 1000l., and conditioned as the former bond, except that there was a condition for giving either to the buyer or seller, within twenty-four hours after demand, a contract note, containing therein a true copy of the entry to be made in the "broker's book;" and that the stipu-

<sup>(</sup>a) The words between crotchets were inserted in the special verdict, after the argument, at the suggestion of the Court.

Vol. XXIV.—24

lation respecting the assembling in Exchange Alley or other public places, was omitted. This case was argued in Michaelmas term.

Follett, for the plaintiff. The question is, whether a person acting as a stockbroker within the city of London, or its liberties, is a broker required by the statute of 6 Anne, c. 16, to be admitted to that office by the court of mayor and aldermen of the city of London. That statute subjects a party acting as a broker within those limits, and not having been so admitted, to a penalty of 251. By the 57 G. 3, c. lx. that penalty is increased to 1001. In Janssen r. Green, 4 Burr. 2103, it was decided, that a stockbroker was a broker within the meaning of the statute of Anne, and the authority of that case was recognised in Gibbons v. Rule, 4 Bingh. 301, where it was decided that a shipbroker was not within the act, because he was not a person who bought and sold for another. In popular language, a broker is a person who makes contracts for others. One of the definitions given of the word broker, in Johnson's Dictionary, is "one who does business for another." In Jacob's Law Dictionary \*brokers are described, "Those who make bargains in matters of money or merchandise;" and he enumerates exchange-brokers, corn-brokers, brokers of stock, and pawnbrokers. In Blunt's Law Dictionary are mentioned "exchange-brokers, mediators in any contract of buying and selling, or contracts of marriage, and pawnbrokers." In Cowel there is a similar enumeration The stat. 1 Jac. 1, c. 21, (see p. 857, post,) gives the city of London the power of admitting brokers, and describes them as persons who make contracts between merchants and tradesmen. The meaning of the term in the statute of Anne is to be collected from other acts of legislation passed about the same time. It will be said, that at the time of the passing of the 6 Anne, c. 16, there were no stock transferable in the Bank of England; but there were government securities then transferable. The 8 & 9 W. c. 20, is entitled "An Act for making good the Deficiencies of several Funds therein mentioned, and for enlarging the Capital Stock of the Bank of England, and for raising the Public Credit; section 60, imposes a penalty of 201. upon every person who shall be employed as a broker on the behalf of any person to make or drive any bargain or contract for the buying or selling of any orders or tallies (in the act mentioned.) who shall take more than 2s. 6d. per cent. for brokerage." This shews that, before the statute of the 6 Anne, the legislature applied the term broker to a person buying and selling public securities. The 8 & 9 W. 3, c. 32, (which was in force for three years only) provided that no person should act as a [\*851 broker in making bargains respecting any \*bank stock, or any tallies, bills of credit, or tickets payable at the receipt of the exchequer, or at any of the public offices, who had not been admitted a broker within the city of London; and in the fifth section, which imposes a penalty of 500l., the word broken is constantly used in reference to stock. (See p. 858, post.) By 10 Anne, c. 19, s. 121, a penalty is imposed on every person "who shall be employed as a broker, in the behalf of any other person, to make any bargain, or contract for the buying or selling of any tallies, orders, exchequer bills, exchequer tickets, bank bills, or any share or interest in any joint stock erected by act of parliament, ac. who shall take or receive, directly or indirectly, any sum of money, or other reward, exceeding the sum of 2s. 9d. per cent." The 6 G. 1, c. 18, s. 21, enacts, "that if any broker, or person acting as a broker for himself, or on behalf of any others, shall bargain, sell, buy, or purchase, or contract or agree for the bargaining, selling, buying, or purchasing of any share or interest in any of the undertakings by that act declared to be unlawful, or in any stock, or pretended stock, of such undertakers," he shall be disabled from practising 25 3 broker, and also forfeit the sum of 500l. It appears, therefore, from these several acts (which are nearly contemporaneous with the stat. 6 Anne, c. 16,) that the legislature used the word broker as descriptive of a person who made contracts for others in merchandise, transferable stock of private companies, or government securities. The 7 G. 2, c. 8, s. 4, imposes a penalty of 500l. upon

all brokers and agents, negotiating any contract for the buying, selling, assigning, or transferring \*of any public or joint stock, or other public securities whatsoever, which the person on whose behalf the contract shall be made, shall not at the time of making such contract be actually possessed of or entitled to in his own right, &c. Sect. 4, also imposes a penalty upon brokers negotiating other bargains respecting stock, prohibited by the act. But Janssen r. Green, 4 Burr. 2103, is an authority expressly in point to show that a stockbroker is a broker within the meaning of the statute of 6 Anne, c. 16. (He

was then stopped by the Court.)

Campbell, Solicitor-General, contra. Stockbrokers are regulated by a general act of parliament, and are not required by 6 Anne, c. 16, to be admitted by the court of the mayor and aldermen of London. That statute ought to be strictly construed; for it is not only penal, but it imposes a tax on one part of his Majesty's subjects for the benefit of another. The statute 57 G. 3, c. lx. is similar in its nature. It is for increasing the payments to be made by brokers, and it raises the penalty to 100%. As the statute itself does not give a definition of the word broker, the meaning of that term may be collected from other acts of parliament. The Court cannot adopt either the popular or mercantile use of the word broker; for there are various persons called brokers who are not within the meaning of the statute, as furniture brokers, ship brokers, and probably insurance brokers. A broker is a person whose employment is to buy and sell for others some visible, tangible commodity, capable of deli-\*853] very. If the word be not so confined, an insurance, \*broker might be considered within the act, for he buys and sells for others a contract of indemnity; or an attorney, who buys and sells for others the grant or assignment of an annuity. If the latter be not within the act, a stockbroker is not, for he only buys and sells the assignments of government annuity. Now it has been frequently held, that the public securities are not goods and chattels. The true definition is to be found in the 1 Jac. 1, c. 21: it recites that " Of long and ancient time, by divers hundred years there have been used within the city to be selected persons meet to be brokers, &c., who take their oath to use and demean themselves uprightly and faithfully between merchant English and merchant strangers and tradesmen, in the contriving, making and concluding bargains to be made between them, concerning their wares and merchandises to be bought and sold and contracted for within the city of London, and moneys to be taken up by exchange." The subject-matter of the contracts made by brokers is described as wares and merchandise, and money taken up by way of exchange. Now the brokers referred to in 6 Anne, c. 16, must have been those who had been so denominated by the ancient usage of London; and whose dealings were in respect of goods and chattels and moneys taken up by exchange. The statute 8 & 9 W. 3, c. 32, was not in force when the statute 6 Anne, c. 16, was passed. The penalties imposed by the latter statute ought not to be extended to brokers and stock-jobbers, or pretended brokers, mentioned in the statute which had expired. Janssen v. Green, 4 Burr. 2103, cannot be supported. \*Lord Mansfield, in considering the statute of A-2-2-3 considering the statute of Anne, adopted the definition of the word broker found in an act of parliament passed near thirty years afterwards. The very circumstance of that act having been passed so long after, for the regulation of stockbrokers, raises the inference that those persons were not held to be included by the legislature in the statute of Anne. It is clear that in the 8 & 9 W. 3, c. 20, s. 60, the legislature contemplated that other persons besides stockbrokers might make purchases and sales of stock. It speaks of persons employed as brokers, solicitors, or otherwise, to make bargains. One of the conditions of the bond which brokers were compelled to enter into was, until the year 1818, that they should carry on their business in the Royal Exchange, and not in 'Change Alley. Now, the stock exchange was, at the time when the stat. 6 Anne, c. 16, passed, and is now, the place of business for buying and selling stock. [Littledale, J. The question, whether a stockbroker be

within the act, cannot depend on the terms of the condition of the bond.] Stockbrokers are regulated by a general law, the 7 & 8 G. 2, c. 8. [PARKE, J. That act merely obliges them under a penalty to keep books: it contains no other general regulation for stockbrokers.] To impose a tax on those who deal in the public securities, would be indirectly laying a tax on the transfer of those securities.

\*\*Cur. adv. rull.\*\*

LITTLEDALE, J., in this term, delivered the judgment of the Court. This case was argued before my brother Parke and myself, in the course of last Michaelmas term, \*and the question upon the record is, whether a person who, on various occasions, buys shares in the government securities, transferable at the bank of England for other persons, for reward,—in ordinary parlance, a stockbroker, be within the provisions of the 6 Anne, c. 16, and the 57 G. 3, c. lx., and liable to penalties for acting as such, under the latter act, in London without having been admitted by the mayor and aldermen of the

city of London.

The first of these acts abolishes the office of garbler of spices, by repealing the statute of 1 Jac. 1, and gives an equivalent to the city by the admission of brokers. The fourth section recites, that the profits of the said office are part of the revenues of the city of London, and were then leased to W. Stewart. under a rent of 3001, per annum; the profits of which office, and the right of the said W. Stewart to the same, by repealing the said act, would be very much diminished: it then enacts, that "all persons that shall act as brokers within the city of London and liberties thereof, shall, from time to time, be admitted so to do by the court of mayor and aldermen of the said city for the time being, under such restrictions and limitations, for their honest and good behaviour, as that court shall think fit and reasonable; and shall, upon such their admission. pay to the chamberlain of the said city for the time being, for the uses thereinafter mentioned, the sum of 40s.; and shall also yearly pay to the said uses the sum of 40s. upon the 29th day of September in every year." The fifth section provides that "if any person shall take upon him to act as a broker within the city and liberties, not being admitted as aforesaid, he shall forfeit and pay the sum of 251., to be recovered by the chamberlain of the city."

\*The other of these acts, the 57 G. 3, c. lx., was passed for granting an equivalent for the diminution of the profits of the office of guager of the city by the construction of the London Docks, and for increasing the payment to be made by brokers. It raises the fee upon admission, and the annual payment from admitted brokers, to 5l., and increases the penalty upon a person

"for taking upon him to act as a broker," to 100l.

The very question now raised by this record, was decided by the Court of King's Bench upon a special case, in the case of Janssen v. Green, 4 Burr. 2103: and by that decision we ought to be bound, unless we are clearly satisfied that it is contrary to law. The question has been fully and elaborately argued before us; and in the result we see no reason to think that the decision was wrong.

It was very strongly urged by the Solicitor-General, that the clause in the statute of Anne, which enacts that all persons "who shall act as brokers" in the city of London, shall be admitted, and pay the sums therein mentioned ought to be strictly construed, as it imposes a tax, and that upon persons who derive no advantage from the abolition of the office for which the payments are given as a compensation. The act, however, appears also to have had in view the regulation of brokers; and to have secured and enforced the ancient right of the city to admit brokers, which, by the statuta civitatis Londini, 13 Ed. 1. (see Ex parte Dyster, 1 Mer. 173, note (a)) it appears to have possessed in the earliest times. But supposing that such a strict construction ought to prevail, because the act imposes a tax for the benefit of an individual, and a corporation, it is clear, \*that the statute extends to all persons who shall act as brokers; [\*857 and the question is, what persons fall within that description? All who do are equally liable to the tax, and all are alike taxed, without any correspond-

ing benefit; for the abolition of the office of garbler appears to have conferred no more benefit on one class of brokers than another. But as the legislature has imposed the burthen on all brokers, all, that we are judicially satisfied were intended to be included in that denomination, must bear it.

In order to ascertain who these are, the statutes, and particularly those which were passed about the time with the act in question, furnish us with the best

means of information.

The 1 Jac. 1, c. 21, recites, that persons have been admitted as brokers, who have taken their oaths on admission "to use and demean themselves uprightly between merchant English and merchant strangers, and tradesmen, in contriving, making, and concluding bargains and contracts to be made between them concerning their wares and merchandizes to be bought and sold and contracted for, within the city of London, and moneys to be taken up by exchange between such merchant and merchants, and tradesmen, and these kind of persons have had and borne the name of brokers, and been known, called, and taken for brokers." The act proceeds to declare that persons who buy and sell, and take pawn of garments, &c. are not brokers, but frippiers, and to provide a remedy against illegal pledges; and the last clause provides that nothing in the act contained shall be prejudicial to the ancient trade of brokers between merchant and merchant or other traders or occupiers within the city, being selected as therein mentioned. \*Though this was the occupation of regular brokers at that time, it is obvious that when a new subject of dealing was created in government securities, those who dealt in the same way respecting securities, might fall under the same denomination. The class of men who dealt either partially or exclusively in this new description of security, might equally fall within the description of brokers as those who dealt partially or exclusively in some new description of merchandize.

That this was so, the statutes passed in the reign of King William clearly and decisively prove. The 8 & 9 W. 3, c. 20, s. 60, mentions brokers employed on the behalf of other persons to make bargains and contracts for the buying and selling of orders of the treasury, and of tallies, which are described in the fifty-

seventh section, and limits their brokage to 2s. 6d. per cent.

The 8 and 9 W. 3, c. 32, a temporary act, entitled "An Act to restrain the Numbers and ill Practice of Brokers and Stock Jobbers," after reciting that for the conveniency of trade, sworn brokers have been anciently admitted within the city of London for the making and concluding of bargains and contracts between merchant and merchant, and other tradesmen, concerning their goods, wares, merchandizes, and moneys taken up by exchange, and for negotiating bills of exchange between merchant and merchant; and that brokers, stock jobbers, or pretended brokers, have lately carried on most unjust practices in selling and discounting tallies, bank stock, bank bills, shares and interest in joint stock, and other matters and things, and have combined to raise and fall from time to time the value of such tallies, &c., which is a great abuse of the said ancient trade and \*employment; and that the number of such brokers and stock jobbers had very much increased within these few years, by reason that they were not at present under such regulations as are necessary to prevent the mischief aforesaid, for remedy, provides that no person or persons whatsoever shall directly use or exercise the office, trade, mystery, occupation, or employment of a broker, or act or deal as such within the cities of London or Westminster, borough of Southwark, or the limits of the weekly bills of mortality, in the contriving, making, or concluding bargains between merchant and merchant, or between merchants and tradesmen or others, concerning their wares and merchandizes to be bought and sold, and contracted for, moneys to be taken up by exchange between such merchant and merchants, and tradesmen, or concerning any tallies, or orders, bills of credit, or tickets payable at the receipt of the exchequer, or at any of the public offices, or concerning any bills or notes Payable by the governor and company of the Bank of England, or for or con-

cerning any part of the capital or joint stock belonging or to belong to the said governor and company, or to any members of the said company, or for or concerning any share of the capital or joint stock belonging to any company or society that is or shall be incorporated by act of parliament, or letters-patent, until such person shall be first admitted, licensed, approved, and allowed of by the lord mayor and court of aldermen for the time being, upon such certificate

of their ability, honesty, and good fame as hath been usual.

The act then proceeds to direct the oath, to limit the number of brokers, to regulate the fee on admittance (not to exceed 40s.,) and to impose a penalty of 500l. \*on those who use the trade, &c. of broker, or act or deal as brokers, and to provide that if any person, not being a sworn broker, shall negotiate and deal as a broker in the discounting of tallies, exchange bills. or bank bills or notes, or in stock jobbing, or selling of bank stock or any other interest or securities, upon any fund or funds granted by parliament, such person so offending shall forfeit 500l. and stand in the pillory. The act proceeds to make further regulation for the keeping of books, the amount of brokerage (10s. per cent.,) and other matters; and also requires brokers of tallies or securities on funds granted by parliament, to be licensed by the treasury.

This act was limited to three years.

In the 6 G. 1, c. 18, s. 21, (passed twelve years after the statute of Queen Anne) a penalty is imposed on brokers buying and selling shares in illegal undertakings.

The 7 G. 2, c. 8, s. 8, mentions "brokers" with reference to transactions of

buying and selling stock.

Considering the provisions of these statutes, recently before and after the passing of the statute 6 Anne, it appears to us that persons buying and selling government stock and securities for others were considered as brokers at that time, and must fall under that description in the statute in question.

If brokers dealing in government stock and securities then existing, were so. it does not admit of a doubt that those who dealt in all subsequently-created stock, and securities of the like description, would be so; just as much as merchant brokers, who bought or sold a new description of merchandize.

It was urged that the statute 7 G. 2, c. 8, was passed \*for the regulation of stock brokers. That is not the case. It is for the purpose of [\*861] preventing stock jobbing; and the only matter of regulation which it contains is, that brokers are to keep books, in which contracts are to be registered, under a penalty of 50l.; and unless the statute in question (the 6 Anne) gives the power of admission, with such restriction for their good behaviour as they think reasonable, to the mayor and court of aldermen, there is no power of admission and control over this important class of brokers in any person. Such a power is not absolutely necessary, and the legislature might have omitted to give it; but certainly it is not given by any other statute than this.

For the reasons above mentioned, and particularly from what may be deemed the contemporaneous exposition of the legislature itself in the statutes of 8 & 9 W. 3, c. 20, & c. 32, we are of opinion that the case of Janssen v. Green, 4 Burr, 2103, was rightly decided, and that judgment must be for the plaintiff.

Judgment for the plaintiff.

### The KING v. SMITHSON. May 7.

Where a rule for a criminal information had been discharged upon the merits, the Court refused to grant a rule to shew cause on a second application in the same case, upon additional affidavits.

THE Solicitor-General had obtained a rule nisi for a criminal information against the above party for a libel, imputing to the prosecutor that he had used certain unbecoming words at a public dinner. The rule was obtained on the single affidavit of the prosecutor, denying \*that he had spoken the words. In opposition to the rule several affidavits were filed, contradicting that statement. The Solicitor-General thereupon consented that his rule should be discharged with costs. On the same day he again moved for a rule to shew cause why a criminal information should not be filed against the same party for the same libel, offering in support of such rule, affidavits of several persons confirmatory of that sworn by the prosecutor: and as a precedent for this application, he referred to a late case in which a similar rule was moved for on behalf of the Marshal of the King's Bench, against the publisher of a paper called the Satirist, and the affidavits being defective, the rule was discharged, but the Court allowed a second motion to be made.

DENMAN, C. J. We think that, according to the practice of the Court, we have no power to entertain such an application; and it would be dangerous if we were to do so. The rule is, that when affidavits have been answered, the party moving is not entitled to file others in reply; but that would, in effect, be done, if we allowed the course now proposed. A party moving for a criminal information has some great advantages, and he may reasonably be required to collect all the necessary materials for his application when he first makes it. It is not suggested here that the party moved against has been guilty of any collusion or other improper conduct to obtain the discharge of the rule, but only that the prosecutor has been, in the first instance, less amply supplied with materials than he might have been. I think we ought not to grant the rule on

such a ground.

\*LITTLEDALE, J. To allow such a motion as this would in effect be

\*863] admitting affidavits in reply.

PARKE, J. In the case referred to, the first rule was discharged merely on a defect in the proof of publication. But to grant the rule in this case would be a precedent for re-inquiry in almost every instance where a criminal information was moved for without success. It would rarely happen that the party would not be able to mend his case on a second motion. The prosecutor has another remedy. We must act upon the general rule: we should establish a very dangerous precedent by departing from it.

Rule refused.

# Ex parte SANDYS, Gent. May 7.

A clerk to justices in petty sessions, appointed by order of such sessions, has no legal hold upon his office, nor will the Court interfere if he is dismissed summarily, and without cause assigned.

JOHN WILLIAMS moved for a rule to shew cause why a criminal information should not be filed against certain justices acting within the Western Division of the lathe of St. Augustine, in the county of Kent, for having maliciously and without reasonable cause removed Mr. Charles Sandys, an attorney, from the office of clerk to the petty sessions of the justices of peace for the said division. Mr. Sandys and a Mr. Pierce were nominated and appointed clerks to the said justices by an order of petty sessions in March, 1806, on the resignation of the preceding clerk. In 1814 Pierce resigned, and at a meeting of the said justices in special sessions for the amendment of the highways, it was ordered that Sandys should be, and he was, by such order, elected and appointed \*364] sole clerk to the said \*justices. His remuneration was by fees, as regulated by 26 G. 3, c. 14, "for the settling and ascertaining the fees to be taken by clerks to justices of the peace," and other statutes. In 1833 one of the magistrates against whom this application was made, wrote to him in the name of the justices, informing him that they should dispense with his services

from that time. No cause was assigned, nor would the magistrate, on application made to him for that purpose, state any, or afford him an opportunity of answering any charge that might have been made against him. It did not appear that any such complaint had in fact been preferred. No order of petty sessions was made for his dismissal.

J. Williams now contended that the clerk had such a right and interest in his office that the justices could not remove him at pleasure, and without cause assigned. He is appointed by an order of petty sessions; and the office is recognised, not only by 26 G. 3, c. 14, which provides for its emoluments, but by other statutes, particularly the Jury Act, 6 G. 4, c. 50, s. 10, and the act for licensing public-houses, 9 G. 4, c. 61, s. 15.

PER CURIAM.(a) There is no ground for this application. A clerk to justices has no legal hold upon his office; he is only appointed to assist the justices; it is an office during pleasure, like that of a vestry clerk. There must be no Rule refused.

# \*In the Matter of FLOUNDERS, Esq. May 8.

**[\*865** 

Notice to a magistrate (under 13 G. 2, c. 18, s. 5), of intention to move for a certiorari, "on the first day of next term, or so soon after as I can be heard," is irregular if served on the first day of that term, though the party does not, in fact, move till after the expiration of six days. Held, Denman, C. J., dubitante.

Benjamin Flounders, Esq., a justice of peace for the North Riding of Yorkshire, having made an order of allowance of surveyors' accounts, was served

with the following notice on the 11th of January, 1833 :-

"I do hereby give you notice that I shall, on the first day of next Hilary term, or as soon afterwards as I can be heard, move his Majesty's Court of King's Bench for a rule, calling upon you to shew cause why a writ of certiorari should not issue, directed to you, and calling upon you to certify and remove into the said Court a certain order of allowance, &c. and also the accounts so allowed, &c., in order that the said order of allowance, and accounts, &c. may be quashed, or otherwise dealt with according to the judgment and discretion of Dated," &c. the said Court.

On the 19th he was served with a copy of a rule nisi, which was abandoned on the 21st, and a fresh rule obtained, and enlarged to the present term. No notice of intention to apply for a certiorari was ever served on the magistrate but that of January 11th. Notice of the enlarged rule was served on the 30th

of March.

F. Pollock now shewed cause. The notice was irregular, for it was given on the 11th of January, which was the first day of Hilary term, and it states that on the first day of Hilary term, or so soon after as the party can be heard, a certiorari will be moved for. \*The act 13 G. 2, c. 18, s. 5, directs that no certiorari shall be granted to remove proceedings before a justice, unless moved for within six months, and unless it be proved on oath that the party suing forth the same has given six days' notice in writing to the justice, to the end that he may shew cause. The rule here might not in fact be moved for till the expiration of six days, but the justice could not know that. [PARKE, J. By the act he ought to have six days before the time at which the application can be first made.] It is true the rule was enlarged, but that does not cure the defective form of notice.

Sir James Scarlett and S. Temple, contrà. "As soon afterwards as I can be heard," means, "as I can legally be heard;" that is, after the expiration of six days. [LITTLEDALE, J. The rule is a four day rule.] It would not be made absolute in less than six. [LITTLEDALE, J. The Court ought not to entertain the rule unless proper notice were first given. PARKE, J. The notice is, in effect, that the party must be ready on any day; whereas he ought to have six days to prepare himself. At most, as it is now put, the notice is that the Court will be moved as soon as counsel can be heard.] In Doe dem. Lord Huntingtower v. Culliford, 4 D. & R. 248, notice was given to a tenant, dated the 27th of September, 1822, to quit "at Ladyday, or at the end of your current year;" the tenant having entered in August, 1821; and it was said this might mean a current year which expired on the 29th of September, and so there would be only two days' notice. But the Court decided that the words must be taken to mean a six months' notice, or such notice as the law required; \*the rule being to construe general language (in case of doubt) so as to [LITTLEDALE, J. The rule acted make it sensible, not insensible. upon in that case has been long established, and does not apply to this. landlord often does not know when the tenancy expires, but it is supposed to be within the knowledge of the tenant.]

DENMAN, C. J. I should have thought it sufficient if the justice actually had six days' notice; but as the rest of the Court is of a different opinion, the Rule discharged.

rule must be discharged.

# The KING v. MARGARET JOLLIE and JAMES STEEL.(a)

A motion for a criminal information against a person who is not charged as a magistrate or public officer, may be made later than the second term after the alleged offence, if it be shewn that the prosecutor did not know of the fact in time to make an earlier application.

By a rule of last Hilary term, January 21st, granted on the affidavit of the Earl of Lonsdale and others, the defendants were called upon to show cause on the 30th, why a criminal information should not be exhibited against them for printing and publishing certain libels. The libels were contained in a newspaper called the Carlisle Journal (published in that city) of the 23d of June, 29th of September, and 20th and 27th of October, 1832, and went into much detail upon transactions extending over a great length of time. The Earl, in his affidavit, sworn on the 18th of January, 1833, contradicted the charges in a circumstantial manner, and in conclusion stated, "That he did not see, nor had he any knowledge of the matters contained in the said \*several statements before set forth, until this present month of January." The defendant Steel, in an affidavit sworn on the 26th of January, stated that the rule nisi and copies of the affidavits were not served upon him and Margaret Jollie till the 24th of that month, and that he could not peruse and answer the affidavits within the time assigned by the rule for shewing cause. He also made some allegations tending to call in question the fact that the Earl had not known of the libels before that month. The rule was enlarged to this term.

Aglionby, in the course of the term, shewed cause. The application came too late. A rule for a criminal information cannot be moved for later than the second term after the imputed offence, and that only if no assize has intervened; and there must be time for the defendant to shew cause within the term. Rex v. Harries and Peters, 13 East, 270, Rex v. Morice and Others, 13 East, 271, note (a), Rex v. Marshall and Grantham, 13 East, 322. Here a quarter session had intervened, and there was not time to shew cause within the term. It is no excuse for applying after the proper time, that the prosecutor did not know of the libel sconer. Rex v. Bishop, 5 B. & A. 612.

F. Pollock, contra. In the cases cited the motions were all against magistrates, who are entitled to peculiar protection in the discharge of their duties. There is nothing in common between such cases and that of an individual publishing a newspaper for his own profit.

\*DENMAN, C. J. I think, under the circumstances stated by the pro-

secutor, the application comes in sufficient time.

LITTLEDALE, J. I also think that in this case the time to be allowed for moving must be reckoned from the prosecutor's knowledge of the libel: though if that had been otherwise, I should not have thought the application made early enough in the present term to give the defendant an opportunity of answering in the course of the term. The rule must be absolute.

PARKE, J., concurred.

Rule absolute.(a)

# GEORGE MOORE, Gent., One, &c., v. TERRELL and Others. May 9

In an action for a libel, charging an attorney with "disgraceful conduct" in having, at an election, disclosed confidential communications which he had acquired professionally, the defendant pleaded that the plaintiff had, on that occasion, disclosed details professionally and confidentially made known to him, relating to three transactions (which were specified); two of them being instances in which he had been employed by mortgagers to manage mortgages, and a third, where, in his employment as attorney he had become acquainted with the nature of his client's title, and his right to grant free-hold leases. At the trial, it appeared, as to the mortgages, that the plaintiff had acted as attorney both for the mortgagors and mortgagees:

Held, that the question for the jury was, whether the matters disclosed by the plaintiff were confidential communications acquired by him professionally, and not whether they were such as he would not be compellable to disclose, if called as a witness in a court

of justice.

(a) The general rule, as affecting prosecutors of criminal informations, is to be found in Rex v. Robinson (1 Sir W. B. 542), where Lord Mansfield says, that, as to the time of application, "there is no precise number of weeks, months, or years; but, if delayed, the delay must be reasonably accounted for." An exception seems to be now well established in the case of magistrates, against whom the motion must be made early enough in the second term (no assize having intervened, according to Rex v. Harries, 13 East, 270) we allow of their shewing cause during the term. And this, in the following case, we extended to other public officers.

#### REX v. HARTLEY and Others.

In Michaelmas term, 1825 (Nov. 25), Scarlett moved for a rule nisi for a criminal information against certain commissioners of paving in Southwark, for corrupt exercise of authority, and misappropriation of funds. The objection was, that the matter complained of took place in June, 1824; but it had only been disclosed by an investigation of the parishioners, principally in May last. Rex v. Marshall (13 East, 322), was mentioned to the Court; but Scarlett said that the parties here were not justices, and, though public commissioners, they were self-elected, and it was a place of advantage. The Court thought that public officers were entitled to the same protection as magistrates, and that the principle of the rule was the same; they therefore said Scarlett should take nothing by his rule then, but might mention it again the first day of the next term if he thought right. The case was not again mentioned. MS. of Mr. Robinson of the Crown Office.

Rex v. Barry O'Meara, the prosecutor, Sir Hudson Lowe, on the \*11th of February, 1823 (the last day but one of the term), obtained a rule nisi for a criminal information against the defendant, for libels in a work called Napoleon in Exile. The prosecutor's affidavits stated, that the first edition of the work was published in August preceding, and a fifth in the subsequent November. It was not mentioned when the prosecutor (who had been abroad) returned to England, or when the libel came to his knowledge. On cause being shewn, the Court held that the application came too late, and discharged the rule.

It appears from Rex v. Bishop (5 B. & A. 612), that, on motion against a magistrate, the prosecutor cannot excuse delay by merely swearing that the facts have but lately come to his knowledge. And Rex v. Hartley (supra), seems to extend this to other public

officers.

Semble, that the knowledge acquired by the plaintiff as to the right of his client to grant freehold leases, was of that privileged nature that he would not have been bound to disclose it if called on as a witness.

DECLARATION stated that there had been an election of a knight of the shire to serve in parliament for Dorset, on which occasion Lord Ashley and the Honourable W. F. S. Ponsonby were candidates, and the plaintiff was retained by and acted as attorney on behalf of Lord Ashley, during the examination of voters; and that the defendants contriving, &c., and to cause it to be believed that the plaintiff, as such attorney, was unworthy of confidence, and that he was a person who, as such attorney, had illegally, dishonestly, treacherously, and disgracefully disclosed communications which he had acquired \*professionally, and that he was a person to whom it would be dangerous to make any confidential communications as such attorney, wrongfully and maliciously published in a newspaper called the Western Times, a false, malicious, and defamatory libel, of and concerning the said election, and of and concerning the plaintiff, and of and concerning him in the way of and in respect of his profession as such attorney as aforesaid, containing the libellous matter following:-We are sorry to find that the town of Blandford has, since the election, become the scene of violent outrage. Mr. S. Smith and Mr. Moore (meaning the plaintiff), two attorneys, advocates for Lord Ashley, had, during the examination of the voters, disclosed many confidential communications which they had acquired professionally. The townsmen, justly annoyed at such conduct, have broken into their offices, taken all their papers, and scattered them about the streets of Blandford. This is the more to be lamented, as Mr. Smith, we understand, was one of the registrars of the diocese, and we fear the wills intrusted to his care have shared a similar fate with his private papers. Nothing can be more disgraceful than such conduct as was pursued by those attorneys" (meaning to include the plaintiff) "at the election, but we regret that it should have entailed such serious consequences as we have related."

Plea, that before the publishing of the libel, and before the said election, W. Ball and John Ball had borrowed a sum of money of the Blandford Bank, upon mortgage of certain property in which they were jointly interested, and had, upon that occasion, employed the plaintiff, then being an attorney, to conduct and negotiate the said mortgage on their behalf, and \*that he had conducted and negotiated such mortgage for them, and had received, in the course of such employment, divers professional and confidential communications touching the affairs and property of the said W. B. and J. B., and especially touching the said mortgage and the sum borrowed thereon, and the value of the said mortgaged premises, and that they W. B. and J. B., before the publishing of the supposed libellous matter, and at the election, came up to poll as voters, and tendered their votes respectively for W. F. S. Ponsonby, one of the candidates at the election, and were examined in the presence and hearing of the plaintiff touching their said votes; and thereupon the plaintiff, acting as attorney on behalf of Lord Ashley during the examination of voters, and being one of his advocates, did, without the permission of W. B. and J. B., and during such their examination, disclose and make known to one J. H. Terrell, and to other persons then present, and hearing the same, the said mortgage transactions, and divers details and particulars relative thereto, and divers of the said confidential communications which the plaintiff had professionally received as aforesaid, and did then, in the presence and hearing of the said persons, disclose and declare the amount of the purchase money of the said mortgaged property, and the amount of the moneys borrowed thereon, and declared aloud, in the hearing of the same persons, that the interest on the money so borrowed as aforesaid was as much as the rent payable in respect of the said property, whereas, in truth, there was a considerable surplus accruing from the said rent, over and above, and after, the payment of the said interest. The plea

estated another transaction, similar to the first, in which the plaintiff was employed to conduct and manage a mortgage of one Nippard, and that, upon his tendering his vote, the plaintiff made a similar disclosure as to the amount of the money borrowed, and the interest, &c. The plea also stated, that, before the publishing of the supposed libellous matter, and before the said election, the plaintiff, then being an attorney, had been professionally employed by Sir J. W. Smith in the management of his affairs and business, and in the course of such employment had become professionally and confidentially acquainted with the title of the said Sir J. W. Smith to certain property in the county of Dorset, and to the exercise and enjoyment of certain rights and powers respecting the same, and especially to the exercise of a power to grant a freehold lease of part thereof, and which power had been exercised by the said Sir J. W. Smith before the said election, by granting a freehold lease of part of the said property to one J. Coward; and the said J. Coward, before the publishing of the supposed libellous matters, and at the said election, came up to poll as a voter, and tendered his vote for the said F. W. S. Ponsonby, and was examined in the presence and hearing of the plaintiff touching his said vote; and that the plaintiff, acting as attorney for Lord Ashley, without the permission of either the said J. Coward or the said Sir J. W. Smith, and during such examination of Coward, disclosed and made known to J. H. Terrell and other persons, then present and hearing the same, divers details and particulars touching the title of the said freehold lease, and touching the right of the said Sir J. W. Smith to grant the same, which said details and particulars had been so professionally and confidentially made known to the plaintiff as aforesaid. The plea \*further stated, that the plaintiff, for the purpose of delaying the election, Land harassing Ponsonby's voters, took frivolous and unfounded objections to the votes of persons who tendered their votes for Ponsonby, and insulted the voters, and conducted himself in a disgraceful manner; that divers of the townsmen of Blandford were justly annoyed at the disclosure of the confidential communications, and were thereby induced to and did break into the office of the plaintiff, and take his papers, and scatter them about the streets of Blandford, and the said town became the scene of violent outrage, &c., wherefore the defendants did compose and publish, &c., as they lawfully might.

At the trial before Park, J., at the Dorset Spring assizes, 1832, evidence was given by the defendant of the three instances in which the plea charged the plaintiff with having improperly availed himself of the knowledge obtained by him as an attorney, to prevent parties from voting. In the two cases of the mortgages, it appeared that no other attorney than the plaintiff had been employed, and that he acted for mortgagor and mortgagee. As to Coward's case, it was stated that he tendered his vote in right of a freehold lease granted to him by Sir J. W. Smith in 1829, and that the plaintiff said he (plaintiff) was the attorney of Sir J. W. Smith, and that the latter had no power at that time to grant such a lease. Some evidence was also given of the alleged frivolous objections. One of the facts in dispute at the trial was, whether the outrages were committed against the plaintiff's property by inhabitants of the town, or by strangers. There was some, but not very explicit evidence on that subject, but the question was not distinctly submitted to \*the jury. The jury found a verdict for the plaintiff, damages 100%. In Easter term following, a rule nisi was obtained for a new trial, on the ground that the learned Judge, in his address to the jury, had too much narrowed the sense of the words "professional and confidential communications" employed in the plea, and that he had treated them as synonymous with those privileged disclosures, which an attorney, if called upon as a witness in Court, would not be compelled to

reveal.

Coleridge Serjt. and Barstow shewed cause in this term. The defendants failed in proving the justification. The misconduct of the plaintiff, and the annoyance and consequent outrage of the townsmen of Blandford, are connected

together by the libel. It was therefore incumbent on the defendants to prove that the outrage was committed by those townsmen, but there was no such proof. The cases put in the plea are certainly not instances of privileged communications. As to Coward's case, the relation of attorney and client never existed between him and the plaintiff. The allegation by the latter that Sir J. W. Smith had no power to grant the lease in 1829, if any breach of confidence, was so only in respect of Sir J. W. Smith. As to the mortgages, it was proved that the plaintiff acted as the attorney of both parties, and it never could have been intended that he should not disclose to the mortgagee any defect of title in mortgagor. The rule as to privileged communications (which the attorney when a witness is not compellable to disclose) is not confined to communications made in the course of, or with a view to a cause, Cromacke v. Heathcote, 2 B. \*876] & B. 4, Hughes v. Biddulph, 4 Russ. 190, \*Doe v. Harris, 5 C. & P. 592, Clark v. Clark, 2 M. & M. 3. [Denman, C. J. The question upon this record is not whether certain communications were so privileged that the plaintiff if called upon as a witness would not be bound to disclose them, but whether they were confidentially made to him in his professional character, so as to render it disgraceful for him to reveal them. PARKE, J. In Greenough v. Gaskell the Lord Chancellor consulted with Tindal, C. J., Lord Lyndhurst, and myself, and we all thought the client's privilege extended much beyond communications in respect of a suit.(a)] The defendants were bound to make \*out not only that there was a breach of confidence by the plaintiff, but that it took place under circumstances disgraceful to him, and of that there is no evidence.

Crowder contrà. The learned Judge, at the trial, seemed to think it necessary for the defendants to make out that the matters disclosed by the plaintiff were such as he would have been privileged to decline stating as a witness. But, independently of this objection, the question raised by the record was (and that was for the jury), whether the matters so disclosed by him, had been communicated in professional confidence, so as to make it disgraceful in him to disclose it. There are cases where physicians, surgeons, and divines are bound to

(a) In Bolton v. The Corporation of Liverpool (Mylne & Keen, 88), on a bill of discovery in aid of the defence to an action brought by the corporation for the recovery of town dues, the defendants, by their answer, admitted that they had in their custody, and relating to the matters mentioned in the bill, divers cases which had been prepared and laid before counsel in contemplation of the then pending litigation, as also certain grants and deeds, which were the title deeds and documents evidencing their title to the dues in question, Lord Chancellor Brougham held, that the plaintiffs in equity were not entitled to an inspection of such cases or deeds. And in Greenough v. Gaskell (M. & K. 98), on a bill which sought to charge a solicitor with a fraud on the plaintiffs in the course of transactions in which he had been engaged for his client, the same noble Lord refused to order the production of entries and memorandums contained in the defendant's books, or of written communications made or received by him, relating to those transactions, and admitted by the answer to be in the defendant's custody. In that case, on a full review of the authorities, the Lord Chancellor laid it down generally that attorneys or solicitors cannot be compelled to disclose "matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of."—"As regards them," "his Lordship said, "it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and it may be the most important, of all communications;—those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the Court issued."

any trouble or grievance, or by injuring their animals to unjustly distress them. And I and my heirs \*will faithfully warrant this gift to my aforesaid monks against all men." Then follow the names of several witnesses. In a suit (17 Ed. 3,) before the Justices in Eyre in Lancaster, between the abbot of Whalley and the forester of the forest of Penhull, who had claimed a right of puture in Brandwood, the jury found (as appeared by the record) that, in the reign of King John, Roger de Lacy, by the deed already set out, gave Brandwood to the then abbot of Stanlowe, under which the abbot was seised and that, in the time of King Henry the Third, the abbot first built houses in Brandwood, and brought a great part of it into cultivation.

The defendant also gave in evidence the following deed:—

"To all to whom this present writing indented shall come, Henry, Earl of Lancaster, Derby, Leicester, and Lincoln, Steward of England, greeting: Know ye, that whereas the Lord Roger de Lacy, Constable of Chester, of good memory, and our predecessor of the lordship of Blackburnshire and of Rachedal, fermerly had given and granted by his deed, which we have seen, among other things, to God and the blessed Mary, and to the abbot and monks of the Bene dictine place of Stanlawe, the predecessors of the abbot and convent of Whalley, that pasture which is called Brandewode in his forest by the divisions under mentioned, that is to say, from Gorsilache, &c. (setting out the bounds as before) free and discharged from all secular service, custom, and exaction We, Henry, the aforesaid earl, of our certain knowledge and our special favour. approve, ratify, and, as much as in us lies, confirm the aforesaid gift and grant We, willing, moreover, on account of the devotion which we have to the mother of God, the \*Glorious Virgin, and the special affection which we bear to the person of brother John de Lindelaye, abbot of the said house of Whalley, Doctor of Divinity, to do the said abbot and convent and their successors the greater favour in this behalf, have remised, released, and altogether have quit claimed for us and our heirs to the said abbot and convent of Whalley, and their successors for ever, all the right and claim which can belong to us or our heirs by any title whatsoever, within the pasture aforesaid, so that henceforth the said abbot and convent may have and hold the said pasture in severalty exonerated, freed and discharged, as well from puture of the forester of us and our heirs, as from agistments, or any putting of the cattle on the pasture aforesaid, by us or our heirs, or the servants of us or our heirs, and from all other services, exactions, and demands whatsoever. And that it may be lawful for the said abbot and convent, and their successors, to inclose the said pasture, and to reduce it to cultivation, or to make any other profit thereof at their free will, without contradiction or impediment of us or our heirs, saving to us and our heirs in the aforesaid pasture our right to hunt without injury or troubling the said abbot and convent, or their successors and servants. We also have released to the said abbot and convent of Whalley, and their successors, all the right and claim which we could in any manner have in forty acreof waste in Blackburn, and seven acres of waste in Castleton, which said fortyseven acres of waste were lately approved by the said abbot and convent in the township aforesaid; so that neither we nor our heirs can hereafter require or claim by any title or pretext in the aforesaid wastes so approved any right ( \*claim, but thereof we will by these presents to be altogether excluded. And we, the said Henry, the aforesaid earl, and our heirs, will warrant, acquit, and for ever defend all the aforesaid pasture and waste approved as aforesaid to the said abbot and convent, and their successors, in form aforesaid, against all people. In witness whereof, &c. Given at our manor house of the Savoy, near London, the 20th day of February, in the twenty-fifth year of the reign of King Edward the Third," &c.

The defendant also produced in evidence a grant made by King Henry the Eighth, in the thirty-third year of his reign, to Thomas Holt of Gristlechurst, in fee, of the manor of Spotland within the parish of Rochdale, and all those

messuages, lands, tenements, meadows, feedings, pastures, woods, and underwoods, &c. lying and being in Brandwood, Whytworth, Tongend, and Rocliffe, within the parish of Rochdale, which manor and other premises lately belonged to the late monastery of Whalley, and came to the crown by reason of the attainder of John Paslowe, the last abbot of the same, who was attainted of high treason. The defendant further proved that the above mentioned premises passed from the family of Holt about the time of Charles the Second by sale: that the occupiers of three ancient tenements called Rocliffe, and Tonge, and Greave, had exclusively turned cattle on Tooter Hill and Reaps Moss, and had got turf for sale on the Moss beyond the time of living memory; that they, in 1812, agreed to divide among them the waste land in question, and subsequently, about fourteen years ago, inclosed the whole of it; and that the defendant was possessed of a portion of this inclosure.

\*885] \*The learned judge told the jury that the second deed given in evidence operated not merely as a confirmation of the grant of pasture, but also as a grant of the soil, subject to a right of chase, and consequently that Tooter Hill and Reaps Moss, which were part of Brandwood, were thereby severed from the manor of Rochdale: that on the attainder of the abbot of Whalley, when the lands revested in the crown, they did not reunite with the duchy of Lancaster, because they vested in the king in right of his crown, and not of the duchy, (see 1 Bla. Comm. 119,) and that the circumstance of Holt's descendant having accepted a grant from the Byrons might have arisen merely from a distrust of his ancestor's title, and a persuasion that Queen Elizabeth had granted Brandwood, to the Byrons in granting to them the duchy manor of Rochdale. The

jury found for the defendant.

F. Pollock, on a former day in this term, moved for a new trial, on the ground that the learned Judge had misdirected the jury as to the legal effect of the deeds. He contended that the first deed clearly passed only a right of common of pasture, and the second was a confirmation only of the right granted by the first. It undoubtedly gave a license to inclose the land, but it did not pass the soil.

Cur. adv. vult.

DENMAN, C. J. now delivered the judgment of the Court.

In this case a motion for a rule nisi was made by Mr. Pollock, on the ground that the learned judge misdirected \*the jury, with respect to the legal effect of two instruments,—one a deed of Roger de Lacy to the abbot and monks of Stanlawe; the other of the Earl of Lancaster to the abbot and convent of Whalley. It was urged, that neither of the deeds could operate to convey the soil of the pasture of Brandwood, and that the learned judge was wrong in directing the jury that they could. The first is in ambiguous terms. If it had been confined to a grant of the pasture which is called Brandwood, it would have conveyed the soil, but the context seems to confine the grant to that of a

right of common only.

The second instrument is in less ambiguous terms. We think it was clearly the intention of the grantor to pass a separate interest in the soil, and not a mere right of common; but there are no words to make the deed operate as a feoffment with livery of scisin. There is, however, no diffculty in presuming that the abbot and convent were in possession at the time of the deed, which would make it operate as a conveyance by way of release; and we think i ought to be done in favour of the possession in modern times, the land havin been actually enclosed for sixteen years, and proved by uncontradicted evidence to have been exclusively pastured upon by the owners of three estates, as far back as living memory went. We think, therefore, that there should be no rule.

Rule refused.(a)

<sup>(</sup>a) For a full historical account of the religious foundation of Stanlaw, translated afterwards to Whalley, see Whitaker's History of Whalley, book ii., chap. ii.

Vol. XXIV.—25

Note to the case of Howard v. Bartolozzi, ante, p. 555.

The following case was argued and determined in the Court of Exchequer, in Hilary term, 1834.

#### TABRAM, Gent., One, &c. v. FREEMAN.

An agreement by an insolvent about to take the benefit of the act, with his creditor, that the claim of the latter should be omitted in the schedule, and that a cognovit which he held shall be suspended, and revived after the debtor's discharge, was held by the Court of Exchequer to be fraudulent, and the cognovit and judgment signed, and excution issued thereupon after the discharge, were set aside with costs.

A RULE had been obtained, calling upon the plaintiff to shew cause why the cognorit, and judgment, and execution thereon, should not be set aside with costs. It appeared upon the affidavits, that the defendant was indebted to the plaintiff, and being about to take the benefit of the Insolvent Debtors' Act, employed the plaintiff, an attorney of the Insolvent Court, to procure and conduct his discharge; but it was agreed between them, that the plaintiff's debt should not be inserted in the schedule, and that a cognovit which had been given to secure it, should be suspended until after the defendant's discharge, and then revived. About two years afterwards, the plaintiff entered up judgment on the cognovit, and issued execution. The present rule was moved for on the ground that the agreement was a fraud upon the Insolvent Debtors' Court, upon the creditors of the insolvent, and upon the policy of the law.

Follett shewed cause. As to the agreement being a fraud upon the Court, no creditor being bound to come in, the Court could not be deceived by the omission of any particular debt. It is no fraud upon the creditors at large, because they have in fact each a greater present share of the insolvent's effects, than if another creditor had been added to their number. Nor is it a fraud upon the law, for the reasons given in Howard v. Bartolozzi

(4 B. & Ad. 555).

Kelly in support of the rule. Such an agreement as this is a fraud upon the Court, the creditors, and the law. It is a direct agreement between the insolvent and his attorney. that the former shall forswear himself, and impose upon the Court; for by the Insolvent Debtors' Act, 7 G. 4, c. 57, s. 40, the debtor is to deliver in upon oath a true and correct account of all his debts. He swears falsely if he omit any debt in his schedule. The creditors are also defrauded, for by the fifty-seventh section the assignee may obtain a judgment and issue execution against the insolvent's after-acquired effects. If any single creditor can by agreement with the debtor withhold his debt, and immediately after the discharge sue for it and obtain a judgment, he may gain a priority of execution, and seize the whole after-acquired effects, to the prejudice of the other creditors. So it is a clear fraud upon the policy of the law, which \*contemplated the effectual and complete [\*888 discharge of the person of the debtor, and the application of all his effects, present and future, to the fair and proportionate satisfaction of his debts. Howard v. Bartolozzi (4 B. & Ad. 555), was decided upon too limited a view of the Insolvent Debtors' Act.

PER CUBIAM (Bayley, Vaughan, Bolland, and Gurney, Bs.). This judgment cannot be permitted to stand. The plaintiff, by agreeing that a schedule, omitting his own debt. shall be delivered in under the statute, agrees that the defendant shall deceive the Court by a wilfully false statement upon oath, contrary to section 40 and 71, of the Insolvent Debtors' Act. This alone would avoid the agreement. But the creditors are also imposed upon. They have a right to believe that the debtor is set free, and that by his future exertions he may procure the means of supporting himself, and of satisfying their just claims. How can he do this if his person and his property are liable to an execution. whenever after his discharge, the plaintiff finds it advantageous to come upon him? The true scope and object of the statute appear to have been but partially considered in the case of Howard v. Bartolozzi. The intent of the statute was, that insolvents should lay before their creditors and the Court a fair and true statement of their affairs; that where they have been guilty of no misconduct, their persons should be discharged, and their property divided among their creditors; and that when discharged, they should be unincumbered with prior obligations, and free to seek their livelihood, subject to the right of the creditors to their future surplus property. All these objects might be defeated, if agreements like the present could be supported in law. The rule for setting aside the cognovit and subsequent proceedings, must be absolute with costs; and if the plaintiff be advised to try the correctness of our present decision before a higher tribunal, he may do so by prosecuting his action, and raising the question on the record.

Rule absolute.

# INDEX

TO THE

# PRINCIPAL MATTERS.

ACCIDENTAL FIRE.

See PAWNBROKER.

ACTION.

See MANDANUS, 2. PRACTICE, 4.

ACTION ON THE CASE

ACTION ON THE CASE. See Market, 1. Pleadings, 3, 4.

 A reversioner cannot maintain an action on the case against a stranger, for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way, such an act during the tenancy not being necessarily injurious to the reversion. Baxter v. Taylor, M., 3 W. 4.

2. Plaintiff declared in case, that the defendants wrongfully and maliciously took his goods, of the value of 700L, as a distress for 141L alleged and pretended to be due for a poor rate, whereby they levied an unreason-like and excessive distress for the said 141L; and it was proved that the defendants, overseers, having a regular distress warrant for the rate, distrained cattle, &c., of the plaintiff, to the value of more than 600L:

Held, that the plaintiff was not bound to demand a copy of the warrant, pursuant to the 24 G. 2, c. 44, s. 6, before commencing his action, as the overseers had not acted in obedience to the warrant, and no action would have lain against the justices.

Held, further, that it was not a question to be left to the jury, on these facts, whether or not the defendants acted maliciously.

And, on motion in arrest of judgment, held that the declaration, though it did not expressly admit any poor rate to have been due, (on which ground it was objected that the action ought to have been trespass,) was sufficient, at least, after verdict. Sturch v. Clarke and two others, M., 3 W. 4. 113. Declaration stated, that plaintiff, being the inventor and manufacturer of metallic hones,

used certain envelopes for the same, denot-

ing them to be his; and that defendants wrongfully made other hones, wrapped them in envelopes resembling the plaintiff's, and sold them as his own, whereby the plaintiff was prevented from selling many of his hones, and they were depreciated in value and reputation, those of the defendants being inferior:

Held, that the plaintiff was entitled to some damages for the invasion of his right by the fraud of the defendants, though he did not prove that their hones were inferior, or that he had sustained any specific damage.

Blofield v. Payne, H., 3 W. 4 410

4. After distress made by a broker, in a case

 After distress made by a broker, in a case within 57 G. 3, c. 93, the rent and charges may still be tendered to the landlord.

Declaration contained six counts in case; the seventh charged, that the defendants took and distrained the goods of the plaintiff for rent, of more than sufficient value to satisfy the rent and costs, and then voluntarily abandoned the same; and afterwards wrongfully, injuriously, and recatiously again took and distrained the same goods for the same rent, and refused to return the same, and converted them to their own use: Held on motion in arrest of judgment for misjoinder of case and trespass, that although this second taking of the goods was a trespass, yet the plaintiff might bring case for the conversion, and that the count was an informal one in case, and sufficient after verdict. Smith v. Goodwin, H., 3 W. 4.

5. The words, "He robbed J. W.," are actionable, as imputing an offence punishable by law. If they are used in any other sense, the defendant must show it. Per Denman, C. J., and Parke, J., Littledale, J. dubitante. Tomlinson, Gent., One, &c. v. Brittlebank, E., 3 W. 4.

ADMISSION. See Evidence, 5.

#### ADVERTISEMENT. See Assumpbit, 5.

#### AFFIDAVITS.

See Arrest, 2. Judgment. Juryman. Mandamus, 5.

#### AGREEMENT.

# See Stanp.

#### AMENDMENT.

See Appeal, 3. Pleading, 5. Poor Rate, 3. Practice, 4.

#### ANNUITY.

#### See WARRANT ON ATTORNEY, 2.

1. By statute 1 & 2 G. 4, c. exvii., incorporata gas light company, it was enacted that the directors should have the custody of the common seal, and power to use it for the affairs and concerns of the company, who were themselves, by another clause, empowered to make orders under seal at their meetings for the government of the company, and for regulating the proceedings of the directors. No power was expressly given by the act to grant annuities. At a special meeting of the company, a committee previously appointed for certain purposes, re-ported that it was expedient that the then clerk, whose health was bad, should be invited to retire upon a pension, on condition of abstaining from acts prejudicial to the company; that such proposal had been made to him, and that he had accepted it. The meeting voted, that the report should be received and entered on the minutes, and that the directors should carry into effect the committee's recommendation. No order to this effect was made under seal. The directors. by deed, in the name of the company, granted an annuity to the clerk on his retirement, subject to the conditions of the nature above stated, and they put the corporate seal to it: Held, the seal was properly affixed by the directors; that the granting of such annuity was warranted by the statute; that it was a concern of the company, within the first-mentioned clause; and that no order of the company under seal was necessary to authorize it. Clarke v. The Imperial Gas Light and Coke Company, 3 W. 4. 315

2. A rector, after the statute 13 Eliz. c. 20, had been repealed, and before its revival by 57 G. 3, c. 99, demised his rectory to a trustee for ninety-nine years to secure an annuity. After the passing of 57 G. 3, c. 99, by deed reciting the grant of the former annuity, and that A. had agreed to purchase of the grantor an annuity of 574L a year for 4400L, and out of that sum to pay off the former annuity, and that that annuity, and the term created to secure the same, should be assigned to a trustee for A.'s benefit, the rector granted the said annuity of 574L chargeable on his rectory, and the trustee of the term created to secure the annuity of 1813, assigned it to the trustee for the benefit of

A.:
Held, that inasmuch as the term was created after the passing of the 43 G. 3, c. 84, which repealed the 13 Eliz. c. 20, the as-

84, which repealed the 13 Eliz. c. 20, the assignment of it, though for the purpose of securing the payment of an annuity charged on the benefice after the passing of the 57

G. 3, c. 99, was valid. Doe dem. Wilks and Others v. Rameden, Clerk, E., 3 W. 4. 603

#### APOTHECARY.

1. A person authorized to practice as a physician, by a diploma from a Scotch University, is not thereby exempted from the penaltimposed by 55 G. 3, c. 194, s. 20, for practising as an apothecary in England or Wales. without the certificate required by that act. Apothecaries' Company v. Collins, E., 3 W.

2. A person who advises patients, and corpounds and sells the medicines recommended by himself, but does not and cannot make up physicians' prescriptions, is liable to the penalties of 55 G. 3, c. 194, s. 20, for practising as an apothecary without a certificat. The Apothecaries' Company v. Allen, E. 3 W. 4.

#### APPEAL.

#### See POOR RATE, 3.

1. Notice was given of appeal against a per rate, and the respondents attended at the sessions and prayed a respite, alleging that they had not had time to prepare their defence to the matters stated as grounds of appeal. The appellant opposed the respite but it was granted, no notice of appeal having been proved or expressly admitted. An order of respite was made out embodying the grounds of appeal stated in the notice:

Held, that, at the following sessions, the appellant was entitled to be heard without proving any notice of appeal. The King v. The Justices of Hertfordshire, H., 3 W. 4.

2. An order of removal "to the parish of L" was directed "to the churchwardens and overseers of the parish of L." There were no such officers, but the parish was divided into three hamlets, A., B. and C., each maintaining its own poor, and having reparate officers. The pauper, with the order, was delivered by the officers of the removing parish to the officers of the hamlet of A. Hield, that a notice of appeal given in the name of the officers of the hamlet of A., and reciting the order to be for removal to the hamlet of A., in the parish of L., could not under those circumstances, be objected to by the respondents, and that the appeal coght to have been heard. The King v. The Justices of Carmarthesshire, H., 3 W. 4.

3. Paupers were removed to the tornship of Bingley: the township does not maintain its own poor, but is in the parish of Bingley which does: Held, that the order was informal, but the sessions might amend it The King v. The Inhabitants of Bingley, H. 3 W. 4.

4. In a notice of appeal against an order for stopping up a footway (under 55 G. 3, c. 65, s. 3), it sufficiently appears that the appellant is a party aggrieved, if it be stated that he and his tenants, occupiers of a farm and lands near the said way, and who have heretofore used, and have a right to use it, and also other persons, and the public will be put to great inconvenience.

to great inconvenience.

The statute requires "ten days'" notice of an appeal to the sessions against such order. By a rule of the West Riding sessions, in cases of appeal, "not otherwise directed by

law," "ten days'" notice is to be given, exclusive of the day of notice and first day of the sessions: Held, that the statute meant ten days' notice, one inclusive and the other exclusive; that the sessions' rule did not apply to this case, or, if it were intended to do so, this Court would use its discretionary power of controlling the practice.

The appellant gave notice of appeal against three orders, all of the same date; he attended the clerk of the peace to enter them, and the entry was in the following form: A., appellant, against an order of B. and C., esquires, dated, &c. for stopping up footways in, &c. He paid the fee as upon one appeal. At the sessions, the appellant's counsel being called upon to elect which appeal he would proceed with, proved his notices upon one, which was dismissed on a supposed defect of notice, and the order confirmed, as were the two others, nothing being raid of the appeals against these, to which the same objections would have applied. On motion for a mandamus to enter continuances and hear the appeals, it appearing that the preliminary objection taken was unfounded, and that the appellant had in reality intended to enter his appeal against all the orders, this Court made the rule absolute as to all three. The King v. The Justices of the West Riding of Yorkshire, E., 3 W. 4. 685

# APPOINTMENT. See EVIDENCE, 6. TREASURER.

ARBITRAMENT.

See Mandamus, 2. Partnership, I. ARREST.

- I. A defendant arrested on an irregular writ de contamace capiendo, was brought up by habeas corpus before a judge to be discharged. Immediately after his discharge, and before he had time to return home, he was again arrested on a similar writ for the same matter: Held, that he was protected from arrest redeundo. The second writ was sued out of Chancery without any return made to the first: nevertheless it was held to be ragular. The King v. Blake, M., 3 W. 4.
- 2. The Court will interfere to discharge a party from arrest, or set aside the bail-bond, where it appears plainly on the face of the matter, that the arrest was groundlers, but not where it would become necessary to try the merits of the case on detailed and contradictory statements in several affidavits.

It is not sufficient ground for such interference, that the defendant, denying that he is indebted and advancing a number of facts in support of such denial, alloges his belief that the action is brought for the purpose of obtaining from him by intimidation a release of certain covenants; and states that the plaintiff, or his attorney in his presence, on being refused such lease a week before the arrest, declared that some strong measure must be adopted against the defendant. Button v. Hausorth, H., 3 W. 4.

ARREST OF JUDGMENT.

See Assumpsit, 3.

ASSIGNRES OF INSOLVENT DEBTOR. See FRADULENT CONVEYANCE.

#### ASSIGNMENT.

See BANKRUPT, 5.
ASSIGNMENT OF TERM.

See Annuity, 2.
ASSIZES.
See Judgment.

ASSUMPSIT.

See PAYMENT OF MONEY INTO COURT.

- In assumpsit on a special contract, and for money had and received, &c., defendant pleaded the general issue, and to the common counts a tender; and he paid money into Court upon a rule in the common form, not applying in terms to any particular count: Held, that such payment could not be referred exclusively to the counts as to which a tender was pleaded, but that it applied to the whole declaration, and admitted the special contract. Bulwer v. Horne, M., 3 W.
   4.
- 2. A. and others were part owners of a ship in R. the service of the East India Company. was managing owner, and employed C. as his agent for general purposes, and amongst others, to receive and pay moneys on account of the ship; and C. kept an account in his books with B., as such managing owner. In order to obtain payment of a sum of money due from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner, and upon a receipt signed by B. and one of the other owners, C. received on account of the ship 20004. from the East India Company, and placed it to B.'s credit in his books. The part owners having brought money had and received, to recover the balance of that account: Held, that C. had received the money as the agent of B., and was accountable to him for it; that there was no privity between the other part owners and C., and consequently that the action was not maintainable. Sime and Others v. Brittain and Others, M., 3 W. 4. 375
- 3. Declaration stated that W. P. owed the plaintiff 13., and that in consideration thereof, and that W. P., at the defendant's request, had promised defendant to work for him at certain wages, and also in consideration of W. P. leaving the amount which might be carned by him in the defendant's hands, he the defendant undertook and promised to pay the plaintiff the sum of 13t. Averment, that W. P. performed his part of the agreement. Judgment arrested, because the plaintiff was a stranger to the consideration. Price v. Easton, H., 3 W. 4.
- 4. The solicitor to the assignees of a bankrupt received from them a sum of money, to be applied in payment of the costs of the petitioning creditor, up to the time of the choice of assignees. The solicitor offered to pay the money on condition that the bill should undergo a subsequent taxation, but to that the petitioning creditor would not assent: Held, that the latter could not maintain money had and received thereupon against the solicitor, though, after the above offer, he had authorized the solicitor to pay over part of the money in discharge of commissioner' fees. Baron v. Husband, E., 3 W. 4. 611

5. A., by public advertisement, stated, that whoever would give information which should lead to the discovery of the murder of B. should, on conviction, receive a reward of 201.: Held, that C., who gave such information, was entitled to recover the 201., though she was led to inform, not by the proffered reward, but by other motives. Williams v. Carwardine, E., 3 W. 4.

6. An auctioneer, employed by a supposed executrix, sold goods of the testator; but before payment, the real executrix claimed the money from the buyer: Held, that the auctioneer could not afterwards maintain an action against the buyer, though the latter had expressly promised to pay on being allowed to take away the goods, which he did. Dickenson v. Naul, E., 3 W. 4. 638

7. Where a party has employed two attorneys, partners, to manage a cause for him in the Palace Court, an action in the common form lies against him at the suit of both for the bill of costs, though one only was an attorney of the Court, and actually did the business there.

Although the client gave a written retainer to the latter attorney only, and he only was mentioned in the rule for taxing costs, these facts were held not conclusive, there being evidence, aliunde, of a contract with both. J. and R. Arden, Genta., &c. v. Tucker, Gent., One, &c., E., 3 W. 4. 815

ATTACHMENT. See Practice, 6.

ATTESTATION OF BOND.

See Attorney, 3.

ATTESTATION OF WILL.

See DEVISE, 2.

#### ATTORNEY.

See EVIDENCE, 5. LIBEL. PRACTICE, 3.
WARRANT OF ATTORNEY, 1.

1. The rule of Trinity term, 21 G. 3, which

empowers the marshal of the King's Bench to regulate the admission of persons to visit the prisoners, does not authorize him at his pleasure to prevent an attorney from visiting his client in the prison, but he must have some ground to show for so doing, provided the attendance of such attorney is on the client's business, and necessary to or required by him. Ex parte Matanle, M., 3 W. 4. 365 2. In an action against attorneys for negli-gence, it appeared that the plaintiff employed the defendants to conduct an action for him against a surveyor of turnpike roads, for alleged trespasses. The surveyor had seized and impounded plaintiff's sheep, as having been found straying on the road: the plaintiff regained possession of them, by promising the pound keeper to pay the proper charges, and drove them home; on the same day the surveyor retook the sheep in the plaintiff's field, and again impounded them. The first and second taking were in Surrey, but on an intermediate day the sheep had escaped, and been impounded in Sussex. The turnpike act 4 G. 4, c. 95, s. 75, only authorises surveyors to impound sheep found on a turnpike road. The general turnpike act 3 G. 4, c. 126, s. 147, (incorporated in the above statute by reference) requires that actions against any person for any thing done in pursuance of the act, shall be commenced within three months, and the venue laid in the county where the cause of action arose.

The attorneys commenced the action within three months, and had a declaration drawn by counsel, who returned it with an observation indorsed, that it would have been prudent to have joined two other parties. attorneys thereupon (with the plaintiff's assent) discontinued the action, and brought another after the expiration of the three months, laying the venue in Succer. The declaration was settled by counsel, and the case afterwards submitted to a special pleader, who gave as his opinion, that the protecting clause of 3 G. 4, c. 126, did not apply to the trespass in seising the sheep in the plaintiff's field. The plaintiff went to the trial, and was nonsuited, on account of the action being out of time and the venue improper, with leave to move, which was done without success:

Held, that this was not a case of action-

able negligence in the attorneys.

Quere, whether the surveyor, in making the second scieure, was within the protection of 3 G. 4, c. 126, as acting in pursuance of that statute, or 4 G. 4, c. 95: Held, that at all events, there was so much doubt on this point, that the attorneys, if mistaken upon it, were not therefore culpably negligent. Kemp v. Burt and others, H., 3 W. 4. 425

3. An attorney's bill for business done in the county court is within the statute 2 G. 2, c. 23, s. 23, and must be delivered to the client one month before action brought.

A charge for attesting a replevin bond is a charge relating to a suit in that court.

An attorney not having delivered any bill to his client before action brought, but particulars of demand, containing some taxable items, after action brought, cannot recover for an item not taxable, if such item be is respect of business done or money paid to his client's use, in his character of attorney.

Wardle v. Nicholson, H., 3 W. 4.

i. An attorney employed by a party about to take the benefit of the Insolvent Act, to prepare a list of debts, which were afterwards to be inserted in the schedule, omitted a debt due from the insolvent to himself, and sued for that debt after the party's discharge: Held, by Denman, C. J., and Parke, J., that this was not such a fraud upon the general policy of the Insolvent Act as would bar the action. Queere, whether, if he omitted to insort the debt in breach of his duty to his client, that would be a defence to an action brought by him against the latter to recover the debt, or whether it would only be the subject of a cross action? If a defence, queere whether or not it should be specially pleaded? Howard, Gent., One, &c. v. Bertolowi, H., 3 W. 4.

5. Plaintiff's attorneys gave defendant's attorneys their own undertaking as security for costs; the defendant obtained a verdict and died, and judgment was entered up in his name within two terms: Held, that the attorney for such deceased party, having a claim against his estate in respect of the costs, might enforce the security to satisfy

such claims, without any scire facias having been sued out by the personal representatives. Chaucel v. Chaucell, E., 3 W. 4. 590 6. Where an attorney has received money to

the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate.

But if the attorney committed fraud in the receiving and not accounting, the Court, in the exercise of its general jurisdiction over its officer, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct.

The case of fraud, however, ought to be clear, and the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to show cause why he should not pay over the money. In re Bonner, Gent., One, &c., E., 3 W. 4.

7. Where a party has employed two attorneys, partners, to manage a cause for him in the Palace Court, an action in the common form lies against him at the suit of both, for the bill of costs, though one only was an attorney of the Court, and actually did the business there.

Although the client gave a written retainer to the latter attorney only, and he only was mentioned in the rule for taxing costs, these facts were held not conclusive, there being evidence, aliunde, of a contract with both. J. and R. Arden, Gente., &c. v. Tucker, Gent., One, &c., E., 3 W. 4.

8. An agreement by an insolvent about to take the benefit of the act, with his creditor (his attorney), that the claim of the latter should be omitted in the schedule, and that a cognovit which he held shall be suspended, and revived after the debtor's dischaage, was held by the Court of Exchequer to be fraudulent, and the cognovit and judgment signed, and issued thereupon after the discharge, were set aside with costs. Tabram, Gent., One, &c. v. Freeman, E., 3 W. 4.

AUCTION.

See FRAUDS, STATUTE OF. STAMP.

AUCTIONEER.
See Assumpsit, 6.

BAIL BOND.

See ARREST, 2. PRACTICE, 2.

BANKER. See Check.

BANKRUPT.

See Assumpsit, 3. Indictment, 1.

1. It is a good answer to a plea of bankruptcy that the certificate was obtained by fraud, though the enactment to that effect in 5 G. 2, c. 30, s. 7, is not repeated in 6 G. 4, c. 16. Horny, Ion. M. 3 W. 4.

Horav. Ion, M., 3 W. 4.

The statute 1 W. 4, c. 7, s. 7, exempting judgments on cognovit, and by default, confession, or nil dicit, in any action commenced adversely and without collusion, from the operation of s. 108, of the bankruptact, does not extend to judgments on warrants of attorney, though given without collusion or in-

tention of fraudulent preference. And a sheriff having seized and sold goods on an execution issued upon such judgment, and paying over the proceeds after notice of an act of bankruptcy committed by the defendant, is answerable to the assignees for money had and received. Croefield and another v. Stanley, M., 3 W.4.

87
3. A fieri facias was sued out on a judgment

entered up under a warrant of attorney, and the sheriff seized the goods before ten in the forencon of the 13th of August, and sold the same ten days afterwards. On the 13th of October following, about noon, a commission issued against the defendant, under which he was declared a bankrupt: Held, first, that the seizure of the goods by the sheriff was a sufficient executing or levying, within the meaning of those words in the statute 6 G. 4, c. 16, s. 81; secondly, that more than two calendar months had elapsed between the execution and the issuing of the commission; thirdly, that although the execution issued on a judgment entered up in pursuance of a warrant of attorney, yet, having been executed more than two months before the issuing of the commission, it was protected by s. 81, and not taken out of that section by the proviso in s. 108. Semble, that that proviso only applies to executions executed within two calendar months before the issuing of a commission. Godson v. Sanctuary, M., W. 4.

4. The stat. 6 G. 4, c. 16, s. 127, which vests in assignees the future effects of a bankrupt who had before been bankrupt, or taken the benefit of an insolvent act, and has not paid 15s. in the pound under the subsequent commission does not apply to a bankrupt who had obtained his certificate under such subsequent commission, before the statute passed; and, therefore, where A., after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate before the passing of the 6 G. 4, c. 16, but did not pay 15s. in the pound, and he was afterwards sued on a bond executed before his discharge under the insolvent act, but not inserted in his schedule, it was held that his certificate did not bar the action. Carew v. Edwards, M., 3 W. 4.

5. A., who resided at Liverpool, was in the habit of making consignments of goods to B., his agent in South America, for sale, on the faith of and against which consignments, A. drew bills proportioned to their amount, to be paid by the agent out of the proceeds; and the bills were negotiated by the indorsements of C., A.'s correspondents in London. Some of the bills so indorsed were refused acceptance by the agent. C., on receiving information that they had been so dishonored, requested that A. would order his agent, in case he did not pay his, A.'s, drafts, immediately, to hand over to C.'s agent such property as he had of A.'s of an equivalent value to the bills that should not be paid by him. A. agreed to do so, but became bankrupt before his order to transfer the goods reached South America: Held, that the bargain between A. and C. did not operate as a legal or equitable assignment of the property in A.'s goods, held by B. his agent, but that they remained the property of A. at the time of his bankruptcy, and passed to his assignees. Carralho v. Burn, H., 3 W. 4. 383

6. A tradesman undertook to do work upon an article delivered to him, for a person to whom he was indebted, and it was agreed that the work should be paid for in ready money. He afterwards became bankrupt: Held, that the act 6 G. 4, c. 16, s. 50, (which provides for the setting off of cross demands where there has been mutual credit between the bankrupt and a party claiming on his estate) did not, in this case, render the assignees liable in trover for refusing to deliver such articles to the creditor on his offering to set off the price of the work against his own demand. Clarke and Others v. Fell and Another, H., 3 W. 4.

7. The act 1 & 2 W. 4, c. 53, s. 42, does not give validity to commissions of bankrupt founded on concerted acts of bankruptey; and, therefore, the execution of a deed, whereby a trader assigns all his property to a trustee for the benefit of his creditors, is not an act of bankruptey sufficient to support a commission founded on the petition of a creditor, who was either party or privy to such deed.

Marshall v. Barkworth, H., 3 W. 4. 508

8. After the bankruptcy of one of two partners, the solvent partner, thinking the firm capable of paying debts, continued the business, and paid partnership money into a banker's to be applied in discharge of running bills of the firm payable at the bank; and it was so applied: Held, that this payment having been made bona fide, and without any contemplation of bankruptcy by the solvent partner, was valid at law. The assignees and the solvent partner afterwards opened a fresh account at the bank, and paid in 900%. to discharge a debt on the old account, which carried interest. The second partner became bankrupt: Held, that the assignees of the two could not recover this last sum. Woodbridge v. Swann, E., 3 W. 4. 633

9. A bankrupt made a purchase of timber by two agreements, one before and one after the act of bankruptcy, and, after the act of bankruptcy, received part of the timber without paying for it, but was entitled to receive the remainder without giving security for the whole. After the act of bankruptcy the de-fendant became security, and purchased from the bankrupt the benefit of the contract; which purchase was recited in the instrument by which the defendant became security. The bankrupt afterwards agreed with the defendant, that he, the bankrupt, would pay the money due to the vendor for the tim-ber purchased by the first agreement and in part received, and should be entitled to re-tain the timber so purchased. The bankrupt then delivered money and bills to the defendant, to be paid to the vendor for the timber first purchased. The defendant paid the cash to his own bankers, and indorsed the bills to them; and afterwards paid the amount of the cash and of the bills to the vendor, by a single draft on those bankers. After this the commission issued.

Held, that the defendant was not liable to repay the cash to the assignees, nor to indemnify the bankrupt's estate against the bills; for the defendant was the mere agent of the vendor, and neither the cash nor

the proceeds of the bills could have been recovered back from him, the transaction on his part being a bona fide one, protected by 6 G. 4, c. 16, s. 82. Shaw and Others, Assignees of Richard Batley v. Thomas Batley, R., 3 W. 4.

10. A trader, conveying away property to such an extent as will prevent him from continging his business, and render him insolvent, commits an act of bankruptcy. But those who rely upon such act of bankruptcy on a trial, must shew that it was calculated to have the alleged effect by evidence of the general state of the party's affairs at the time of such conveyance.

It is not sufficient to prove that the trader under pocuniary pressure, disposed of some article essential to the carrying on of his business, as that a miller, by bill of sale, transferred his wagon and horses to a creditor who had arrested him. Wedge v. Nestyn, E., 3 W. 4.

BANNS.

See MARRIAGE.

RASTARD.

See SETTLEMENT BY BASTARDY.

### BILL OF EXCHANGE.

1. A defendant, prosecuted by parish officer for disobeying an order of maintenance, we convicted and sentence deferred by the Court, with a view to an arrangement: in the meatime he was committed to prison, and the officers demanded of him a sum considerably exceeding the amount of maintenance due, but part of which was to cover costs. A paid part, and gave a note for the remainder; he was then brought before the Court, fined la, and discharged. It did not appear whether or not the particulars of the arrangement were communicated to the Court, but A made no complaint when brought up. In an action afterwards brought upon the note:

Held, that no irregularity appeared in the compromise, and that the note was legal.

Kirk v. Strickwood, 3 W. 4.

2. "Received and borrowed of A. B. 594, which I promise to pay with interest at the rate of 5t. per cent. I also promise to pay the demands of the sick club at H. in part of interest and the remaining stock and interest to be paid on demand to the said A. B. Witness my hand, &c. C. D."

This is not a promissory note. Bolton v. Dugdale, E., 3 W. 4.

3. In assumpsit on a bill of exchange drawn upon "P. P. No. 6. Budge Row," and accepted by him, an averment that the bill, when due, was presented and shewn to P. P. for payment, is supported by proof that the holder went to 6 Budge Row to present it, but found the house shut up, and no one there. And notice may be given to the drawers on the day of such dishonour, as in the case of an actual refusal to pay. Hime v. Allely, E. 3 W. 4.

BILL OF MIDDLESEX.

See PRACTICE, 1.

BOARD OF CONTROL. See MANDANUS, 4.

BOND.
See Executor, 3.
BOOKS.
See Evidence, 4.
BRIDGE.
See Indictment, 3. Toll.
BROKER.

A stock-broker is a broker within the 6 Ann. c. 16, and 57 G. 3, c. lx., and liable to the penalty imposed by the latter statute for acting as a broker without having been admitted by the Court of Mayor and Aldermen of London. Clarke v. Powell, E., 4 W. 4. 846

BUTCHER.
See MARKET.
BY LAW.
See MANDAMUS, 3.
CASE AND TRESPASS.

See Pleading, 4.

CERTIFICATE.

See Apothecary, 1, 2. Bankrupt, 1, 4. Settlement by Apprenticeship, 2.

CHECK.

By the usage in the city of London, a person receiving a check with his bankers name written across it, pays it in at the bankers, and the banker, if he receives it in time presents it at the clearing-house, and obtains payment the same day. A debtor paid his creditor by a crossed check, and the latter on the same day, transmitted it to his banker. The banker negligently (as was alleged) omitted to present it at the clearing-house in time for that day (when it would have been paid), and on the next it was dishonoured, the firm on which it was drawn having stopped payment:

Held that the supposed negligence of the banker, thought it might render him liable to his customer, did not discharge the drawer; the holder of the check being entitled by the general law, to present it the day after he receives it; and no custom of the city being proved, as between debtor and creditor, that a crossed check, if received by the latter, and sent by him to his banker in sufficient time, must be cleared the same day. Boddington and Another v. Schlenker, E. 3 W. 4.

CLERGYMAN.
See PENAL ACTION.
COLLATERAL FACT.
See EVIDENCE, 1.
COMMENCEMENT OF ACTION.
See ATTORNEY, 2. EJECTMENT, 1.
COMMITMENT.

The 5 G. 4, c. 18, s. 2, reciting that, by some acts, penalties or sums of money are to be recovered before a justice, and he is authorized to issue his warrant for levying the same by distress, but no further remedy is provided in case no sufficient goods can be found, enacts, that whenever it shall appear to such justice that the party has not suffi-

See Overseer. PAWNBROKER.

cient goods whereon to lovy, it shall be lawful for such justice to issue forth his warrant for committing such offender to the common gaol for any term not exceeding three calendar months, unless the sum adjudged to be paid, and costs, shall be sconer paid: provided always, that the amount of such costs shall be specified in such warrant of commitment:

Held, that such warrant of commitment must be in writing; and that the detention of such party without such written warrant, cannot be justified for any longer time than is necessary for making it out. Hutchinoon v. Loundes and Others, M., 3 G. 4.

COMPENSATION.

See Evidence, 3. Mandamus, 5, 6, 7.

COMPROMISE.

See BILL OF EXCHANGE, 1. COMPUTATION OF TIME. See Appeal, 4. Bankrupt, 3.

CONCERTED ACT OF BANKRUPTCY.

See BANKRUPT, 7.

CONDITION.

See Pleading, 7.

CONDITION PRECEDENT.

See TREASURER.

CONSIDERATION.

See Assumpsit, 3.

CONSOLIDATED ACTIONS.

See PRACTICE, 8.

CONTEMPT OF COURT.

See PRACTICE, 2.

CONVICTION.

See Bill of Exchange, 1.

The stat. 15 Ric. 2, c. 2, gave justices a summary jurisdiction to convict, on their own view, for a forcible detainer after a forcible

entry.

The stat. 8 Hen. 6, c. 9, recites that the stat. 15 Ric. 2, c. 2, did not extend to entries in tenements in peaceable manner, and after holden with force, and then enacts, that that statute should be duly executed, and if from henceforth any doth make any forcible entry in lands, &c. or them do hold forcibly after complaint thereof made within the same county where such entry is made to the justices of the peace, that they should cause the statute duly to be executed:

Held, that this statute was intended to give a summary jurisdiction in cases of forcible detainer after an unlawful entry; and that a conviction by justices on that statute, merely stating an entry and a forcible detainer, was insufficient. The King v. Oakley and Others, M., 3 W. 4.

COPYHOLD.

See DEVISE, 2. EVIDENCE, 9.

CORPORATION.

See Annuity, 1. Mandamus, 3. Settlement by Apprenticeship, 4.

 In que warrante for usurping the office of alderman and justice of peace of the city of Norwich, the plea set out a charter of Car.
 granting, among other things, that all the

aldermen of the city who had borne the office of mayor, so long as they should continue in their public offices, should be justices of the peace of the same city; that the defendant was duly elected an alderman, and still was alderman: and that he became mayor, and thereby afterwards became justice. Replication, that the defendant being such alderman and justice, was duly ap-pointed to be treasurer of the county of the city of N., and gave such security to the mayor and recorder, being justices of the peace for the said city, as in that behalf required, and accepted, and took on himself the office of treasurer, and entered on the discharge of the duty of his office, which offices of alderman and justice, and of trea-surer, were incompatible with each other, whereby the defendant vacated the offices of justice and alderman, &c. Rejoinder, that the defendant did not give such security: Held, on demurrer, that the rejoinder was bad, as tendering an immaterial issue:

Held, secondly, that the replication was bad, because the acceptance by a person holding a corporate office, of another incompatible office not corporate, did not operate as an absolute avoidance of the corporate office, though it might be ground of amotion; and that acceptance, of an incompatible office, does not operate as an absolute avoidance of a former office, in any case where the party could not divest himself of that office by his own act, and without the concurrence of another authority to his resignation or amotion, unless such authority be privy and consenting to the second appointment.

Held, also, that the defendant, as long as

he was an alderman and justice of peace of the city of N., was not a person capable of being appointed county treasurer. The King v. John Patteson, M., 3 W. 4. 9 2. By charter of Car. 2, there were to be in

the borough of S., a mayor, aldermen, and twenty-four capital burgesses. On the death or removal of an alderman, the mayor and aldermen, or the greater part of them, were to elect a capital burgess to supply his place, when a capital burgess died, &c. the mayor, aldermen, and other capital burgesses, or the greater part of them were to elect a successor from among the inhabitants and burgesses, and the mayor was to be annually elected on a certain day by the burgesses of the said borough, or the greater number of them, with the consent of twenty-four freeholders and inhabitants to be chosen as directed by the charter. In practice, the mayor had always been elected by the capital burgesses only. At the election of mayor on the charter-day in 1832, there was not a majority of the number of twentyfour capital burgesses present, and no other burgesses attended.

Held, that this did not avoid the election; for that the word "burgesses" in the charter, (where it treated of the election of mayor,) could not be construed to mean capital burgesses: that the right of election did not devolve upon the body of capital burgesses by the mere forbearance of the other burgesses to interfere, and that the capital burgesses, in electing the mayor, acted in

the capacity of burgesses merely. The King v. Goldsmith, R., 3 W. 4.

3. On motion for a que warranto information an affidavit stating the relator's information and belief, that the officer was elected at a court held on a certain day, and there was not at the court where he was elected as aforesaid, a proper number of electors present, is answered, if it be sworn that there was a proper number of electors at the court held on the specified day, and that the officer was not elected at that court. The officer is not bound to answer for the proceedings of any other day than that specified by the relator. Rez v. Rolfe, E. 3 W. 4.

COSTS.

See PRACTICE, 8.

COUNTY COURT.

See ATTORNEY, 3.

COVENANT.

See LANDLORD AND TENANT, 2.

CRIMINAL INFORMATION.
See EVIDENCE, 11.

A motion for a criminal information against a person who is not charged as a magistras or public officer, may be made later that the second term after the alleged ofence, if it be shown that the prosecutor did not know of the fact in time to make an earlier application. Rex v. Jollie and Another, E. 3 W. 4. 86.

CUSTOM. See Check. Market.

DEED.

See ANNUITY, 1. BANKRUPT, 7.

R. L. granted by deed to the abbot and monks of S. the pasture called Brandwood to feed their animals, and that the grantees should have in that pasture 100 cows. By deed of the 25 Edw. 3, reciting the former grant, Henry, Duke of Lancaster, the then owner of the fee, released to the abbot and moris and their successors for ever, all the right and claim which belonged to him and his heirs by any title in the pasture aforesaid, and that it might be lawful for the abbot and convent, and their successors, to in-close the said pasture, and to reduce it to cultivation, or to make any other profit thereof at their free will, without contradiction or impediment, saving to the granter and his heirs their right to hunt On ejectment brought to recover the lands, as part of the waste of a manor belonging to the duchy of Lancaster, the above deeds were proved, and it appeared that, as far back as living memory went, rights of ownership, inconsistent with the alleged title in respect of the duchy, had been exercised over the lands; and they had been inclosed sixteen years: Held, that the abbot and monks were to be presumed to have been in possession at the time of the second deed, and that it operated as a conveyance of the soil by way of release, though there were not words to make it operate as a feoffment with livery of seisin.

Doe dem. Dearden and Others v. Maden, E., 3 W. 4.

DEMOLITION OF A DWELLING-HOUSE.

See EVIDENCE, 3.
DEMURRER.
See PLEADING, 4.
DEVISE.
See FINE. 1.

1. Testator, after premising that should his daughter die unmarried he would not have his estate sold or frittered away after her decease, or left to any body who would not reside on it, but that it should be entailed, and residence be made the absolute ground-work of such entail; devised all his real estate to trustees and their heirs: "But to permit, nevertheless, my daughter S. J. not only to receive the rents and profits thereof to her own use, or to sell or mortgage any part, but also to settle on any husband, she may take the same or any part thereof for life, should he survive her, but not without his being liable to impeachment for waste, or non-residence, or neglecting necessary repairs. But should my daughter have a child, I devise it to the use of such child. from and after my daughter's decease, with a reasonable maintenance for the education. &c., of such child in the meantime. Should none of these cases happen," he then devised the estate after his daughter's decease to trustees to preserve contingent remainders for the use of his nephew, on condition of residence, or of giving security for his residence when of age, if he should be a minor, when the remainder vested. There were other remainders over. He added, that he did not will to restrain his daughter as a tenant for life, but that in case of misconduct in any of the remainder men, she might, by the advice or consent of the trustees, set aside such a one by her will. He further added, "I recommend it to my daughter, for want of issue to herself, not to leave in legacies above 600% and that out of my charge on N., which I have also articled for, and entail the rest for the further support of this house."

Held, that the word "child" in this devise was nomen collectivum; that the daughter took an estate tail; that the estate during her life and after her decease were not of different qualities, and therefore that a recovery suffered by her after the testator's death, was valid. Doe dem. Jones and Others

v. Davies, M., 3 W. 4.

2. At a court baron C. surrendered copyhold premises to the use of J. H. for life, and after his decease to the use of such person and for such estate as J. H. should by will, attested by three witnesses, appoint; and in default of such appointment to the use of the heirs and assigns of J. H. for ever.

J. H. was admitted on such surrender and afterwards by will, attested by two witnesses selly, devised the premises to W. and J., and died without having made any other surrender or will: Held, that although the will attested by only two witnesses was not a good execution of the power given to J. H. by the surrender, it operated on the reversion vested in him in default of appointment, and that the want of a surrender to the use of such

will was cured by the 55 G. 3, c. 192. Doe d. Hickman v. Hickman, M., 3 W. 4. 56
3. Testator devised to J. T. his messuage or dwelling-house, and mill, with the gardens and cottage adjoining, with the mill pond, rights, and privileges thereto belonging: and also his messuage the Ark Cottage, garden, and lands at Shatterwell, in Wincanton, rented by Mrs. Sly and others; and his messuage, dwelling-house, shop, garden, and orchard at Whitehall, in Wincanton aforesaid, rented by A. B. and others, with their respective appurtenances. He also devised to J. T. his orchard by the side of the river in W., near the foregoing premises, for all his (testator's) estate and interest therein, charged, nevertheless, as to the whole of the premises, with the payment of 500% to his executors, in aid of and towards his residuary personal estate.

In ejectment by the devisee, to recover certain lands called Shatterwell Close, as part of the lands intended by the testator to pass by the above devise, it was proved by the defendant that the testator was entitled to the following premises at Shatterwell in

Wincanton.

The principal messuage and two closes of land rented by Mrs. S.

The Ark Cottage, occupied by P., and the garden rented by W. L.

The messuage, garden, and orchard called Whitehall, rented by A. B. and C. D., and Motion's Orchard, described in the will as the little orchard, occupied by the testator himself.

These premises, with the exception of Motion's orchard, were conveyed to the testator in 1828, by one conveyance, and were therein described to comprise a messuage, Ark Cottage, a garden, and closes by name, formerly in the occupation of, &c., but then untenanted; and also a messuage called Whitehall, with a garden and orchard rented by A. B.

Motion's Orchard was purchased by the testator in 1827, before which time it had been united with the foregoing premises, in

the possession of one person.

The testator, in 1824, purchased other premises in Shatterwell, and at the date of his will, and of his death, their situation was as follows: Shatterwell Close was rented by W., with several other closes, at the rent of 1701. per annum. An orchard, called Cold Bath Orchard, was also rented by W., but under a separate rent. A messuage adjoining was rented by the said W. L., and Lewis's orchard was occupied by the testator himself. No part of the premises purchased in 1828 had ever been let with any part of the premises purchased in 1824, except the garden rented by W. L.; and all these latter premises were separated from the former by a lane, from which there was no entrance to Shatterwell Close: Held, that all these facts were admissible in evidence but that they raised no ambiguity as to the meaning of the devise of the messuage, the Ark Cottage, garden and lands at Shatterwell, in Wincanton. rented by Mrs. Sly and others, that being sufficiently explicit to pass all the lands of the testator situate at Shatterwell in Wincanton, rented by any tenant. Doe d. Templeman v. Martin and Richards, E., 3 W. 4. 771

4. Testator by will, dated April, 1827, after edvising his closes, lands, hereditaments, and real estates at H., in the occupation of J. W., to the use of P. R., his heirs and assigns for ever, devised his messuage or tenement, closes, lands, hereditaments, and real estates situate at Kirton, which were then in the occupation of J. A., and also the close in Kirton aforesaid, then in the occupation of the said J. W., to the use of his great nephew J. R., his heirs and assigns for ever. At the time of making this and the next mentioned will, and of the testator's death, J. W. occupied two closes in Kirton, as tenant to the testator.

In 1825 the testator had made another will, whereby he devised "the close in K., occupied by J. W.," to certain persons, in trust for his great nephew J. R., when he should attain the age of twenty-three years. The attorney who made that will, stated he received instructions in writing from the testator, to give to J. R. all the lands in Kirton, occupied at that time by J. W., but received also verbal instructions, whereby the testator described the land in the occupation of J. W. as a close: that the testator not being certain what land J. W. occupied, inquiry was made of a person supposed to know, who stated to the witness, in the presence of the testator, that it was all in one close; and that the witness, in consequence of that information, so described it in the will of 1825:

Held, that from the use of the word closes in other parts of the will of 1827, the word close in the devise of J. R. must be construed in its ordinary sense as denoting an inclosure, and as the parol evidence shewed that the testator had two closes in Kirton in the occupation of J. W., it was uncertain which was intended, and in the absence of the evidence as to the former will, the devise would have been void for uncertainty.

Secondly, assuming that this evidence was admissible, (which was very doubtful,) that did not remove the ambiguity; but left it uncertain what the testator intended to pass under the name of "the close in K. in the occupation of J. W.," and consequently that the devise was at all events void for uncertainty. Richardson v. Watson, E., 3 W. 4.

DISCHARGE.

See Arrest, 1, 2.

DISCONTINUANCE.

See FINE.

DISPENSATION.

See SETTLEMENT BY HIRING AND SERVICE.
DISTRESS.

See Action on the Case, 2. 4. Commitment.

. LANDLORD AND TENANT, 1. EAST INDIA COMPANY.

T INDIA COMPANY. See Mandanus, 4.

ECCLESIASTICAL BENEFICE.

See Annuity, 2. WARRANT OF ATTORNEY, 2. RJECTMENT.

 A lease contained a proviso for re-entry, in case of non-repair, within three months after notice. The landlord gave notice, and before the end of the three months (which would have expired in Hilary vacation, 1832,) brought an ejectment. During the three months the cause came on for trial, and the parties agreed to an order of Court, directing that a juror should be withdrawn, and the repairs done by Midsummer. Default being made, the landlord brought a second ejectment, without further notice, in Trinity vacation, under the stat. 11 G. 4, and 1 W. 4, c. 70, s. 36.

Held, first, that the former notice had not been waived.

Secondly, that it could not be objected at nisi prius that the action had not been commenced within ten days after the right of entry accrued, pursuant to the act, this being merely matter of irregularity; and, further, that the objection was not well founded, the right of entry having been only suspended by agreement of the parties. Doe dem. Baskin v. Brindley, M., 3 W. 4.

2. By a local turnpike act, certain tolls were made, subject to the payment of the moneys borrowed and to be borrowed thereupon. The trustees granted mortgages of such tolls in the form given by the general turnpike act, 3 G. 4, c. 126, s. 81, conveying to each creditor such proportion of the tolls, and the toll-gates, and toll-houses, as the money advanced by him bore, or should bear, to the whole sum due, or to become due, on that security. By a subsequent act for making a new branch road, the former act was continued, and certain tolls were granted in respect of the new branch, to be applied like the former, and to be subject to the debts incurred on the credit of the former tolls, and it was enacted that all moneys due on such credit should be entitled to a "preference and priority of charge and payment," before any moneys advanced under this act for making the new branch.

On ejectment for the tolls and toll-houses by the holder of a mortgage (framed like the former ones) for moneys lent to complete the branch road: Held, that the words "priority of charge," did not prevent this mortgage from acquiring a legal estate in the subjects (3 G. 4, c. 126, s. 49), only remaining accountable to the other mortgages for such portion of the tolls as they were entitled to in respect of their advances. Doe dem. Thompson v. Lediard, M., 3 W. 4. 137

3. R. L. granted by deed to the abbot and monks of S. the pasture called Brandwood, to feed their animals, and that the grantees should have in that pasture 100 cows. By deed of the 25 Edw. 3, reciting the former grant, Henry, Duke of Lancaster, the then owner of the fee, released to the abbot and monks and their successors, for ever, all the right and claim which belonged to him and his heirs by any title in the pasture aforesaid; and that it might be lawful for the abbot and convent, and their successors, to inclose the said pasture, and to reduce it to cultivation, or to make any other profit thereof, at their free will, without contradiction or impediment, saving to the granter and his heirs their right to hunt. On ejectment brought to recover the lands, as part of the waste of a manor belonging to the duchy of Lancaster, the above deeds were proved; and it appeared that, as far back as living

memory went, rights of ownership, inconsistent with the alleged title in respect of the duchy, had been exercised over the lands, and they had been inclosed sixteen years: Held, that the abbot and monks were to be presumed to have been in possession at the time of the second deed, and that it operated as a conveyance of the soil by way of release, though there were not words to make it operate as a feofiment with livery of seisin. Doe dem. Dearden and Others v. Maden, E., 3 W. 4.

ENTRY (UNLAWFUL.)

See Conviction, 1.

EQUITABLE ASSIGNMENT.

See BANKRUPT, 5.

EQUITABLE DEMAND.

See Executor, 3.

ESTATE TAIL.
See DEVISE, 1.

EXCEPTIVE HIRING.

See SETTLEMENT BY HIRING AND SERVICE, 2.
EVIDENCE.

See Appeal, 1. Bankrupt, 1, 9. Bills of Exchange, 3. Check, Devise Executor, 2. Market Pleading, 5.

 If a witness on a trial gives evidence against the interest of the party calling him, such party may bring other witnesses, not to discredit him generally, but to contradict him on the fact to which he has deposed, if it be material to the issue; not if it be merely colleteral

In an action upon a policy of insurance against fire, one issue was, whether or not goods of the plaintiff had been destroyed by fire, as alleged in the declaration. A witness was called for the plaintiff, to prove that part of the goods were supplied to the plaintiff by him before the fire; but on being shewn an invoice and letter relating to such goods, he stated that they were written by him, but that he never delivered such goods to the plaintiff; and he deposed, that the letter (supposed to have been sent from Edinburgh) was written by him in London, at the desire of the plaintiff; that the invoice was drawn up by him (the witness) after the fire, in the presence of the plaintiff's son and shopman, and that the son and shopman persuaded him to state that the goods had been sent according to the invoice and letter:

Held, that the son and shopman, who had already been examined for the plaintif, might have been called back to contradict all these statements. Friedlander v. The London Assurance Company, M., 3 W. 4.

2. On the trial of an appeal against an order of removal, the respondents having proved, by parol, the renting of two fields, in the appellant parish, at 15t. a year; and an occupation and payment of the rent for a whole year, the appellants then gave evidence that the contract for taking the two fields was reduced into writing: Held, that it lay upon the latter to produce the written contract. The King v. The Inhabitants of Padstow, M., 3 W. 4. 2088.

3. In an action on 7 & 8 G. 4, c. 31, against the hundred of B., for the felonious demolition of Nottingham Castle by rioters, the plaintiff produced in evidence certain orders made by the justices at quarter sessions for the county, in which the castle was described as being in that hundred. No proof was given that the justices who made those orders were resiants in the county; Held, that the orders were admissible as evidence of reputation, for that the justices, from the nature of their office, must be presumed cognizant of the subject.

It was proved by other evidence, that for nearly two centuries the castle of N. had been reputed to be within the hundred of B.

The defendants attempted to prove that the town of N. had been from the earliest period separated from any jurisdiction of or connection with the adjoining hundreds, and for that purpose gave in evidence an extract from Domesday Book, in which the town was mentioned previous to the enumeration or description of the hundreds in the county, and various presentments during the reigns of Ed. 1, Ed. 3, and Hen. 6, by the jurors of N. of deaths within the castle and its precincts; and they produced a charter of Hen. 6, whereby the town of N. was made a county of itself, and the castle was specially excepted.

The Judge, after recapitulating all the evidence, told the jury that the excepting of the castle when the town was made a county, did not shew in what hundred the castle originally was; that the evidence of reputation given by the plaintiff was entitled to great weight, and that when things had gone on for two centuries in one uniform course, it was reasonable to infer that that course had prevailed from the earliest period, unless the evidence to the contrary was certain. It being objected that by this summing up too much weight was given to modern reputation, and too little to the ancient documents: Held, that the direction was proper.

Semble, that in assessing compensation for the demolition of a dwelling-house under 7 & 8 G. 4, c. 31, the jury ought to consider what sum will be necessary to repair the injury, and replace the building in the state it was when the outrage was committed; and not whether the plaintiff was likely to make it his residence, or whether it was suitable for such residence. The Duke of Newcostle v. The Hundred of Broxtowe, M., 3 W. 4.

4. By statute 1 & 2 G. 4, c. czvii. incorporating a gas light company, it was enacted, that the directors should have the custody of the common seal, and power to use it for the affairs and concerns of the company, who were themselves by another clause empowered to make orders under seal at their meetings, for the government of the com-pany, and for regulating the proceedings of the directors. No power was expressly given by the act to grant annuities. At a special general meeting of the company, a committee, previously appointed for certain purposes, reported that it was expedient that the then clerk, whose health was bad, should be invited to retire upon a pension, on condition of abstaining from acts prejudicial to the company; that such proposal had been

4. Testator by will, dated April, 1827, after edvising his closes, lands, hereditaments, and real estates at H., in the occupation of J. W., to the use of P. R., his heirs and assigns for ever, devised his messuage or tenement, closes, lands, hereditaments, and real estates situate at Kirton, which were then in the occupation of J. A., and also the close in Kirton aforesaid, then in the occupation of the said J. W., to the use of his great nephew J. R., his heirs and assigns for ever. At the time of making this and the next mentioned will, and of the testator's death, J. W. occupied two closes in Kirton, as tenant to the testator.

In 1825 the testator had made another will, whereby he devised "the close in K., occupied by J. W.," to certain persons, in trust for his great nephew J. R., when he should attain the age of twenty-three years. The attorney who made that will, stated he received instructions in writing from the testator, to give to J. R. all the lands in Kirton, occupied at that time by J. W., but received also verbal instructions, whereby the testator described the land in the occupation of J. W. as a close: that the testator not being certain what land J. W. occupied, inquiry was made of a person supposed to know, who stated to the witness, in the presence of the testator, that it was all in one close; and that the witness, in consequence of that information, so described it in the will of 1825:

Held, that from the use of the word closes in other parts of the will of 1827, the word close in the devise of J. R. must be construed in its ordinary sense as denoting an inclosure, and as the parol evidence shewed that the testator had two closes in Kirton in the occupation of J. W., it was uncertain which was intended, and in the absence of the evidence as to the former will, the devise would have been void for uncertainty.

Secondly, assuming that this evidence was admissible, (which was very doubtful,) that did not remove the ambiguity; but left it uncertain what the testator intended to pass under the name of "the close in K. in the occupation of J. W.," and consequently that the devise was at all events void for uncertainty. Bickardson v. Watson, E., 3 W. 4.

DISCHARGE.
See Arrest, 1, 2.

787

DISCONTINUANCE.
See FINE.

DISPENSATION.

See SETTLEMENT BY HIRING AND SERVICE.
DISTRESS.

See Action on the Case, 2. 4. Commitment. LANDLORD AND TENANT, 1.

> EAST INDIA COMPANY. See Mandanus, 4.

ECCLESIASTICAL BENEFICE.

Mos Ameuitt, 2. Warrant of Attorney, 2. EJECTMENT.

 A lease contained a proviso for re-entry, in case of pon-repair, within three months after notice. The landlord gave notice, and before the end of the three months (which would have expired in Hilary vacation, 1832.) brought an ejectment. During the three months the cause came on for trial, and the parties agreed to an order of Court, directing that a juror should be withdrawn, and the repairs done by Midsummer. Default being made, the landlord brought a second ejectment, without further notice, in Trinity vacation, under the stat. 11 G. 4, and 1 W. 4, c. 70, s. 36.

Held, first, that the former notice had not

Held, first, that the former notice had not been waived.

Secondly, that it could not be objected at nisi prius that the action had not been commenced within ten days after the right of entry accrued, pursuant to the act, this being merely matter of irregularity; and, further, that the objection was not well founded, the right of entry having been only supended by agreement of the parties. Doe den. Rakin v. Brindley, M., 3 W. 4.

2. By a local turnpike act, certain tolls were made, subject to the payment of the moneys borrowed and to be borrowed thereupon. The trustees granted mortgages of such tolls in the form given by the general tampite act, 3 G. 4, c. 126, s. 81, conveying to each creditor such proportion of the tolls, and the toll-gates, and toll-houses, as the money advanced by him bore, or should bear, to the whole sum due, or to become due, on that security. By a subsequent act for making a new branch road, the former act was continued, and certain tolls were granted in respect of the new branch, to be applied like the former, and to be subject to the debts incurred on the credit of the former tolls, and it was enacted that all moneys due on such credit should be entitled to a "preference and priority of charge and payment," before any moneys advanced under this act for making the new branch.

On ejectment for the tolls and toll-house by the holder of a mortgage (framed like the former ones) for moneys lent to complete the branch road: Held, that the words "priority of charge," did not prevent this mortgage from acquiring a legal estate in the subjects (3 G. 4, c. 126, a. 49), only remaining accountable to the other mortgagees for such portion of the tolls as they were entitled to me respect of their advances. Doe des. Thompson v. Lediard, M., 3 W. 4.

3. R. L. granted by deed to the abbot and monks of S. the pasture called Brandwood, to feed their animals, and that the grantes should have in that pasture 100 cows. By deed of the 25 Edw. 3, reciting the former grant, Henry, Duke of Lancaster, the then owner of the fee, released to the abbot and monks and their successors, for ever, all the right and claim which belonged to him and his heirs by any title in the pasture aforesaid; and that it might be lawful for the abbot and convent, and their successors, to inclose the said pasture, and to reduce it to cultivation, or to make any other profit thereof, at their free will, without contradiction or impediment, saving to the granter and his heirs their right to hunt. On ejectment brought to recover the lands, as part of the waste of a manor belonging to the duchy of Lancaster, the above deeds were proved; and it appeared that, as far back as living

memory went, rights of ownership, inconsistent with the alleged title in respect of the duchy, had been exercised over the lands, and they had been inclosed sixteen years: Held, that the abbot and monks were to be presumed to have been in possession at the time of the second deed, and that it operated as a conveyance of the soil by way of release, though there were not words to make it operate as a feofiment with livery of seisin. Dee dem. Dearden and Others v. Maden, E., 3 W. 4.

ENTRY (UNLAWFUL.)

See CONVICTION, 1.

EQUITABLE ASSIGNMENT. See BANKRUPT, 5.

EQUITABLE DEMAND.
See EXECUTOR, 3.

ESTATE TAIL. See Devise, 1.

EXCEPTIVE HIRING.

See Seitlement by Hiring and Service, 2.

EVIDENCE.

See Appeal, 1. Bankrupt, 1, 9. Bills of Exchange, 3. Check, Devise Executor, 2. Market Pleading, 5.

I. If a witness on a trial gives evidence against the interest of the party calling him, such party may bring other witnesses, not to discredit him generally, but to contradict him on the fact to which he has deposed, if it be material to the issue; not if it be merely collateral.

In an action upon a policy of insurance against fire, one issue was, whether or not goods of the plaintiff had been destroyed by fire, as alleged in the declaration. A witness was called for the plaintiff, to prove that part of the goods were supplied to the plaintiff by him before the fire; but on being shewn an invoice and letter relating to such goods, he stated that they were written by him, but that he never delivered such goods to the plaintiff; and he deposed, that the letter (supposed to have been sent from Edinburgh) was written by him in London, at the desire of the plaintiff; that the invoice was drawn up by him (the witness) after the fire, in the presence of the plaintiff's son and shopman. and that the son and shopman persuaded him to state that the goods had been sent according to the invoice and letter:

Held, that the son and shopman, who had already been examined for the plaintif, might have been called back to contradict all these statements. Friedlander v. The London Assurance Company, M., 3 W. 4.

2. On the trial of an appeal against an order of removal, the respondents having proved, by parol, the renting of two fields, in the appellant parish, at 16. a year; and an occupation and payment of the rent for a whole year, the appellants then gave evidence that the contract for taking the two fields was reduced into writing: Held, that it lay upon the latter to produce the written contract. The King v. The Inhabitants of Padetore, M., 3 W. 4.

3. In an action on 7 & 8 G. 4, c. 31, against the hundred of B., for the felonious demolition of Nottingham Castle by rioters, the plaintiff produced in evidence certain orders made by the justices at quarter sessions for the county, in which the castle was described as being in that hundred. No proof was given that the justices who made those orders were resiants in the county; Held, that the orders were admissible as evidence of reputation, for that the justices, from the nature of their office, must be presumed cognizant of the subject.

It was proved by other evidence, that for nearly two centuries the castle of N. had been reputed to be within the hundred of B.

The defendants attempted to prove that the town of N. had been from the earliest period separated from any jurisdiction of or connection with the adjoining hundreds, and for that purpose gave in evidence an extract from Domesday Book, in which the town was mentioned previous to the enumeration or description of the hundreds in the county, and various presentments during the reigns of Ed. 1, Ed. 3, and Hen. 6, by the jurors of N. of deaths within the castle and its precincts; and they produced a charter of Hen. 6, whereby the town of N. was made a county of itself, and the castle was specially excepted.

The Judge, after recapitulating all the evidence, told the jury that the excepting of the castle when the town was made a county, did not shew in what hundred the castle originally was; that the evidence of reputation given by the plaintiff was entitled to great weight, and that when things had gone on for two centuries in one uniform course, it was reasonable to infer that that course had prevailed from the earliest period, unless the evidence to the contrary was certain. It being objected that by this summing up too much weight was given to modern reputation, and too little to the ancient documents: Held, that the direction was proper.

Semble, that in assessing compensation for the demolition of a dwelling-house under 7 & 8 G. 4, c. 31, the jury ought to consider what sum will be necessary to repair the injury, and replace the building in the state it was when the outrage was committed; and not whether the plaintiff was likely to make it his residence, or whether it was suitable for such residence. The Duke of Newcastle v. The Hundred of Broxtowe, M., 3 W. 4.

3 W. 4.

4. By statute 1 & 2 G. 4, e. exvii. incorporating a gas light company, it was enacted, that the directors should have the custody of the common seal, and power to use it for the affairs and concerns of the company, who were themselves by another clause empowered to make orders under seal at their meetings, for the government of the company, and for regulating the proceedings of the directors. No power was expressly given by the act to grant annuities. At a special general meeting of the company, a committee, previously appointed for certain purposes, reported that it was expedient that the then clerk, whose health was bad, should be invited to retire upon a pension. on condition of abstaining from acts prejudicial to the company; that such proposal had been

made to him, and that he had accepted it. The meeting voted that the report should be received and entered on the minutes, and that the directors should carry into effect the committee's recommendation. No order to this effect was made under seal. The directors, by deed in the name of the company, granted an annuity to the clerk on his retirement, subject to conditions of the nature above stated, and they put the corporate seal to it: Held, that the seal was properly affixed by the directors; that the granting of such annuity was warranted by the statute; that it was a concern of the company, within the first mentioned clause; and that no order of the company under seal was necessary to authorize it.

The act prescribed that nothing should be done at any special general meeting, but the business for which it was called; and certain forms were required for calling it. On a special case stated, it did not appear that those forms had been gone through, and the company, who were sued on the above deed, alleged this irregularity in answer: Held, that it lay on them to give strict proof of the default; and this not being done, but a possibility appearing that the forms might have been complied with, the Court would not presume the contrary.

By the statute, the orders and proceedings entered in the company's books were to be considered as originals, and read in all courts, &c. Quære, Whether this rendered them admissible evidence as between the company and a stranger? Clarke v. The Imperial Gas Light and Coke Company, M., 3 W. 4.

5. A letter written to the plaintiff's attorney before action brought, by the attorney who afterwards appears in the cause for the defendant, is not evidence of a fact admitted therein, without further proof that the defendant authorized the communication. Wagstaff v. Wilson, M., 3 W. 4.

6. By the general turnpike act, 3 G. 4, c. 126, s. 134, it is enacted "that where any action shall be brought by or against any trustee of a road, evidence of the trustee having acted as such, together with the act of parliament by which he was appointed, or the order, or a copy of the order, for his appointment or election, in case he was appointed or elected by the trustees, shall be sufficient proof of his being a trustee:" Held, that the words in case he was appointed or elected by the trustees, applied to cases where there was an appointment or election de facto by the trustees, in contradistinction to an appointment by the road act; and therefore proof of a party having acted as a trustee, and of a order made by the trustees for his appointment or election was sufficient; and that even under a local act, whereby the appointment of new trustees on death or removal, was required to be under the hands and seals of five of the old trustees; and although it was shown that the order for such appointment was not so made. Doe Dem. Baggaley v. Hares, H., 3 W. 4.

7. In an action against the sheriff, admissions by the under-sheriff are not evidence, unless they accompany some official act of the latter, or tend to charge himself.

And, therefore, in an action against the

sheriff for taking illegal poundage, declarations of the under-sheriff, after he was out to office, are not admissible to prove that its bailiff charged with having committed the extortion was the sheriff's authorized agent. Snowball, qui tam, &c. v. Goodricke, H., 3 W. 4. 541

 Proof of a tender of 20l. 9e. 8d. in bank notes and silver, is sufficient to support a plea of tender of 20l. Dean and Another v. James, H., 3 W. 4.

9. The 48 G. 3, c. 149, s. 32, which require that every surrender of copyhold and admittance out of Court, or a memorandum theref shall be stamped; and sect. 33, which enacts, that in case of surrender, &c. in Court, the steward shall make, and deliver to the tenant, a stamped copy of the Court roll, are merely revenue regulations, and not intended to vary the rules of evidence; and, therefore, a surrender and admittance out of court (presented and enrolled afterwards), may be proved by an examined copy of the Court roll, without producing the original surrender, &c. or memorandum thereof. Doe des. Cauthors v. Mee, E., 3 W. 4.

 Defendant paid money into court is at action for work and labour generally, where full particulars were annexed to the record The plaintiff proved the work mentioned in the particulars to have been performed on the property of G. by the order of M.; and gave evidence to shew that M. was authorized by the defendants, and also proved acts done by the latter, which it was contended were s recognition of his own liability for the work. The Judge left to the jury whether sufficient money had been paid; whether the defen-dant had ratified M.'s order, and to what extent? The jury having found for the defendant, declared, in answer to a question from the Judge, that M. had no authority to bind the defendant. The Court, Parke, J., dubitante, refused to disturb the verdict, it not distinctly appearing that the opinion last expressed by the jury was the ground of their verdict.

Held, per Littledale and Parke, Js., that payment into court shews only a liability for some work and labour, and is merely evidence which may be coupled with other facts, so as to shew a partial or total liability on the particular claim, and that the effect of such payment is not altered in this repect by the rule of Trin. 1 W. 4, which requires a particular demand to be annexed to the declaration. Meager v. Smith, E. 3 W. 4.

11. The rule established at nisi prius in prosecutions for libel in a newspaper, viz. that after production of the stamp-office affdarit, a paper corresponding with it in title, printer's and publisher's name, and place of publication, may be put in and read as published by the parties therein named, without other proof on this point, applies equally on motions for criminal information. The history v. Donnison and Another, E., 3 W. 4.

12. A master in giving the character of his late servant to a person intending to take her, charged her with theft; and in support of that charge, stated, that she had borrowed money when she came into his service, and repaid it before she received any wages. Is reply to an inquiry made afterwards by a

relation, he admitted that the time when he paid the wages was entered in a book, which he produced, but refused to state what the time was; and on the same party remonstrating, and observing that the servant, in consequence of her loss of character, might have gone upon the town, he answered, "What is to us?"

Held, that this conduct was evidence to go the jury (though slight,) that the communication to the intended master was made maliciously. Kelly v. Partington, E., 3 W.

13. In an action against B. and C. to recover the balance of a banking account which commenced in 1822, and ended on the 1st of November, 1831, the right of the plaintiffs to recover depended on the rate of interest which they were entitled to charge by the understanding between the parties during their transactions together. The defendants, to prove their case on this point, proposed to call D., who stated on the voir dire, that he was a partner with B. and C. from 1822 to the 23d of June, 1831, and that the partnership accounts as between them were still unsettled. Between the witness's retirement. and Nov. 1831, considerable sums had been paid in, and drawn out by the defendants, but the general balance had not been materially altered. Since the witness's retirement, B. and C. had asked time of their creditors to pay their debts. General releases, inter alia, of "all demands" from B. and C. to D., and from D. to B. and C. were exccuted: Held, that by these releases, D. was rendered a competent witness. Wilson v. Hirst, E., 3 W. 4. 760

# EXECUTOR.

#### See Assumpsit, 6.

 Where the residue of a term of years becomes vested in executors, and the yearly value is less than the reserved rent, the executors are still liable in the debet and detinet as assignees, for so much of the rent as the

premises are worth.

The plaintiff having declared in covenant for rent at 26l. a year, the defendant pleaded that they were only chargeable as executors, that the term came to them as such, that the premises were of less yearly value than the said rent of 26l., viz., of no value, and that they had fully administered, &c. Replication that the premises were of the yearly value of 26l., issue thereon. At the trial, the yearly value was found by the jury to be 20l.: Held, that the replication was, in substance, that the premises were of some value; that the issue was morely informal, and cured by verdict; and that the plaintiff might recover the arrears of rent at the rate fixed by the jury. Rubery v. Sterens and Another, M., 3 W. 4.

2. The inventory exhibited in the Ecclesiastical Court by an executor, for the purpose of obtaining probate, is not generally prima facie evidence of his having received assets. Semble, (per Porke, J.) that where the inventory only describes effects on a farm with which the executor was acquainted, it may be prima facie evidence; but that is rebutted if it appear that no effects actually came to executor's hands, though his co-executor

has, with his knowledge, intermeddled with the property.

Semble, (per Littledale and Parke, Js.) that a probate stamp is not prima facie evidence that the executor has received asset to the amount covered by the stamp. Stears v. Mills, E., 3 W. 4.

3. S. gave a bond, conditioned for the payment of money. The obligee made C. his executrix, and residuary legatee, and died, not having fully administered, leaving E. executrix of the executrix C., in trust for her (E.'s) own benefit, a sum due on the bond in the first testator's lifetime remained unpaid. C., during her lifetime, in consideration of a marriage about to take place between her and the father of S., gave a bond to a trustee, conditioned for payment of a sum of money to the use of S., if C. should survive her intended husband. She did survive him, and the money not having been paid in her lifetime, the trustee's executor sued E. the executor of C. upon that bond.

Held, that in this action the claim of E. upon S.'s bond could not be set off. Tucker

v. Tucker, E., 3 W. 4.

 Neglect to cultivate the glebe land in a husbandlike manner, is not a dilapidation for which an incumbent can recover. Bird, Clerk v. Relph and Another, E., 3 W. 4. 826

# FIERI FACIAS. See BANKRUPT, 3.

# FINE.

Estates were settled to certain uses, with remainder to trustees for 500 years, to raise portions for younger children, remainder to the use of the first and other sons successively of the settlor in tail male, remainder to his The estate heirs and assigns for ever. came, by virtue of the settlement, to Edward, the settlor's eldest son, who also become the reversioner in fee. He levied a fine to his own use in fee, and devised the estates in trust for Thomas, his brother's son, for his life, remainder to the use of Thomas, his brother's son, for life; remainders to the sons of the last mentioned Thomas successively, in tail male; remainder to the use of E. C. in fee. Edward died without issue in 1774. Thomas, the brother, suffered a recovery in the same year, devised the estates to Thomas, his son, for life; with remainder over, and died in 1780. Thomas, the son, entered on his father's death:

Held, that Edward being the tenant in tail, possessed of the immediate estate of freehold, was not precluded by the term of 500 years from levying a fine, which worked a discontinuance of the remainders; and that he thereupon acquired a tortuous fee, which he might devise as above:

Held also that the entry of Thomas, the nephew of Edward, on the death of his father, did not remit him to the reversionary estate formerly vested in Edward. Doe dem. Cooper v. Finch and Others, M., 3 W. 4. 283

#### FIXTURES.

See Landlord and Tenant, 3. Mandamus, 7.

FORCIBLE DETAINER.

See Conviction, 1.

FORFEITHER

See LANDLORD AND TENANT, 2.

FORM OF ACTION.

See PLEADING. 3.

FRANCHISE. See MARKET.

FRAUD

See Action on the Case.

FRAUDS, STATUTE OF.

In assumpsit by an auctioneer against a purchaser, for goods sold, an entry in the sale book by the auctioneer's clerk, who attended the sale, and as each lot was knocked down. named the purchaser aloud, and on a sign of assent from him, made a note accordingly in the book, is a memorandum in writing by an agent lawfully authorized, within sect. 17 of the statute of frauds. For the clerk is not identified with the auctioneer (who sues), and in the business which he performs of entering the names, &c., he is impliedly authorized by the persons attending the sale, to be their agent. Bird v. Boulter, H., 3 W.

# FRAUDULENT CONVEYANCE

The assignees of an insolvent debtor are "parties griered," within the meaning of the act 13 Eliz. c. 5, against fraudulent conveyances, and may recover the penalty thereby given from the insolvent and others, parties to such conveyance.

On a fraudulent alienation of lands, the offending parties forfeit (by sect. 3 of the act) a year's value of the estate, but not the consideration money named in the conveyance. Butcher and Another v. Harrison and Another, M., 3 W. 4.

FRAUDULENT REMOVAL OF PREG-NANT WOMEN.

See SETTLEMENT BY BASTARDY.

FRIENDLY SOCIETY ACT.

The sixth section of the Friendly Society Act. 10 G. 4, c. 56, does not apply to a society formed before the passing of the act, though it has conformed to the provisions of the act, as required by sections 39 and 40; and therefore the justices at quarter sessions are bound to enrol the rules of such a society. although it has not been made appear that the tables of payments to be made, and benefits to be received, may be adopted with safety to all parties concerned. The King v. The Justices of Somersetshire, H., 3 W. 4. 549

> GAS LIGHT COMPANY. See Annuity, 1.

GENERAL TURNPIKE ACT.

See EVIDENCE.

GOODWILL.

See Mandanus, 6.

GRANTOR AND GRANTEE.

See PLEADING, 7.

HIGHWAY.

See NUISANCE.

In trespass against surveyors of the highways for pulling down a watch-house, the act 13 G. 3, c. 78, s. 82, does not enable them under | 1. An attorney, employed by a party about to

a plea, of not guilty, to justify the removing of it as being a nuisance on the highest.

The Company of Proprietors of the Withen Navigation v. Padley and Others, M., 3 W.

> HULL DOCK COMPANY. See TORNAGE DUTIES.

HUNDRED. ACTION AGAINST. See EVIDENCE, 3.

HUNGERFORD MARKET COMPANY.

See MANDANUS, 1, 6.

IMMEMORIAL USAGE.

See INDICTMENT. 3.

IMPRISONMENT.

See Connithent. Settlement by Hiring and SERVICE, 1.

INCOMPATIBLE OFFICE.

See CORPORATION, 1.

INDENTURE

See SETTLEMENT OF APPRENTICESHIP, 3, 4. INDICTMENT.

See NUIBARCE.

1. Indictment after stating that a commission of bankrupt had issued against A., by we tue of which the commissioners adjudged him to be a bankrupt, charged that he and the other defendants conspired to conceal a part of his personal estate: Held, that ever since the statute 6 G. 4, c. 16, s. 112, such an indictment is defective for not shewing that the party had actually become bank-The King v. Jones and Others, M., rupt

2. On indictment for felony, removed by cercertiorari, the Court, under special circumstances, ordered that the defendants should be at liberty to plead by a clerk in court, and they and the prosecutor should be restrained from bringing error on account of the plan

being so taken.

But in the same case the Court refused to allow a suggestion to be entered for the parpose of removing the trial from Cornwell into another county, on the alleged ground that titles to duchy property were likely to come in question, with respect to which prejudice. existed in Cornwall, and that an impartial trial could not be had there. The king 1. Penpraze and Othere, H., 3 W. 4.

3. A parish may be indicted for non-repair of a bridge, without stating any other ground of liability than immemorial usage. The King v. The Inhabitants of Hendon, E, 3 W.

INDORSEMENT OF PROCESS.

See PRACTICE, 3.

INFORMAL ISSUE

See PLEADING, 2.

INFORMATION. See PRACTICE, 11.

INSOLVENT ACT.

See Attorney, 4. LANDLORD AND TEXAM, I PENSION.

INSOLVENT DEBTOR.

See BANKRUPT, 4. FRAUDULENT CONVEYANCE

take the benefit of the insolvent act, to prepare a list of debts which were afterwards to be inserted in the schedule, omitted a debt due from the insolvent to himself, and sued for that debt after the party's discharge: Held, by Denman, J., and Parke, J., that this was not such a fraud upon the general policy of the insolvent act, as would bar the action

Queere, Whether, if he omitted to insert the debt in breach of his duty to his client, that would be a defence to an action brought by him against the latter to recover the debt, or whether it would only be the subject of a cross action? If a defence, quere whether or not it should be specially pleaded? Howard, Gent., One, &c. v. Bartolozzi, H. 3 W. 555

2. An agreement by an insolvent about to take the benefit of the act, with his creditor, that the claim of the latter should be omitted in the schedule, and that a cognovit which he held shall be suspended, and revived after the debtor's discharge, was held by the Court of Exchequer to be fraudulent, and the cognovit and judgment signed, and execution issued thereupon after the discharge, were set aside with costs. Tabram, Gent., One, &c. v. Freeman, B. 3 W. 4.

## INSURANCE.

# See EVIDENCE, 1.

Goods and freight were insured at and from Liverpool to Monte Video and Buenos Ayres, if open, or the ship's final port of discharge in the River Plate, with liberty to wait two months at Monte Video, if needful, at a premium of five guineas per cent., to return 21. per cent. for risk ending at Monte Video on arrival. The vessel arrived on the 2d of August at Monte Video, which was then blockaded by an enemy's fleet to prevent vessels passing to Buenos Ayres. The blockade did not cease till the 4th of October. The vessel afterwards sailed for Buenos Ayres, and was lost: Held, that the risk was at an end as soon as the vessel had staid two months at Monte Video, and that the underwriters were therefore discharged. Doyle v. Powell, 3 W. 4.

INTERPLEADER ACT,

1 & 2 W. 4, c. 58. See PRACTICE, 5.

INVENTORY.

See EXECUTOR, 2.

IRREGULARITY.

See EJECTMENT, 1. EVIDENCE, 4.

JOINT TRESPASSER. See TRESPASS. 2.

JUDGMENT.

See BANKRUPT, 2. WARRANT OF ATTORNEY, 1, 2.

By the act 11 G. 4, c. 70, s. 9, upon trials for felony or misdemeanor on a King's Bench record, judgment may be pronounced at the assizes, and shall have the effect of a judgment of the Court above, unless that Court, in the first six days of the term, grant a rule nisi for a new trial, or for amending the judg-

A defendant on such record, having been sentenced at the assizes, cannot apply to the Court to amend the judgment by dimin-ishing the punishment upon ordinary affi-davits in mitigation, or without shewing some specific defect in the sentence, or some matter which could not have been adduced at the assises. The King v. Lloyd, Burnell and Others, M. 3 W., 4.

#### JURYMAN.

The delivery of food to a juryman after the jury were shut up to consider of their ver-dict, is no ground for setting the verdict aside, if it do not appear that such refresh-ment was supplied by a party to the cause, or that it was delivered to a juryman, whose holding out decided the event.

Affidavits of jurymen are admissible as to matters which pass openly in Court, but where there is a judge's report on the same points, that is conclusive. Everett v. Youells, E., 3 W. 4.

#### JUSTICES.

See Action on the Case, 2, Conviction, 1. FRIENDLY SOCIETY. MANDAMUS, 5. OFFICE. OVERSEER. PAWNBROKER.

> JUSTICES' CLERK. See OFFICER.

JUSTIFICATION.

See LEBEL. PLEADING, 1.

KINGS BENCH PRISON.

See Attorney, 1.

LANDLORD AND TENANT.

See Action on the Case, 4. Ejectment, 1.

- 1. By the insolvent act 7 G. 4, c. 57, s. 3, no distress for rent made and levied after the arrest of any person who shall petition the court for the relief of insolvent debtors for his discharge, upon the goods or effects of such person, shall be available for more than one year's rent. A distress taken before, but not sold till after the arrest of such insolvent debtor, is available for more than a year's rent. Wray v. The Earl of Egremont, M., 3 W. 4.
- 3. A private dwelling-house was demised for forty years by lease, containing a covenant to repair and keep in repair the premises, and all such buildings, improvements, and additions as should be made thereupon by the lessee during the term, with a proviso for re-entry in case of breach of covenant. The lessee changed the lower windows into shop windows, and stopped up a doorway, making a new one in a different place in the internal partition of the house: Held, that no forfeiture was incurred, the lessee's covenant being only against non-repair, and it being implied by the terms of the lease that additions and improvements were to be made. Doe d. Dalton v. Jones, M., 3 W. 4.
- 3. A tenant (not a gardener by trade) cannot remove a border of box planted on the demised premises by himself, unless by special agreement with the landlord. Empson, Gent., One, &c. v. Soden, E., 3 W. 4. 655

See EJECTMENT, 1. LANDLORD AND TENANT, 2, MANDAMUS, 7.

# LEGAL ESTATE. See Ejectment, 2. LIBEL.

# See EVIDENCE, 11.

1. The following words—"D. has had a tolerable run of luck. He keeps a well spread sideboard, but I always consider myself in a family hotel when my legs are under his table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of scarte or any other game. The fellow is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession"—will support a declaration for libel, without explanatory averments, for they tend generally to disgrace the plaintiff.

Quere, Whether a defendant, by demurring to a declaration for a libel to have been published with the intent ascribed to it in the declaration. Digby v. Thomera, E., 3 W. 4. 821

2. In an action for a libel charging an attorney with "disgraceful conduct" in having at an election disclosed confidential communications which he had acquired professionally, the defendant pleaded in justifica-tion that the plaintiff had disclosed many details and particulars professionally and confidentially communicated to him relating to three transactions (which were specified) two of them being instances in which he had been employed by mortgagors to manage mortgages, and a third where in the course of his employment as attorney, he had become acquainted with the nature of his client's title and his right to grant leases. At the trial it appeared as to the mortgages, that the plaintiff had acted as attorney both for mortgagors and mortgagees: Held, that it was a question for the jury whether the matters disclosed by the plaintiff were such the knowledge of which was acquired professionally, and not whether they were such as he would not be compellable to disclose if called upon as a witness in a court of justice.

Semble that the knowledge acquired by the plaintiff as to the right of his client to grant freehold leases, was of that privileged nature that he would not have been bound to disclose it if called on as a witness. Moore, Gent., One, &c. v. Terrell and Others, E., 3 W. 4.

# LICENSE.

#### See PLEADING, 7.

## LIEN.

#### See VENDOR AND VENDER, 1.

1. A. purchased premises which were mortgaged to B., with a proviso for reconveyance at the costs and charges of the mortgagor, on payment of principal and interest. B. sold the premises, and was to pay off the mortgage on the completion of the purchase; but A.'s attorney, who held the title deeds, would not deliver them to B. till his own bill was also paid. The bill contained some items fairly chargeable on the occasion, as costs due from the mortgagor and others, which were properly payable by the mortgage: Held, that the attorney might enforce his lien on the deeds against B. to the whole

extent of the bill; and that B. having been obliged to pay it for the purpose of releasing the deeds, could not recover back from the attorney the amount unduly charged. Ogle v. Storey, Gent., One, &c., E., 3 W. 4.

# LOCOMOTIVE STEAM ENGINES. See NUIBANCE.

LONDON DOCK COMPANY. See PRACTICE, 5.

# MALICE.

See Action on the Case, 2. Evidence, 12.

## MANDAMUS.

See APPEAL, 4.

1. By stat. 11 G. 4, c. lxx., the Hungerford Market Company were empowered to purchase certain premises for the purposes of the act; and by sect. 6, it was enacted as follows: That if any person interested in such premises shall, for twenty-one days next after notice given him of their being required for the purposes of the act, refuse to treat, or not agree, for the sale thereof, is every such case the Company shall cause the value of, and recompense to be made for, such premises to be inquired of by a jury; and for summoning and returning such jury, they are empowered to issue their warrant to the High Bailiff of Westminster, who is required to impannel, summon and return such jury, and is empowered to swear twelve, and to examine witnesses before them, &c.: and they shall assess the damages and recompense, &c.:

Held, that the Company, having given such notice to an occupier, could not withdraw from it, though they offered to pay all reasonable costs incurred by him in coasequence; but that the act obliged them, en his demand, to issue their warrant to the High Bailiff for summoning a jury. And the Court granted a mandamus to compel them so to do. The King v. The Hungerford Market Company, 3 W. 4.

L. It is discretionary in the Court either to determine the validity of a return to a mandamus on motion, or to order the case to set down in the grown paper for argument.

set down in the crown paper for argument.
The St. Katharine Dock Company were incorporated by act of parliament, which directed that all actions against the Company should be prosecuted against the treasurer or director for the time being; but that the body or goods, lands, &c., of such treasurer or director should not, by reason of his being defendant in such action, be liable to execu-tion. An action having been brought by T. C. against the treasurer, as such, and another by the Company, in the name of the treasurer, against T. C., all matters in difference were referred to an arbitrator, who awarded that T. C. had cause of sotion against the defendant, as such treasurer, for a certain sum, and directed that the treasurer should pay T. C. that sum on demand: and, as to the other suit, he awarded that the treasuer, as such, had no cause of action, and ordered him, as such treasuer, to pay T. C. the costs on demand: Held, that a mandamus would lie to the treasurer and directors, commanding them to pay the same

awarded. The King v. The St. Kutharine Dock Company, M., 3 W. 4. 360 3. On motion for a mandumus to the master

On motion for a mandumus to the master and wardens of an incorporated company of the city of London, to call a meeting of the company on the next annual day of election, for the purpose of electing a master and wardens according to the charters, it being suggested, as the ground of motion, that the said officers were at present improperly elected by a part only of the company, instead of the whole body; the Court refused the writ.

On motion afterwards for a quo warranto against the master elected in the manner complained of, it appeared that the practice, as far as it could be traced, from the year 1488, had been for the master, wardens, and a body called the court of assistants (which had varied in number from twenty-four to forty), to elect the master; and that he had asually been elected out of the court of assistants, and not out of the general body. The assistants, besides belonging to that court, had the same qualifications for being elected as the other members of the company. In some instances, but it was not stated how many or at what period, persons had been elected who were not of the court. The company had existed from time immemorial; by a charter of Rich. 2, they were empowered to elect a master de scipsis when and as they should please; and by a charter of 18 Hen. 7, (1502) all their liberties, franchises and customs, were confirmed:

Held, that if one entire by-law were to be presumed, for the master, wardens, &c., to elect, and to elect out of a restricted body, the latter part of such by-law would be bad and vitiate the whole, but that no ground was laid for presuming such by-law, inasmuch as the elections from the particular body might have been made in every instance by choice, and not under any rule; and further, it appeared that there were exceptions, although these were not specifically stated; and that even the practice of electing by a limited body was not necessarily to be presumed part of a by-law, as it might have been a custom, incorporated by referonce in the charter of Hen. 7.

Quere, Whether a quo warranto information lies at the instance of a private relator, against a person claiming to hold an office in one of the incorporated companies of the city of London? The King v. Attwood, 3 W. 4. 481

4. The Court of Directors of the East India Company sent to the Board of Control, for their approval, a draft of a dispatch headed "Political Department," which that board altered and returned to them, to be transmitted to India, pursuant to the 33 G. 2, c. 52, a. 12. The directors objected to the alterations, but not the jurisdiction of the commissioners to make them; and the alterations being insisted on by the board, the directors afterwards rescinded the resolution on which the despatch was founded, and of, it to the commissioners to originate the dispatch pursuant to the sect. 15 of the statute. On motion for a mandamus to the directors to transmit the altered dispatch:

Held, first, that the conduct of the directors was equivalent to a refusal to transmit the dispatch; secondly, that the directors could not in this case annul the resolution on which the dispatch had been founded; thirdly, that the despatch having been originated by the directors, and altered by the board of control, and ordered by them to be transmitted, and proceedings being so far regular, it was no answer to an application for a mandamus, that the board might by another proceeding, as by originating a dispatch, attain the same end: fourthly, that the directors having admitted the jurisdiction of the board with respect to the dispatch, and only contested the alterations, were estopped from afterwards contending that the dispatch was not one over which the board had authority. H., 3 W. 4. 530

5. To ground a proceeding at petty sessions under 7 & 8 G. 4, c. 31, s. 8, for compensation in respect of felonious injury by ricters, the party or his servant must go before a justice within seven days after the offence committed, and submit to examination, &c., according to section 3 of the act, as well as where an action is to be brought. And the Court will not grant a mandamus to summon such petty session, where it does not appear by affidavit that these steps have been taken, though the party swear that he has duly served the notice required by section 8. The King v. Bateman and Another, H. 3 W. 4.

6. The act 11 G. 4, c. lxx. (passed May 1830), incorporating the Hungerford Market Company, empowers them to purchase certain estates; and section 17, enacts, that every lessee or tenant for years or at will of any messuages, &c. to be purchased under the act, shall deliver up possession to the company at three months' notice, they making compensation to every such tenant, &c. who shall be required to guit before the expiration of his term: such compensation, in case of dispute, to be assessed by a jury. Section 19, provides, that all tenants for years, from year to year, or at will, occupiers of any messuages, &c. comprised in the act, who shall sustain "any loss, damage, or injury in respect of any interest whatsoerer for goodwill, improvements, tenant's fixtures, or other-wise, which they now enjoy, by reason of the passing of this act," shall receive compensation from the company, by such means as are provided in respect of the tenants of certain hereditaments mentioned in a schedule to the act; namely, by assessments, as before stated.

A lessee, whose term expired on the day the company came into possession (June 24th, 1830), obtained leave to hold on till the premises were wanted, and did so for a year and three quarters, at the end of which time he quitted, having received half a year's notice. His under-tenant, who came in at Christmas 1828, and had held from year to year, and who knew of the above proceedings, and also received notice to quit, was held entitled to compensation for good-will (to be assessed by a jury) under sect. 19. The King v. The Hungerford Market Company, E. 3 W. 4.

 Under sections 17, and 19, of the Hungerford Market Act (see the preceding case) compensation was claimed by a party, who in 1823 became the assignee of a lease for

fourteen years, granted in 1818, of premises on the estate purchased by the company. The lease contained covenants to yield up the premises, with all flatures and improvements, at the end of the term, and not to underlet or assign without leave; but this latter clause had not been introduced in contemplation of any advantage to be taken of it by the landlord with reference to the present act. The company suffered the lease to expire, and then turned out the tenant: Held, that he was entitled to have compensation assessed for the loss, if any, sustained by him in respect of good-will, or the chance of a beneficial renewal of his lease; but not for fixtures set up or purchased, or for improvements made by him, inasmuch as he had no legal interest in them.

Held, nevertheless, that these might be considered by the jury in estimating the chance of a beneficial renewal. The King v. The Hungerford Market Company (Ex parte Gosling), E. 3 W. 4.

MANGANESE. See Poor-Rate, 2.

#### MARKET.

Queere, if the grantee of a newly created market can, by virtue of such grant merely, maintain an action for disturbance of franchise against a person selling marketable articles in his own shop, within the franchise, but not within the limits of the market place on the market day.

But a claim by immemorial custom to exclude others from selling such commodities on the market day, except in the market place, is

valid in law.

And where a market for meat, &c. was proved to have been in existence in the reign of James the First, proof that the grantees of the market had for the last hundred years appointed market-lookers, that no butchers' shope had existed out of the market place until 1810, and that the shops then set up were objected to by the grantees, was held to be sufficient evidence of such immemorial right. The Mayor of Macclesfield v. Pedley, H. 3 W. 4.

### MARRIAGE.

To render a marriage invalid, the 4 G. 4, c. 76, s. 22, which enacts, "that if any persons shall knowingly and wilfully intermarry without due publication of banns, the marriages of such persons shall be null and void," it must be contracted by both parties with a knowledge that no due publication has taken place. And therefore where the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not known that fact until after the solemnisation of the marriage it was held that the marriage was valid. The King v. The Inhabitants of Wroxton, E. 3 W. 4.

MARSHAL OF THE KING'S BENCH.
See ATTORNEY, 1.

MASTER AND SERVANT.
See EVIDENCE, 12.
MINES.

See Poor RATE, 2.

MISJOINDER OF ACTION.
See PLEADING, 3.

MISJOINDER OF COUNTS. See Pleading, 4.

MONEY HAD AND RECEIVED. See Assumpsit, 2, 4. Bankrupt, 2.

MORTGAGOR AND MORTGAGEE.

See EJECTMENT, 2. LIER, 1.

MUTUAL CREDIT.

See BANERUPT, 6.

NEGLIGENCE.

See ATTORNEY, 2.

NOTICE OF APPEAL. See Appeal, 1, 2, 4.

NOTICE, SERVICE OF. See PENAL ACTION.

NOTICE TO OVERSEERS.

See SETTLEMENT BY APPRINTICESHIP, 1.

NOTICE TO QUIT. See MANDANUS, 5, 6.

NOTICE TO REPAIR. See Ejectment, 1.

NOTICE TO PURCHASE PREMISES.
See MANDANUS. 1.

NOTICE OF WRIT OF ERROR.
See TRESPASS, 1.

NOTTINGHAM CASTLE.
See EVIDENCE. 3.

NUISANCE. See Highway, 1.

By an act reciting that a railway between certain points would be of great publicutility. and would materially assist the agricultural interest and the general traffic of the country, power was given to a company to make such railway according to a plan deposited with the clerk of the peace, from which they were not to deviate more than 100 yards. By a subsequent act the company or persons authorized by them were empowered to use locomotive engines upon the railway. The railway was made parallel and adjacent to an ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made, in those instances, to pass at a greater The locomotive engines on the distance. railway frightened the horses of persons using the highway as a carriage road. On indictment against the company for a missance, Held, that this interference with the rights

Held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified; and the public benefit derived from the rallway (whether it would have excused the alleged nuisance at common law or not), showed at least that nothing was unreasonable in a clause of an act of parliament giving

such unqualified authority. The King v. Peace and Others, M. 3 W. 4.

OCCUPATION.

See Settlement by renting a Tenement, 2, 3.

OCCUPIER. See Poor Rate, 1, 2.

# OFFICE.

A clerk to justices in petty sessions appointed by order of such sessions, has no legal hold upon his office, nor will this Court interfere if he is dismissed summarily and without cause assigned. Exparte Sandys, E. 3 W. 4.

# ORDER OF REMOVAL. See APPRAL, 3.

OUTSTANDING TERM.
See FINE.

# OVERSEER.

By the statute 17 G. 2, c. 38, it is discretionary in the magistrates to commit an outgoing churchwarden or overseer who neglects or refuses to account. The King v. The Justices of Norfolk, M. 3 W. 4: 238

PARTICULARS OF DEMAND. See EVIDENCE, 10.

#### PARTNER.

S. and E. were partners in alum works, for an indefinite period. E. was a dormant partner. In January 1829, it was agreed that the settlement of the partnership accounts, and all questions concerning the respective liabili-ties and the mode of winding up the affairs, and the manner and time of dissolving the partnership should be referred to an arbitrator; and it was afterwards agreed that S. and E. should respectively bid for the plant, utensils, and fixtures, and the referee was to declare the highest bidder to be the purchaser. In April 1829, S. having been declared the highest bidder, became the purchaser, and the works were entirely given up to him: Held, that the partnership was then deter-mined, although the referee had made no order as to the dissolution; and that S. had no authority, after that time to bind E. by a promissory note. Heath v. Sansom, M. W. 4.

# PARTNERSHIP.

See BANKRUPT, 8. EVIDENCE, 13. PARTNER.

PARTY GRIEVED.

See APPRAL, 4.

# PAWNBROKER.

The pawnbrokers' act 40 G. 3, c. 99, s. 24, enables justices, in case it shall be proved before them that any goods pawned have been sold contrary to the act, or have been embezied or lost, or are become or have been rendered of less value than at the time of pawning, through the default, neglect or wilful misbehaviour of the person with whom the same were pawned, to award satisfaction to the owner as there specified:

Held, that justices have no power in the above

cases to commit in default of such satisfac-

Quære, Whether a pawnbroker is answerable for pledges destroyed by accidental fire, as goods "lost" within the above clause.

Semble, that the words "through the default," &c. apply to all the cases previously mentioned, and not only to that of the gods pawned having become of less value. Exparts Cording, 3 W. 4.

# PAYMENT. See Bankrupt, 8.

PAYMENT OF MONEY INTO COURT.
See Assumpsit. 1. Evidance, 10.

#### PENAL ACTION.

See APOTHECARY, 1, 2.

One calendar month before the commencement of an action for penalties against a clergyman for non-residence, a notice in writing of the intended writ and cause of action was delivered to the bishop's deputy registrar at his own house, and carried by him the next morning to the registry office, and there left: Held, that that was not sufficient to satisfy the 57 G. 3, c. 99, s. 40, which requires such notice to be delivered to the bishop of the diocese, by leaving the same at the registry of hie diocese. Vaux v. Vollans, Clerk, H. 3 W. 4.

## PENSION.

A pension during his Majesty's pleasure, granted by order in council on petition, for past services as advocate of the admiralty, and charged on the navy estimates, may be appropriated, under the insolvent act 7 G. 4, c. 57, s. 29, with the consent of the lords of the admiralty, for navment of creditors.

admiralty, for payment of creditors.

Quere, Whether this Court could have granted a prohibition to the insolvent debtor's court, against proceeding upon an order for such appropriation, if it had not been warranted by the statute? Ex parte Battine, E. 3 W. 4.

PETTY SESSIONS. See Mandamus, 5.

## PINDER.

See SETTLEMENT BY SERVING AN OFFICE, 1.

#### PLEADING.

See Action on the Case, 2. Bill of Ex change, 3. Evidence, 8.

- In trespass against surveyors of the highways for pulling down a watchhouse, the act 13 tl. 3, c. 78, s. 82, does not enable them, under a plea not guilty, to justify the removing it as being a nuisance on the highway. The Company of Proprietors of the Witham Navigation v. Padley and Others, M. 3 W. 4.
- 2. The plaintiff having declared in covenant for rent at 26l. a year, the defendants pleaded that they were only chargeable as executor; that the term came to them as such; that the premises were of less yearly value than the said rent of 26l., viz. of no value; and that they had fully administered, &c. Replication, that the premises were of the yearly value of 26l.; issue thereon. At the trial the yearly value was found by the jury to b

20%: Held, that the replication was, in substance, that the premises were of some value; that the issue was merely informal and cured by verdict; and that the plaintiff might recover the arrears of rent at the rate fixed by the jury. Rubery v. Stevens, M. 3 W. 4.

3. Declaration contained six counts in case, the seventh charged that the defendants took and distrained the goods of the plaintiff for rent, of more than sufficient value to satisfy the rent and costs, and then voluntarily abandoned the same, and afterwards wrongfully, injuriously, and rexatiously again took and distrained the same goods for the same rent, and refused to return the same, and converted them to their own use: Held, on motion in arrest of judgment for misjoinder of case and trespass, that although this second taking of goods was a trespass, yet the plaintiff might bring case for the conversion, and that the count was an informal one in case, and sufficient after verdict. Smith v. Goodwin and Richards, H. 3 W. 4.

4. Declarations ("in a plea of trespass on the case") stated that the defendant, intending to injure plaintiff in his good name, and to cause his dwelling-house to be searched for stolen goods, and to procure him to be imprisoned, went before a justice, and falsely and maliciously, and without probable cause, charged that certain specified goods of defendant had been feloniously stolen, and that he suspected that the said goods were concealed in the plaintiff's dwelling-house; and upon such charge the defendant procured the justice to grant a warrant, authorizing a constable to enter the plaintiff's house to search for the eard goods; and the defendant, with divers other persons, caused and procured the dwelling-house of the plaintiff to be searched and rummaged for the said goods, and the door of such house and a pantry to be broken to pieces, and the plaintiff and his family to be disturbed in possession, and his goods to be carried away.

The general conclusion was, that by means of the premises the plaintiff was injured in his good name and trade, put to expense, and hindered in his business. A count in trover was added: Held, on general demurrer, by Taunton and Patteson, Js., Littledale, J. dissentiente, that the acts of violence alleged to have been committed in the house, appeared sufficiently by the declaration to have been acts done in pursuance of the warrant; and in consequence of the charge made by the defendant, and that they were stated as mere matter of aggravation, and consequently that the whole count containing this statement was in case. Hensworth v. Fowkes, H. 3 W.

4.19
5 Declaration stated, that in consideration that the plaintiff would sell goods to the defendant for 600l., to be paid for by approved bills, falling due before the 15th of February 1832, the defendant undertook to pay plaintiff said sum, by approved bills falling due before the said, &c. At the trial the plaintiff proved a written contract, corresponding with that set out in the declaration, except that the payment was to be in approved bills, falling due by the 15th of February: Held, that although the declaration did not profess to set forth any contract in writing, this variance was

amendable by the Judge at Nisi Prius, under the statute 9 G. 4, c. 15, s. 1. Lamey v. Bishop, H. 3 W. 4.

op, H. 3 W. 4.

6. Declaration by husband and wife, stated that the wife lived separate from the husband, and kept a boarding-house, and enjoyed good credit, and was supplied necessaries upon credit by tradesmen, both for her own support and for carrying on her said business: that the defendant spoke certain words of her, and of and concerning her manner of carrying on her business, imputing to her issolvency, adultery, and prostitution: by resson whereof divers persons left off boarding with her, and tradesmen coased to supply her on credit, whereby she was injured in her said business and impoverished, &c.: Held, that the wife ought not to have been joined in this action, the words being only actionable in respect of damage to the business, and that damage being solely the husband's.

Whether or not he could have maintained an action under the circumstances, quer-Saville and Joyce his Wife v. Sweeney, H. 2 W. 4.

w. 2.

Trespass for breaking and entering the lade of the plaintiff, and sinking pits. Plea, the before the plaintiff had any thing in the said lands, one U. was seized in fee of one undivided third part therein, and, by indenture granted to B. license to dig, mine. Acthroughout his one third part, with liberty to erect engines, &c. for the term of twenty one years; that before the expiration of the term the grantee died, and his executrix became legally entitled to the enjoyment of the license, and because she could not enjoy it so fully as it was lawful for her to do without committing the supposed trespass, the defendant, as her servant, entered upon the said lands, and upon the plaintiff's possession, and committed the same.

Replication, that the supposed license was granted, subject to a condition "that if the grantee, his executors, &c. should neglect to work the mines for a certain time, or should fail in the performance of all or any of the covenants, then and from thenceforth the indenture, and the liberties and licenses there by granted, should cease, determine, and be utterly void and of no effect." Averment that the grantee, for a space of time exceeding that specified, neglected to work the premises contrary to the condition, and the license thereby became utterly void:

Held, on general demurrer, to the replication, that the word coid, in the provisimeant voidable at the election of the grantor, and therefore that it was necessary for the plaintiff to allege that the grantor, or some person claiming under him (which it was not shown that the plaintiff did,) had, by some act, evinced his intention to avoid the license. Roberts v. Darey, E. 3 W. 4.

7. Declaration by husband and wife stated, that, by agreement between the plaintif and the defendant, reciting that one J. L. had been arrested at the suit of the plaintiffs: that the defendant had become bail to the sheriff; that the bail had been forfeited; and that J. L. had given a cognovit for the debt and costs; it was understood and agreed between the plaintiffs and defendant, and the defendant undertook and promised, in consideration that the plaintiffs would not enter

up judgment, or sue out execution against J. L. until a certain day, that he, the defendant, would render J. L. on that day, or in default pay the debt and costs. Averment that the plaintiff had not entered up judgment or sued out execution against J. L. before the day : Breach, that the defendant did not render J. L. on the day, or pay the debt and costs: Held, on motion in arrest of judgment, after verdict for the plaintiffs,

First, that as the agreement was stated to be with the plaintiffs, the promise must be taken after verdict to have been made to

Secondly, that it sufficiently appeared that the wife had a joint interest, because the cognovit by J. L. to all the plaintiffs, which was recited in the agreement, was a sufficient admission by the defendant of such joint in-

Thirdly, that though the agreement by the wife was void, it might be rejected as surplurage, and that the count would then be good, as stating a promise to pay the debt and costs to the plaintiffs, in consideration that they would not enter up judgment, or sue out execution, until a given day. Nurse v. Wille, B. 3 W. 4.

> PLEDGE. See PAWNRROKER. PHYSICIAN. See APOTHECARY. POLICY. See INSURANCE. POOR RATE.

- 1. Lands are rateable to the relief of the poor in proportion to the net rent which a tenant at rack-rent would pay, he discharging all rates, charges, and outgoings; and, there-fore, an occupier (whatever be his interest) of land which requires to be protected from floods at an occasional expense, defrayed by a sewers' rate, is not rateable to the poor at the same sum as the occupier of lands, of similar quality and equal annual produce, in the same parish, not liable to the sewer's rate; but he should be rated at that sum, minus the sewer's rate. The King v. Adams, M. 3.
- 2 An owner of the soil, who has granted to adventurers liberty to dig, mine, work, and search for manganese for twenty-one years, and the same to take and convert to their own use, and to make adits, shafts, &c., rendering to him 11. 15s. for every ton weight of manganese raised during the term, is not an occupier of any portion of the soil, and consequently not rateable to the relief of the poor. The King v. Tremayne, M. 3 W. 4.
- 3. The 41 G. 3, c. 23, s. 8, enacts, that if on the hearing of an appeal from any poor rate, the sessions shall order the sum rated on any person to be lowered, and it shall be made appear that such person has paid in respect of such rate, a sum which he ought not to have charged with, the said court may order such sum to be returned, together with all reasonable costs occasioned by the overcharge: Held, that the application for an order to refund must be made to the same court of general or quarter sessions which

heard the appeal, or, at least, to that court which ordered the rate to be lowered; and therefore where the sessions confirmed a rate. subject to a case, and this court sent the rate back to be amended, by reducing the charge on appellant; and the court below, at the Easter (being the next) sessions, ordered the sum to be lowered accordingly; an application at the Michaelmas sessions for an order on the overseers to refund the difference between the sum first charged, and which the appellant had paid, and the sum ultimately fixed, was held to be too late. The King v. The Justices of St. Peter's Liberty, York, M.

4. The lessee of a toll-traverse and of a tollhouse (which he occupies) is not rateable to the poor for the tolls, but for the toll-house only. The King v. Matthew Snowdon, E. 3 W. 4. 713

PORT. See TONNAGE DUES. POUNDAGE.

# See EVIDENCE, 7. PRACTICE.

See Mandanus, 2. Warrant of Attorney, 1.

1. The act for uniformity of process, 2 W. 4, c. 39, s. 1, does not prevent the signing of a pluries bill of Middlesex in a suit commenced before the act came into operation. Storr and Another v. Bowles, M., 3 W. 4. 112

2. A bail-bond given by a party attached for contempt, in not putting in an answer in Chancery, is not assignable under the stat. 4 Anne, c. 16, s. 20. Meller v. Palfreyman, M., 3 W. 4.

3. A copy of a bill filed against an attorney or prisoner, does not require the indorsement directed by Rule II., Hilary 2 W. 4, to be made upon the copy of any process served for the payment of a debt. Long v. Wordsworth, M. 3 W. 4.

- 4. A plaintiff commenced his action in Hilary term 1831, and declared in trover. parties went to issue, and plaintiff was put under a peremptory undertaking to try. In Michaelmas term 1832, having been advised that the action was misconceived, he moved for leave to substitute a count in detinue for that in trover, and add one in debt; and it was sworn that no new ground of action was contemplated. Leave refused. Green and others v. Mitton, Gent., M., 3 W.
- 5. Goods consigned to A., and warehoused at the London Docks, were claimed by B. The Dock Company required an indemnity of A., the original consignee, before delivering them to him: A. refused, and brought an action of trover, with counts for special damage for the detention. On motion by the company for relief under the interpleader act, 1 & 2 W. 4, c. 58, B., upon due notice, not appearing, the Court held, that the claim of B. against the company was barred, but that A. ought not to be precluded from re-covering for his special damage, if any.

The rule made was, that on the defendants undertaking to deliver up the wine, then, if A. should accept the same, the action should be discontinued on payment of costs by the defendants; but if A. should go on

with the action, the count in trover should be struck out, and A. proceed for the special damage only. Lucas v. The London Dock Company, M., 3 W. 4. 378

The Court will not grant an attachment without personal service in any case, where the party applying has another remedy. the Matter of Loue v. Johnson, H., 3 W. 4. 412

7. An undertaking to indemnify an execution creditor, if he will allow the sheriff to delay selling, cannot be made a rule of court, even by consent, where the person who so undertakes is neither party nor attorney in the suit. Lyall and another v. Lamb, H., 3 W.

8. Where actions against underwriters have been consolidated by rule of court, and the defendant has obtained a verdict in one, the Court will not restrain the plaintiff from trying a second cause included in the same rule, till the costs of the first are paid. Doyle v. Douglas, H., 3 W. 4.

9. Plaintiff's attorneys gave defendant's attorneys their own undertaking as security for costs, the defendant obtained verdict and died, and judgment was entered up in his name within two terms: Held, that the attorney for such deceased party having a claim against his estate in respect of the costs, might enforce the security and satisfy such claims, without any scire facias having been sued out by the personal representa-tives. Chaurel v. Chimelli, E., 3 W. 4. 590

10. Where an attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to repay the money so received, the amount being a debt barred

by the certificate.

But if the attorney committed fraud in the receiving and not accounting, the Court, in the exercise of its general jurisdiction over its officer, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct.

The case of fraud, however, ought to be clear, and the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to show cause why he should not pay over the money. In the Matter of Bonner, Gent., One, &c., E., 3 W. 4. 811

11. Where a rule for a criminal information has been discharged upon the merits, the Court will not grant a rule to show cause on a second application in the same case The King v. 861 upon additional affidavits. Smitheon, E., 3 W. 4.

12. Notice to a magistrate, under 13 G. 2, c. 18, s. 5, of intention to move for a certiorari, "on the first day of next term, or so soon after as I can be heard," is irregular if served on the first day of that term, though the party does not, in fact, move till after the expiration of six days. Held, Denman, C. J., dubitante. In re Flounders, E., 3 W. 4.

13. A motion for a criminal information against a person who is not charged as a magistrate or public officer, may be made later than the second term after the alleged offence, if it be shown that the prosecutor did not know of the fact in time to make an earlier application. Rez v. Jollie and Steel, E., 3 W. 4.

PRESENTMENT. See BILL OF EXCHANGE, 3. CHECK.

PRINCIPAL AND AGENT. See VENDOR AND VENDER, 1.

PRISONER.

See PRACTICE, 2.

PROBATE.

See EXECUTOR, 2.

PROCESS.

See PRACTICE, 1, 3.

PROHIBITION.

See PRISION.

PROMISSORY NOTE.

See BILL OF EXCHANGE, 1, 2. PARTIES-SHIP, 1.

PROMOTIONS.

P. 1. 381, 589, 590,

PURCHASE OF ESTATE. See SETTLEMENT BY ESTATE.

PUBLIC ADVERTISEMENT.

See ASSUMPSIT, 4, 5.

QUO WARRANTO.

See Mandanus, 3.

RATLWAY.

See Toll, 3.

RECOVERY.

See DEVISE, 1.

RECTOR.

See Annuity, 2.

REFRESHMENT TO JURYMAN. See JURYMAN.

REGULÆ GENERALES.

P. 2. 589.

RELEASE.

See EVIDENCE, 13.

REMITTER.

See FINE, 1.

REMOVAL, ORDER OF. See APPBAL, 2, 3.

REMOVAL OF INDICTMENT. See Indictment, 2.

REPLEVIN BOND.

See Attorney, 3. '

REPLICATION.

See PLEADING, 2, 7.

RETURN OF WRITS. See WRIT DE CONTINUANCE CAPIENDO.

REVERSIONER.

See Action on the Case, 1.

REWARD.

See Assumpsit, 5.

RIGHT OF ENTRY. See Ejecthent, 1.

ROAD.

See TOLL

RULE OF COURT.

See Attorney, 1. Practice, 3, 7. Warrant of Attorney, 1.

RULE TO SHEW CAUSE.
See Practice, 11.

SEAL.

See ANNUITY.

SECOND ACTION. See PRACTICE, 8.

ST. KATHARINE'S DOCK COMPANY.

See Mandanus, 2.

SCIRE FACIAS. See PRACTICE, 10.

SECURITY.

See TREASURER.

SEIZURE OF CHATTEL. See TRESPASS, 2.

SENTENCE.

See JUDGMENT.

SERVANT.

See EVIDENCE, 12.

SET-OFF.

See BANKRUPT, 6. EXECUTOR, 3.

# SETTLEMENT-by Apprenticeship.

1. Under the stat. 56 G. 3, c. 139, s. 2, when an apprentice is bound from one parish into another, notice must be given to the overseers of the latter, though both be in the same county and jurisdiction of the peace.

The King v. The Inhabitants of Threlkeld, M., 3 W. 4.

Under the stat. 33 G. 3, c. 54, s. 24, which is in substance the same as 12 Anne, st. 1. c. 18, s. 2, an apprentice bound to a person reciding in a parish under a certificate, cannot gain a settlement by such apprenticeship, though the certificate be subsequently discharged, and he afterwards continue to serve his master in the parish for forty days. The binding, to confer a settlement, must be such as would at the time be effectual for that purpose. The King v. The Inhabitants of Leeds, M., 3 W. 4.

3. An indenture having been prepared for binding a boy apprentice, the apprentice and his father being unable to write, desired a third person to write their names opposite two of the seals, and he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master and left it with him; and afterwards stated, that when he did so, he considered himself bound; and he went into service under the indenture; Held, that the indenture was sufficiently executed and delivered. The King v. The Inhabitants of Longnor, E., 3 W. 4.

4. By an act of parliament, all persons seized

of land of the annual value of 30% in the hundred of Stow, were incorporated by the name of the guardians of the poor within the hundred of Stow in the county of Suffolk, and were to have a common seal; and the poor of the hundred were to be placed under the management of the corporation; and the directors and acting guardians, whom the corporation were authorized to appoint in the manner therein mentioned, were empowered, with the consent of two justices, to bind any poor child under their management, apprentice, in like manner as churchwardens and overseers of the poor, with assent of the justices of the place, were then empowered to do.

By indenture the directors and acting guardians of the poor of the hundred of Stow, with the consent of two justices, bound out a poor boy under their management an apprentice for one year, and affixed to the indenture the common seal of the corporation, but it was not otherwise executed by the directors and acting guardians: Held, that the indenture was invalid. The King v. The Inhabitants of Haughley, E., 3 W. 4.

SETTLEMENT-By Bastardy.

If a woman pregnant of a bastard be fraudulently removed by parish officers for the purpose of preventing the bastard from becoming chargeable to their parish, the child is settled in the parish from which the mother was so removed; but not if the mother be so fraudulently removed by a parishioner liable to pay rates, not being a parish officer. The King v. The Inhabitants of Mattersey, M., 3 W. 4. 211

# SETTLEMENT-By Estate.

A surrender of an old lease by a grandfather and great uncle, and the taking of a new lease by the grandson and great nephew, at a nominal fine to the lord of a manor, is not a purchase of an estate within the statute 9 G. 1, c. 7, s. 5. The King v. The Inhabitants of Lydlinch, M., 3 W. 4.

# SETTLEMENT-By Hiring and Service.

1. A female pauper, hired for a year, was during the year apprehended and fined for having committed a malicious trespass, contrary to the statute 7 & 8 G. 4, c. 30. She went to prison instead of paying the fine, by the advice of her mistress, who told her to return when her time was out; and after her imprisonment, which lasted a month, she did return to her service, and continued in it to the end of the year, and was paid her whole year's wages: Held, that there was a dispensation with the service during the month of her imprisonment, and that she gained a settlement. The King v. The Inhabitante of Coningsby, M., 3 W. 4.

2. A. agreed to become the hired servant of B. for five years, to do such work as belonged to the finishing of cloth, and B. promised to pay A. 10s. a week for the first two years, 11s. for the third, 12s. for the fourth, and 13s. for the fifth, the hours of working to be from six in the morning till seven in the evening, to be paid for all overtime, and a deduction to be made for all short; Held by Denman, C. J., Parke, J., Patteson, J.

Taunton, J. dissentients, that this was not an exceptive hiring, but a hiring for five years absolutely. The King v. The Inhabitants of Oscett-cum-Gawthorpe, M., 3 W. 4.

3. A pauper agreed with the owners of a colli-

ery to work constantly in the colliery from the 4th of February 1815, to the 4th of February, 1816, or to forfeit and pay to his master 1s. for each and every day he should absent himself from his work, or not work a reasonable day's work to the satisfaction of his master: Held, not an exceptive hiring. The King v. St. Helen's Auckland, E., 3 W.

## SETTLEMENT-by Rates.

Between the passing of the 35 G. 3, c. 101, and that of 6 G. 4, c. 57, a settlement might be gained by reason of a party being charged with and paying his share towards the public taxes or levies of the parish, in respect of a tenement above the value of 101. The King v. The Inhabitants of Penryn, M., 3 G.

# SETTLEMENT-by renting a Tenement.

1. On the trial of an appeal against an order of removal, the respondents having proved by parol the renting of two fields in appellant parish at 15% a year, and an occupation and payment of the rent for a whole year, the appellants then gave evidence that the contract for taking the two fields was reduced into writing: Held that it lay upon the latter to produce the written contract. The King v. The Inhabitante of Padetow, M., 3

2. In 1827 a cottage and land were hired for a year at the rent of 111. 10s., and it was agreed that the land should be entered on at Lady Day 1827, and held till Lady Day 1828, and the cottage entered on at May Day 1827, and held till May Day 1828. The land and cottage were occupied for a year respectively, commencing and ending at the days agreed on, and the rent paid: Held, that that was an occupation of a tenement for one whole year, sufficient to give a settlement under the 6 G. 4, c. 57. The King v. The Inhabi-tants of Ormesby, M., 3 W. 4. 214

8. A pauper in November, 1827, took a dwelling-house of A., at an annual rent of 61. 10s. In May, 1828, he took of B. a building used as a shed, situate in the same parish, but entirely separated and distinct from the dwelling-house, at an annual rent of 51. He occupied both, and duly paid the rents, until September, 1830: Held that he thereby gained a settlement, by renting a tenement under the stat. 6 G. 4, c. 57. The King v. The Inhabitants of Tadcaster, E., 3 W. 4.

## SETTLEMENT—by serving an Office.

703

1. In 1825, three occupiers of land in a parish ordered A. to go and be sworn in pinder, and he was sworn in before a justice of the peace, and served as pinder during that year. He was again sworn in 1826, and served several years, residing in the parish all the time. Before 1825 there was no such officer as a pinder remembered in the parish: Held, that he gained no settlement by serving the office. The King v. The Inhabitants of Clixby, M. 3. W. 4.

2. To gain a settlement by serving an officethe party must reside in the parish where it is executed. The King v. The Inhabitants of Woodbridge, R., 3 W. 4.

> SEWERS' RATE. See POOR BATE, L.

> > SHERIFF.

See BANKRUPT, 2, 3. EVIDENCE, 7. TRES-PASS, 1.

SHIP-OWNER.

See Assumpsit, 1.

SLANDER.

See ACTION ON THE CASE, 5. BARON AND FEM. 1. EVIDENCE, 12.

SPECIFIC DAMAGE.

See ACTION UPON THE CASE, 3.

#### STAMP.

See EVIDENCE, 9. EXECUTOR, 2.

Where several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue, a distinct costract arises for each lot; and a memorandum signed afterwards by the bidder, stating that he agrees to become the purchaser of several lots set against his name, does not require a stamp, though the aggregate exceeds 20. in value, no single lot being of that price.

Roots v. Lord Dormer, M., 3 W. 4.

STOCKBROKER.

See BROKER.

SUPERSEDRAS.

See TRESPASS, 1.

SURRENDER.

See DEVISE, 2. EVIDENCE, 9.

TENDER.

See Action on the Case, 4. Assumpsit, 1. EVIDENCE, 8.

See POOR RATE, 4.

By an act of the 52 G. 3, entitled, "An Act for more effectually repairing the road from Boroughbridge in the county of York, to the county of Durham," it was in section 25, enacted, "that the respective tolls therein mentioned should, subject to the restrictions thereinafter contained, be demanded and taken at every toll-gate and turnpike which should be continued or erected by virtue of that act, from the person using or attending any carriage, before any such carriage should be permitted to pass through the same."

By section 28, it was enacted, that no more tolls should be taken from any person for passing and repassing the same day, with the same horses or carriages, through any of the tollgates or turnpikes erected by virtue of that act, in the whole length of the said road from Boroughbridge to the city of Durham, nor upon the several parts thereinafter specified. than as thereinafter mentioned, viz., six tolk on the whole length, and on certain specified parts two tolls each.

By s. 37, it was enacted that no toll should be demanded or taken for any carriage which could only cross the said road, and which should not pass more than 100 yard thereon.

By s. 68, all persons, counties, townships, &c., and bodies corporate, who by reason of tenure or otherwise, had been used to repair any part of the said road, should continue

liable to such repairs.

Held, that the words said road, in the exempting clause by reference to the title of the act, and to the nearest description of the road, which was in section 28, imported the whole space between Boroughbridge and the city of Durham, and therefore that a cart which had passed more than 100 yards along the road, including a part repairable by the county, as being at the end of a bridge, but which had gone less than 100 yards, exclusive of that part, was not exempt from toll; and that the liability of the county to repair that part did not render it unreasonable that such part should be included in the 100 yards, for passing over which toll was demandable.

And quere, whether under this act the road trustees might not be liable in case of default by the county, to employ the money in repairing the 300 feet at the end of a bridge? Bussey v. Storey, M., 3 W. 4. 98

2. A toll of 1d. for every pig brought into market is not necessarily unreasonable. Wright v. Bruister, M., 3 W. 4.

3. An embankment company was by act of parliament empowered to make a road, and to erect turnpikes upon or cross "any lanes or ways leading or that might thereafter lead out of the same;" and to take tolls at such tumpikes. By subsequent acts another company was empowered to make a railway, and it was enacted that all persons should have full liberty to use the same, with carriages properly constructed, upon payment only of such rates and tolls as should be demanded by the railway company, not exceeding the sums mentioned in that act. The railway was afterwards made, and it crossed the embankment company's road: Held, first, that the railway, though made and opened to the company by act of parliament, was a "way within the meaning of the first mentioned act. Secondly, that the clause in favour of the public in the railway act, did not take away the vested right of the embankment away the vested right of the company to their tolls; and, consequently, that they might take toll of persons crossing their road upon the railway. Rowe v. Shilson and Another, E., 3 W. 4.

#### TONNAGE DUTIES.

By statute 14 G. 3, c. 56, s. 42, the following tonnage duties were imposed on every ship or vessel (except those in the King's service) coming into or going out of the harbour, basin, or docks, of the port of Kingston-upon-Hull, or loading or unloading there. 1. For every ship coming or going between the said port and any port to the northward of Yarmenth, or southward of Holy Island, 2d. per ton. 2. For every ship coming to or going between the said port and any port or place between the North Foreland and Shetland, on the east side of England, except as above, 3d. 3. For every ship trading between the said port and any other port or place in Great Britain not before described, 6d. The duties to be paid on the ship's entry inwards, or clearance or discharge outwards; or, if there were no

entry, then to be paid at the custom house at any time before the vessel proceeded:

Held, that the first clause related only to ports on the east side of England, between the places there named; that it extended to the port of Goole, though situate twenty-five miles inland from Hull, on the river Ouse; and, therefore, that vessels taking all, or part of their cargoes at Goole and going to Hull, or vice versa, were liable to the duty of 2d.; and this, though they did not enter or clear at the custom house: Held, also, that the first clause did not apply to vessels loading at Leeds or other places, not ports, situated above Hull, and going directly thither; that the third clause (if those places were contemplated in it) did not refer to them with the precision necessary for imposing a duty: and, (Parke, J., dubitante,) that the vessels so loading at Leeds did not become liable to duty by merely passing through the entrance basin of the Goole docks, without taking in goods or making any stay there. Hull Dock Company v. Priestly, M., 3 W. 4.

# TREASURER.

# See MANDANUS, 2.

By the statute 12 G. 2, c. 29, s. 6, it is enacted, that the respective high constables shall pay the sums of money received by them in respect of the county rate, to such person whom the justices shall at their quarter sessions appoint to be the treasurer (which treasurer they are thereby authorised to appoint) he first giving sufficient security in such sums as shall be approved by the justices at sessions, to be accountable for the money which shall be paid to him in pursuance of that act, and for which, by section 7, he is made accountable to the justices: Held, that this section of the statute does not make the giving of the security a condition precedent to a person becoming treasurer, or being responsible or accountable to the justices, but that the appointment is complete without such security being given. The King v. Patteson, M., 3 W. 4.

# TRESPASS. See Pleading, 3, 7.

 A sheriff executing a fi. fa. after notice of the allowance of a writ of error, is liable in trespass, though there has been no further supersedeas of the execution.

Notice to the sheriff of such allowance is notice to his officers, and renders them liable in trespass for proceeding with the execution. Belekaw v. Marskall, M., 3 W.

2. A person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use. Wilson v. Barker and Mitchell, E., 3 W.

# TRIAL.

See Indictment, 2.

# TROVER.

See Bankrupt, 5, 6. Practice, 5. Vewdor and Vendre, 1.

TRUSTER.

See EVIDENCE, 6. EXECUTOR, 8.

TURNPIKE ACT.

See Attorney, 2. EJECTMENT, 2. EVIDENCE, 6. Toll, 1, 3.

UNDERTAKING. See PRACTICE, 7. UNIFORMITY OF PROCESS. See PRACTICE. 1.

# VENDOR AND VENDEE.

1. P. having given a general authority to D. to sell hay for him, D. advertised a sale, by the conditions of which a deposit was to be paid, and three months credit given, on approved security, for the remainder, and the lots were to be taken away within forty weeks of the sale. D. sold the hay to S., and took his promissory note for the price. S. applied to D. for leave to cut some of the hay, and, it being granted, cut and took away part; but he was afterwards forbidden by D. to remove the residue. D. indorsed the note, and discounted it at his bankers. who credited him with the amount, minus the discount; it was afterwards dishonoured. D. having become bankrupt, it was agreed between the bankers and S. that the latter should sell them the residue of the hay, and that they should pay him part in money, and return him his note in satisfac-tion of the residue. The bankers, within forty weeks after the sale, demanded the hay of D.'s principal (P.), who refused to deliver it. In trover brought against P. by the bankers for the hay:

Held, first, assuming P. to have had a lien after the sale, and after the vendee had given his promissory note for the price of the hay, that that lien was not divested by reason of the vendee having removed part of the hay, it not appearing that this part-delivery to him was by way of delivery of the whole.

Secondly, that P. had no lien, because he was to be considered as having been paid for the hay by reason of his agent having taken the vendee's promissory note, and discounted it, and its being outstanding in the hands of the plaintiffs. Burney v. Poyntz, H., 3 W.

> VARIANCE. See PLEADING, 5. VENUE. See ATTORNEY. 2. VERDICT.

See EVIDENCE, 10. JURYMAN, PLEADING, 2.

VOID, OR VOIDABLE. See PLEADING, 7.

WAIVER OF NOTICE. See EJECTMENT, 1.

# WARRANT OF ATTORNEY.

1. A debtor being arrested, offered a warrant of attorney. The plaintiff's attorney, who had also advised the defendant in previous stages of the business, came, at his request. to the place where he was in custody, and proposed another attorney, whom he brought with him, to read over the warrant of attorney to the defendant, and attest it on his

behalf. The defendant acquiesced; but the attorney so introduced was not known to, or

sent for, by him:

Held, that this was not a compliance with the rule Easter 4 G. 2, (and see Reg. Hil. 2 W. 4, L. 72,) which declares that ne warrant of attorney executed by a person in custody of the sheriff, &c., shall be valid, unless there be present an attorney on his behalf, to be expressly named by him, and attending at his request to witness it; and the warrant of attorney and proceedings thereon were set aside for irregularity. Walker v. Gardner and Others, M., 3 W. 4. 371

2. A clergyman purchasing an annuity, agreed that it should be charged on his benefice,

and the payment secured by a bond and warrant of attorney, with a judgment to be entered up thereon, for the purpose of charging the benefice. By the deed of grant the annuity was made payable on certain days, and chargeable on the benefice, with a power of distress, &c.; it also contained a demise of the benefice to a trustee, with a power, in default of payment, to receive the tithes, rents, and profits, &c. It was thereby also declared, that the bond and warrant of attorney (referred to in the deed as having been already prepared, and meant to bear even date with, and to be executed and given at the same time as the deed,) and the judgment to be entered up thereon, should be further securities for the annuity; and that immediately after such judgment, the creditors might sue out execution, and do such other acts as might be necessary for obtaining a sequestration; and that as often as the annuity should be in arrear, they might put in force such writ of sequestra-tion. The condition of the bond (after re-citing the agreement for purchase of the annuity, and for securing the same by such bond, warrant of attorney, and judgment, reciting also the deed of grant) was declared to be for the due payment of the annuity on certain days. The warrant of attorney gave authority to receive a declaration at the suit of the plaintiffs, in an action of debt on a bond, describing it as a bond of even date with the warrant of attorney executed by the grantor of the annuity, and given to the grantees, and to suffer judgment. The defeazance recited, that it was given to secure the payment of an annuity of the amount mentioned in the bond, payable on the same days as in the condition of the bond was expressed.

On a motion to set aside the judgment on this warrant of attorney, on the ground that it was a charge on the benefice: Held, that this did not sufficiently appear, the reference in the warrant of attorney to the bond amounting to no more than a descrip-tion of the bond, its date, the parties to it, and the time at which the annuity was to be paid, and not incorporating the terms of the deed of grant (recited in the bond) with the warrant of attorney, so as to make the latter operate as a charge on the benefice; and this being an application to set aside a judgment for irregularity, the will was dis-Colebrook, Baronet, V. charged with costs. Layton, Clerk, H., 3 W. 4.

WARRANT OF COMMITMENT. See COMMITMENT.

WARRANT OF DISTRESS.
See Action on the Case, 2.

WATCH HOUSE.
See HIGHWAY.

WITNESS.

See EVIDENCE, 1, 13.

WRITTEN CONTRACT.

See EVIDENCE, 2.

WRIT OF ERROR.

Error will lie to B. R. on a judgment of C. B., for error in fact.

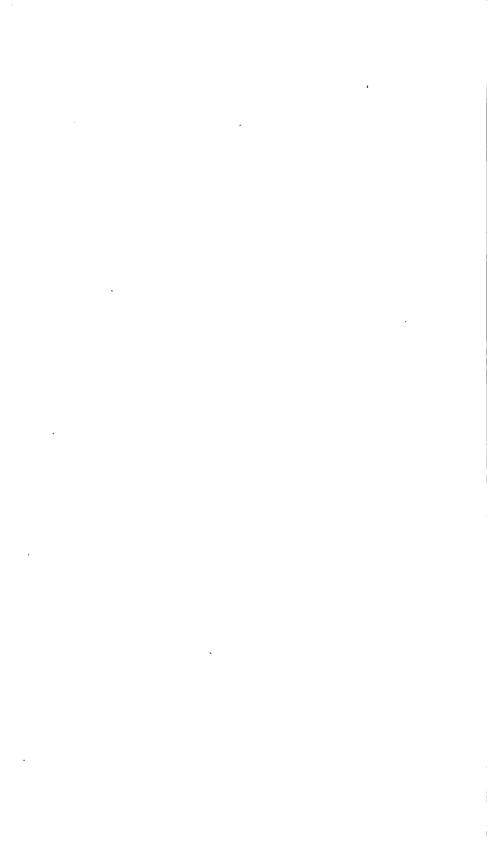
A court of error will give judgment of reversal, if there be error in law apparent on the face of the record, though error in fact only be assigned. Castledine v. Mundy, M., 3 W. 4.

WRIT DE CONTUMACE CAPIENDO. A defendant arrested on an irregular writ de contumace capiendo, was brought up by habeas corpus before a Judge to be discharged. Immediately after his discharge, and before he had time to return home; he was again arrested on a similar writ for the same matter: Held, that he was protected from arrest redeundo.

The second writ was sued out of Chancery without any return made to the first; never-

theless, it was held to be regular.

The stat. 1 W. 4, c. 3, s. 2, which enacts that all writs returnable in the King's Bench. Common Pleas, or Exchequer, on general return days, may be made returnable on the third day exclusive before the commencement of each term, &c.; and the day for appearance shall as heretofore be the third day after such return, exclusive of the day of the return, &c. applies to all writs, not merely to those on mesne process, and consequently it extends to a writ de contumace caplendo. The King v. Blake, M., 3 W.



# REPORTS OF CASES

ARGUED AND RULED AT

# NISI PRIUS,

IN THE COURTS OF

# King's Bench, Common Pleas,

# AND EXCHEQUER,

TOGETHER WITH CASES TRIED ON

THE CIRCUITS, AND AT THE OLD BAILEY;

FROM THE SITTINGS AFTER TRINITY TERM, 1831, TO THE SITTINGS AFTER HILARY TERM, 1833.

BY

F. A. CARRINGTON AND J. PAYNE, ESQES.

OF LINCOLN'S INN, BARRISTERS AT LAW.

VOL. V.

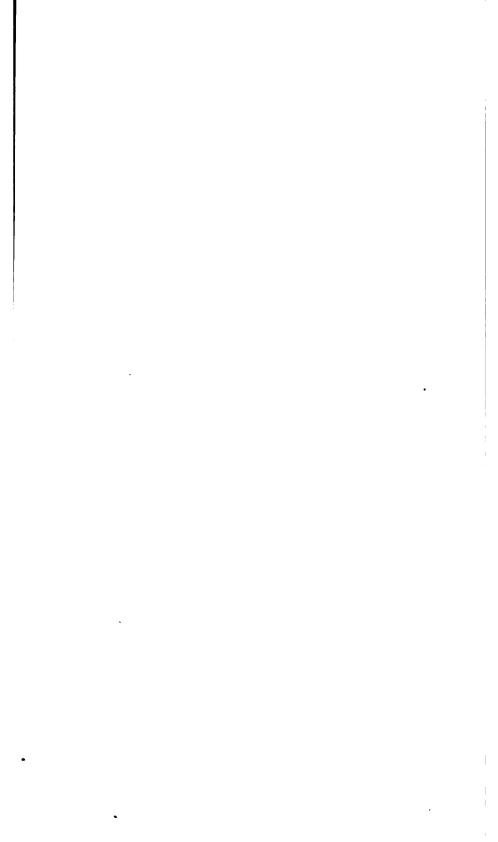
PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,

PUBLISHERS AND IMPORTERS,

NO. 197 CHESTNUT STREET.

1858.



# TABLE

OF THE

# NAMES OF THE CASES

# REPORTED.

<b>A.</b>	. PAGE
PAGI	
ALTES v. Farren 513	Bradshaw v. Bennett
Apothecaries' Company v. Collins . 519	Brearley, Jones v
Archbold v. Sweet 219	Bremridge v. Campbell 186
Arden v. Tucker 248	Brothonton Window
Arkwright, Doe d. Stansbury v 578	Briant v. Eicke,
Auworth v. Johnson	Briscoe, Head v
Ayling v. Williams 399	British Museum v. Finnis
В.	Brocklebank v. Sugrue
Backler, Rex v	
Backler, Rex v	1 · · · · · · · · · · · · · · · · · · ·
Baker, Freeman v. 478	
Banham, Weatherby v	
Barford v. Nelson	1 =
Bayley, Doe d. Finlayson v 6	
Beckford v. Crutwell 242	
Bell, Rex v 162	1
v. Smith	
Bennett, Bradshaw v 48	1
v. Robbins	- I
Benning v. Dove 42	
Bernard, Willis v 342	
Berriman, Rex v 601	
Billington, Seager v 450	
Bingley, Rex v 609	
Bird, Ward v	
Birnie, Rex v 200	
Birt, Rex v 154	
Blackeway, Doe d. Allen v 563	Clarke, Vyse v
Blew v. Wyatt	
Bootyman, Rex v 306	
Boss v. Litton 40'	
Boulton, Rex v	
Bourne, Rex v 120	
Van WWIW OF	,

	PAGE	1	PAGE
Colburn, Planche v		E.	
Colburn, Planche v	380	Eager v. Dyott	. 4
Collier, Rex v	. 160	Earle v. Picken	542
v. Simpson	373	Edwards, Rex v.	518
Collins, Apothecaries' Company v.	. 519	Edwards, Rex v	172
, Rex v	305	Eicke, Briant v	. 44
, Wilson v	. 373	Ellicombe, Rex v.	527
Cooke, Hartley v '	441	Ellicombe, Bex v	. 437
Cope v. Cope	. 535	——, Hill v.	436
Cope v. Cope	604	Hill v. Elton v. Larkins,	86, 385
, Imason v	. 193	Enoch, Rex v.	539
Corbett v. Brown	363	Enoch, Rex v	. 358
Cowan, Serjeant v	. 492	Evans, Rex v	553
Cox, Rex v	297	Everett v. Lowdham	. 91
Cranbrook v. Dadd	. 402	F.	
Cranbrook v. Dadd Creighton, Standage v. Crick, Rex v. Crocket, Ward v. Crockshank v. Rose Crucifix, Firmin v. Crutchley, Rex v. Crowther, Rex v. Crowther, Rex v. Crutwell, Beckford v. Culkin. Rex v.	406	Fallows, Rex v	508
Crick, Rex v	. 508	Fallows, Rex v	. 102
Crocket, Ward v	10	Fairmaner, Budd v	. 78
Crockshank v. Rose	. 19	Fairmaner, Budd v	. 513
Compables Reserve	98	Filmer, Fisher v	92
Creather Der v	. 133	Finacane, Rex v	. 551
Centwell Backford	316	Finacane, Rex v	. 460
Culkin Rev	. 242	Firmin v. Crucifix	. 98
Culkin, Rex v	116	Fisher v. Filmer	. 92
Curtis, Knotts v.	322	Fisher v. Filmer	. 514
Curtis, Knotts v	489	Flaxman, Meredith v	. 99
Cutler v. Close	337	Fleming, Pearcy v	. 503
· D.	001	Fletcher, Wells v	_ 12
Dodd Cranbuck -	400	Ford, Shelley v. , , . , Foreman v. Jeyes Fothergill, Hargest v Freeman v. Baker,	. 313
Dadd, Cranbrook v	. 402	Foreman v. Jeyes	. 419
Devenment Willson v	238	Fothergill, Hargest v	. 303
Davies Dav v	. 931	Freeman v. Baker,	. 475
Davies, Day v	80	Furnival, Reid v	. 531
Day v Davies	. 340	Furnival, Reid v	. 499
Day v. Davies	165	G.	
De Medeiros v. Hill	182	Gammon, Rex v	. 321
De Sewhanberg v. Buchanan .	. 343	Gardener, Scarth v. Garth v. Howard	. 38
Dickenson v. Hatfield	46	Garth v. Howard	346, 350
Dickenson v. Hatfield Dinneford, Clendon v	. 13	Gaskell v. Marshall Gibson v. Baghott Glenester v. Hunter Good, Colepepper v.	. 31
Dixon v. Elliott	437	Glosoft v. Bagnott	. 211
v. Robinson	. 96	Glenester v. Hunter	. 0.
Dodd, Dagleish v	238	Good, Colepepper V.	. 380
Dodd, Dagleish v	. 563	Goodman v. Taylor	. 410 . 190
Crake v. Brown	315	Green, Rex v.	. 312
Finlayson v. Bayley .	. 67	C	. 234
Hiatt v. Miller	595	Guillord, Lowry v	, 204
Packer v. Hilliard .	. 132	H.	
——— Shellard v. Harris	592	Halton, Davies v	. 69
Stansbury v. Arkwright,	. 575	Hamilton, Miller v	. 433
Dove, Benning v	427	Handley, Rex v	. 565
Dover v. Mills	. 175	Hardwick, Nicholson v	. 495
Duff, Yates v	369	Hargest v. Fothergill	. 303
Duke, Castle v	. 359	Hargrave, Rex v	. 170
Dyott, Edgar v	4	Harper, Powell v	. 590

	TABLE	OF	CASE	S REPORTED.	4	<b>1</b> 19
		P	AGE			AGE.
Harris, Doe d. Shellard v			592   I	Litton, Boss v		407
Hart, Nichols v		•	159   I	ock, Wake v	•	454
Hart, Nichols v			179   I	cock, Wake v		55
Hartley v. Cooke .			441 I	Lowdham, Everett v Lowry v. Guildford		91
Hatfield, Dickenson v. Haughton, Bex v.			46 I	Lowry v. Guildford		234
Haughton, Bex v		555,	559   I	Luxford v. Large		421
Hay v. Weakley Head v. Briscoe Heisch v. Carrington .	•		361 I	Lynch, Rex v		324
Head v. Briscoe .		•	484	M.		
Heisch v. Carrington .	•	•	471	C'Kone v. Wood		1
Heming v. Wilton .				fareco, Hicks v	•	
Hemp, Rex v		•	468	farsh v. Thomas	. •	596
Hewitt v. Pizgott .			75	farsh v. Thomas	•	31
Hickman, Rex v	•		151		•	150
Hicks v. Mareco Higgins v. Bretherton			498	Martin. Rex v.	•	128
			2	Hartin, Rex v	•	K14
Hilditch, Rex v			200   1	Mathews. Protheroe	•	KRI
Hill, Charlton v			147	Mathews, Protheroe v Meredith v. Flaxman	•	00
Hill, Charlton v			102   1	Miller, Doe d. Hiatt v	•	KOK
- v. Elliott	•			v. Hamilton	•	433
— v. Phillips .			356	Millne v. Wood		
Hillary v. Morris  —, Whippy v.  Hilliard, Doe d. Packer v			6	Wills Cowis w	•	400
Whippy v			209	Mills, Curtis v	•	207
Hilliard, Doe d. Packer v			132	Dover v	•	175
Hodgkisson, Cokayne v.			543	Moakes, Hyde v. Montgomery v. Richardson	•	42
			524	Montgomery v. Richardson .	•	247
Holloway, Rex v Hookham, Pugh v	. •	•	376	Moody, Rex v	•	23
Honseman w Roberts	•	•	394	Moody, Rex v	•	200
Houseman v. Roberts . Howard, Garth v.	•	246	350	Morris, Hillary v	•	6
Hughes v. Marshall .		J¥0,		Mosely, Thompson v	•	501
Des -	•	• •	100	Murray, Rex v	•	145
Rex v. Hunter, Glenester v.		•	126	N.		
Hyde v. Moakes .	•	•	40 3	Velson, Barford v		8
nyde v. Moakes .		•	42	Nichols v. Hart		179
I.			- 1-	Rex v.		600
Illidge v. Goodwin .			190	, Rex v		495
Imason v. Cope			193	v. Paget	٠.	395
J.			,	Yookes, Rev v.		326
Jager, Sedgwick v			100	Noakes, Rex v	•	177
James v. Campbell .					•	
Rex v		•	!	0.		
Jarmain v. Egelstone	•	•	١		•	168
leffers of Debinson		•	220	Orr v. Browne	•	414
Jeffery v. Robinson . Jeyes, Foreman v	•	•	410	P.		
	• •	•		Paget, Nicholson v		395
Jehnson, Auworth v Joll v. Fisher	•	•		Parker v. Smith		438
_		•	714   T	Parsons v. Chapman		33
Jones v. Brearly .	•	•	V. 1 -	Paul v. White		237
v. Cliff	• •	•		Pearcy v. Fleming	•	503
K.				Pearson, Rex v		121
Kennett, Rex v			രാവി	4	•	521
King, Rex v			199	Pegler, Rex v	•	412
Knotts v. Curtis .					•	197
L.			1	Perryman v. Steggall	•	356
				Phillips, Hill v	•	488
Large, Luxford v	•			Phipps v. Tanner	•	542
Larkins, Elton v	• •	86,		Picken, Earle v	•	. 75
Lees, Tidmas v	•	•	233   1	Piggott, Hewitt v	•	. 10

	PAGE	PAG	88
Pink v. Scudamore .	71	Rex v. Holloway 52	24
Pinney, Rex v.	254	1,226	26
Planche v. Colburn	58		53
Pluckwell v. Wilson .	375		82
Pope, Rex v	208		23
Poulton, Rex v	329		24
Powell v. Harper .	590		28
Poynter v. Buckley .	512		23
Pratley, Rex v	533		45
Price, Rex v	510		00
Promotions	. 1, 435, 606		26
Protheroe v. Mathews .	581		68
Pugh v. Hookham .	376		21
R.			21
Rawson, Walker v	486		112
Reed v. Moore	200		54
Rees, Rex v	302		108
Reid v. Furnival	499		29
Rex v. Backler	118		33
v. Bell	162		10
v. Berriman	601		02
v. Bingley	602		18 52
v. Birnie	206		79
— v. Birt	154		55
v. Bootyman	300	~	43
v. Boulton	537		 104
v. Bourne	120		113
v. Capewell	549		07
v. Chalmers	331		33
— v. Collier	160		01
			33
v. Cooper			48
v. Orick			101
v. Crowther	508		07
v. Crutchley .	133		30
v. Culkin	121		67
— v. Cullen	116	v. Walters 1	38
v. Deering	165	v. Warner	25
v. Edwards .	518		35
v. Ellicombe	522	v. Wedge 2	98
— v. Knoch	. 539	v. Woolcock 5	16
v. Evans	553		18
v. Fallows	508		47
- v. Finacane	551		194
v. Freeman	534	•	52
— v. Gammon	321		179
v. Green	312		96
v. Handley	565	,	30
v. Hargrave .	170		81
v. Harris	159	,,	19
v. Haughton .	. 555, 559	Rule as to Remanets in C. P 4	40
— v. Hemp	468	8.	
v. Hickman	151	St. Weonard's, Rex v 5	79
v. Hilditch	299		96
-	•	•	

# TABLE OF CASES REPORTED.

		PAGE	EDAS
Sainsbury, Thwaites v.		69	Thwaites v. Sainsbury 69
Salisbury Rex v		. 155	Tidmas v. Lees
Savage, Rex v.		143	Trotter v. Simpson 51
Scarth v. Gardener	• •	. 38	Tubby, Rex v 530
			Tucker, Arden v 248
Scudamore, Pink v.		. 71	Tuffs, Rex v 167
			▼.
Sedgwick v. Jager		. 199	Vyse v. Clarke 403
Serjeant v. Cowan			w.
Shadbolt, Rex v.		. 504	Wake v. Lock 454
Shelley v. Ford			Walker v. Rawson 486
Shepherd v. Cafe	• . •		Walters, Rex v 138
Simpson, Collier v		73	Ward v. Bird
, Trotter v.		. 51	
Slaney, Rex v			Warner, Rex v
Smith, Bell v			Weakley, Hay v
- v. Brown			
		. 438	Weale, Rex v
, Rex v			Wedge, Rex v
v. Sainsbury .		. 196	Wells v. Fletcher 12
, Whitworth v			Whippy v. Hillary 209
Smithies, Rex v		. 332	White, Paul v
Smyth, Rex v.			Whitworth v. Smith 250
Spiller, Rex v			Williams, Ayling v 399
Standage v. Creighton .			v. Carwardine 566
Steggall, Perryman v			Willis v. Bernard 342
Stokes, Rex v.	-		Willson v. Davenport 531
Strachan, Maspero v		. 514	Wilson v. Collins 373
Sugrue, Brockelbank v.		21	, Pluckwell v 375
	٠. ٠	. 219	Wilton, Hemming v 54
T.	•		Wood, M'Kone v 1
Tanner, Phipps v		. 488	Wood, M'Kone v
Taylor, Goodman v			Woolcock, Rex v 516
Rex v.			Worsley, Farebrother v 102
Temperley v. Scott .		341	Wyatt, Blew v 397
Thomas v. Marsh			l * ' <b></b>
Thompson v. Mosely .			Y.
Thring, Rex v		. 507	
THE	•	. 501	

	•					
						- 1
						i
	•					
						- 1
•						- 1
	•					- 1
						- 1
						1
					•	
			,			
						1
						- 1
						1
						-
	•					
	•					
				•		
						i
						- 1
		·				

# CASES

AT

# NISI PRIUS.

# PROMOTIONS.

In Trinity Vacation, Philip Williams, Henry William Tancred, Francis Ludlow Holt, and Charles Butler, Esqrs., were appointed his Majesty's Counsel learned in the law.

# COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER AFTER TRINITY TERM, 1881.

BEFORE LORD TENTERDEN, C. J.

# M'KONE v. WOOD. June 14.

In an action against a party, for keeping a dog accustomed to bite mankind, it is not essential that the dog should be his; if he harbours the dog, or allows it to be at, and resort to, his premises, that is sufficient.

Case for keeping a dog accustomed to bite mankind. Plea—General issue. On the part of the plaintiff, it was proved, that the dog had bitten the plaintiff, and that it had bitten two other persons before; but one of the witnesses, who proved that he had made a complaint to the defendant respecting the dog, stated, that the defendant had told him that the dog belonged to a person who had been his servant, but who had left him.

It was also proved, on the part of the plaintiff, that the dog was seen about the defendant's premises, both before and after the time when the plaintiff was bitten.

\*2] \*Campbell, for the defendant, submitted that there was not sufficient evidence to shew that this was the defendant's dog; but on the contrary, it was shewn that it was not. He therefore contended that the defendant was not liable in this action.

Lord TENTERDEN, C. J. It is not material whether the defendant was the owner of the dog or not; if he kept it, that is sufficient; and the harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient

keeping of the dog to support this form of action. It was the defendant's duty, either to have destroyed the dog, or to have sent him away, as soon as he found that he was mischievous.

Verdict for the plaintiff.—Damages 5l.

Follett and S. Martin, for the plaintiff.

Campbell, for the defendant.

[Attorneys-J. Humphreys, and E. Young.]

# HIGGINS v. BRETHERTON. June 14.

If a person go to a coach-office, and direct that a place be booked for him by a particular coach, and that be done, and he leave his portmanteau, the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the coach fare; but, if the party merely leave the portmanteau while he goes to inquire if there be an earlier coach, and no place be actually booked, the coach proprietor has no lies at all.

CASE. The first and second counts of the declaration stated that the plaintif had caused a portmanteau, containing deeds, writings, and wearing apparel, to be delivered to the defendant, to be safely and securely kept, and to be redelivered on request; but that the defendant, contrary to his duty, would not redelive when requested. These counts stated special damage. There was also a count in trover. Plea—General issue.

From the evidence on the part of the plaintiff, it appeared, \*that he went to the coach-office of the defendant, in Liverpool, and asked the fare to London by the Express coach; and that, being told 30s., he put down a 30s. Irish note on the counter, which the book-keeper declined taking; that the plaintiff took up the note, asking permission to leave his portmanteau, saying, that he would go by an earlier coach if he could find one, which he did. It was further proved, that the defendant refused to deliver up the portmanteau, unless a sum of 30s. was paid.

For the defendant, witnesses were called, who stated that, after taking up the 30s. note, the defendant said, "Book me an outside place on the Express, and I will leave my portmanteau;" and that an outside place was accordingly booked.

Lord TENTERDEN, C. J., (in summing up.) If you believe that the plaintiff said that which has been stated by the defendant's witnesses, I think that it gives him a lien on the plaintiff's portmanteau for something, certainly not for 30s., but for something; and, as the plaintiff has not tendered any thing at all, that would entitle the defendant to a verdict.

Verdict for the plaintiff.

Sir J. Scarlett and J. Jervis, for the plaintiff.

Campbell, for the defendant.

[Attorneys-Lucas & P., and Shearman & F.]

# \*EAGAR v. DYOTT and HARMAN. June 20.

In an action for malicious prosecution against A. and B., if it appear that both A. and B. entered into a joint recognizance to prosecute and give evidence, but it also appear that A. only employed the attorney, and that B. attended before the magistrate and the Grand Jury at the request of the attorney, the Judge will direct the acquittal of B.

If C. be entrusted to receive money for A., with a written direction for its application, and C. write a letter to A. stating that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C., under the statute 7 & 8 Geo. 4, c. 29, s. 49, not malicious.

MALICIOUS prosecution. The declaration stated that the defendants, without any reasonable or probable cause, indicted the plaintiff. The indictment was set out verbatim in the declaration; (a) and it charged that the plaintiff being an agent of Mrs. Dyott, she deposited in his hands 2002, with a written direction, signed by her, "with a special purpose specified in the same for the disposition" of the money; and the plaintiff, contrary to good faith, converted the money to his own use. The declaration then went on to state that the plaintiff was ac-

It appeared that the defendant, Mr. Harman, was a trustee for the other defendant, Mrs. Dyott, and as such had to pay her 800% a-year, which sometimes the plaintiff received for her. To shew a want of probable cause the plaintiff put in a check for 84%, dated after the alleged embesslement, and before the time of the prosecution. In this check this sum of 84% was stated to be the balance due to Mrs Dyott. Across this check Mrs. Dyott had written her name. The only evidence to shew that the defendant Harman was a prosecutor of the indictment, was the joint recognizance of the two defendants, entered into before Sir Richard Birnie, who was the committing magistrate; which was a recognizance by both the defendants "to prosecute, and give evidence against the plaintiff;" but the magistrate's clerk stated that recognizances were often filled up in a hurry. It was proved by the attorney for the prosecution, that he was employed by Mrs. Dyott, and not by the defendant Harman; and that Mr. Harson "and "only attended before the magistrate, and before the Grand Jury, at his request."

Sir J. Scarlett, for the defendant Harman.—I submit that my client ought to be acquitted. He was only a witness, and was compelled to attend to give his evidence. He neither employed the attorney, nor had he any interest in

the prosecution.

Lord TENTERDEN, C. J. I think on this evidence that I ought to direct an acquittal of the defendant Harman. I know that these recognizances are often

drawn up in a hurry.

To show probable cause, Mr. Harman was called for the defence. He stated that he had paid a sum of money to the plaintiff on account of Mrs. Dyott; and a letter from the plaintiff to Mrs. Dyott, of a subsequent date, was put in, by which he informed her that he had not received this sum of money.

Lord TENTERDEN, C. J. It being shown that the plaintiff denied the receipt of money, which it is proved that he had received, I think I ought to nonsuit. That appears to me to be sufficient evidence of probable cause. Nonsuit.

The plaintiff in person.

F. Pollock and Capron, for the defendant Mrs. Dyott. Sir J. Scarlett and Follett, for the defendant Harman.

[Attorneys-W. Archer, and Beetham, and J. W. Freshfield.]

In the ensuing term, the plaintiff moved to set aside the nonsuit, but the Court refused the rule.

<sup>(</sup>a) The indictment was on the statute 7 & 8 Geo. 4, c. 29, s. 49, which is set out, ante, Vol. 4, p. 49, n. See the cases of Rex v. Prince, ante, Vol. 2, p. 517, and Rex v. White, ante, Vol. 4, p. 46.

Adjourned Sittings in London, after Trinity Term, 1831.

BEFORE LORD TENTERDEN, C. J.

# \*HILLARY v. MORRIS. June 30.

A. was entitled to commission for introducing to a tradesman a purchaser for his business, which was to be paid on the completion of the bargain. After he had introduced the purchaser, but before the matter was settled he became bankrupt, and his assignees brought an action for the commission, which they afterwards discontinued, and wrote to him, saying that they disclaimed all right to the money. A. upon this brought an action in his own name:-Held, that he was not entitled to recover.

Assumpsit to recover commission as an agent on the sale of the defendant's

business of a wine merchant.

It appeared that, in consequence of a letter written by the plaintiff to the defendant, informing him that he should be able to procure a friend of his to become the purchaser of the business, a letter was written in answer by the defendant's authority, containing the particulars of the business, the quantities of stock, the value of the trade, &c. The letter was written for the purpose of being shewn to the plaintiff's friend, but contained an inclosure marked private, which was in these words:—If the sale is complete, I shall be happy to give you a liberal sum upon the premium." The plaintiff became a bankrupt after he had introduced the purchaser, but before the bargain was fully concluded; and his assignees brought an action for the commission. After a time, however, they discontinued the action, paid the costs to the defendant, and wrote to the plaintiff, saying that they disclaimed all right to the money. The plaintiff had not obtained his certificate.

Sir J. Scarlett and Steer, for the defendant, contended that the plaintiff's bankruptcy was an answer to the action, as, after the transfer of his right to his

assignees, he could not have any title to sue.

Campbell and R. V. Richards, for the plaintiff, replied that the disclaimer of the assignees left the plaintiff at liberty to sue in his own right; and that, as the whole of the \*work had not been done at the time of the action to the assignees, the bankrupt might at least maintain assumpsit for his work and labour for the part which occurred subsequent to the bankruptcy,

although he had not obtained his certificate.

Lord TENTERDEN, C. J. I am clearly of opinion that the assignees had no right to transfer the claim in question to the bankrupt or to any body else. The debt was part of the bankrupt's estate, which they were bound to get in for the benefit of the creditors. The bankrupt could only recover for inteducing the purchaser, he having nothing to do with the valuation; and, although he could not recover any thing till the matter was complete, yet, when it was complete, the cause of action would refer back to the time when the work was done, and that was before the bankruptcy. The assignees, therefore, were the parties entitled to sue, and they have renounced their right. I am of opinion that the plaintiff must be called.

Campbell and R. V. Richards, for the plaintiff. Nensuit

Sir J. Scarlett and Steer, for the defendant.

[Attorneys-W. B. Ogden, and Reynolds.]

#### BEFORE MR. JUSTICE PATTESON,

(Who sat for the Lord Chief Justice.)

## \*BARFORD v. NELSON. July 1.

Practice as to certificates for execution, under the statute 1 W. 4, c. 7, s. 2.

CASE for an injury occasioned by the neligent driving of a coach, called the Leeds Courier, of which the defendant was proprietor, to a cart belonging to the plaintiff.

The case was one of contradictory evidence, and the jury, after retiring for a

considerable time, found a verdict for the plaintiff.

Curwood, upon this applied to PATTESON, J., for a certificate, to entitle the

plaintiff to immediate execution.

F. Pollock, for the defendant, said that Lord Tenterden had laid down a rule, that, if there was a reasonable ground of defence, the case should take the ordinary course of the law; and that he understood that Lord Lyndhurst had, in the Court of Exchequer, laid down a similar rule; and he submitted that, according to those rules, the present case, about which the jury had so long deliberated, was not one in which the certificate should be given.

PATTESON, J. As I am informed that Lord Tenterden has laid down a particular rule, I should be desirous to act, and I will act here, upon that rule. I think it is for the Judge at the time to decide the matter, as the words of the act are—"that, in his opinion, execution ought to issue," &c. And in this case I should say, it is one in which there ought to be instant execution, as it was clearly a question for the jury, and there can be no possibility of disturbing the verdict hereafter. I think that the plaintiff \*ought to have the fruits of his verdict at once; but I will communicate with Lord Tenterden on the subject.

Campbell and Curwood, for the plaintiff. F. Pollock and Holt, for the defendant.

[Attorneys-C. E. Reynolds and Pritchard.]

We are informed by Mr. Bellamy that no certificate was granted.

In the case of Wright v. Guiver, which was also an action for negligent driving, tried before Lord Lyndhurst, in the Exchequer, on the 20th of June, Bompas, Serjt., for the plaintiff, asked for execution at any time his Lordship pleased in the course of the vacation. Andrews, Serjt., for the defendant, submitted that the act of Parliament was not intended to apply to cases of this description. Lord Lyndhurst, C. B., refused to grant the application, being of opinion that it was not a case in which there should be any departure from the usual course.

In the case of Crookshank v. Rose, post, p. 19, which was an action on a bill and a note, given for a public house score, to which the defence was, that part of the demand was illegal and the statute 24 Geo. 2, c. 40, being for spirits; Lord Tenterden refused to certify, saying, that he did not think it a case for execution before the ordinary time.

In the case of Hambidge v. Crawley, (C. P., June 29, 1831), which was an action for criminal conversation, the plaintiff, to prevent a verdict passing against him in consequence of the prevarication of one of his witnesses, consented to be nonsuited; and Tindal, C. J., on the application of Wilde, Serjt., after hearing Payne, for the plaintiff, in the absence of Storks, Serjt., and after taking time to consider, directed execution to issue at the expiration of a month.

The following cases from the Oxford Circuit, being on this subject, we have subjoined them here—

# \*WORCESTER ASSIZES, 1831.—Coram Park, J.

### WARD v. CROCKET. July 20.

DEET for the price of certain windows sold by the plaintiff to the defendant.

There was a verdict for the plaintiff. Godson applied for a certificate to entitle the plaintiff to immediate execution.

Mr. Justice PARK.—I shall not allow immediate execution to issue. The action is in debt, and the defendant is obliged to plead, and come to trial, or the plaintiff might sign final judgment without any writ of inquiry, or proof of the amount of his debt. Lord Tenterden does not grant any certificate if the action is in debt.

Certificate refused.

Godson and -—, for the plaintiff. R. V. Richards, for the defendant.

[Attorneys-Holdsworth, and ---.]

# STAFFORD ASSIZES, 1831,—Coram Patteson, J.

### BELL v. SMITH. July 25.

Assumest on promissory notes. Plea—General issue.

There was a verdict for the plaintiff.

Russell, Serjt., applied for a certificate to entitle the plaintiff to immediate execution. Greaves, for the defendant.—I am in a condition to prove that the writ in this case was issued before the statute of 1 W. 4, c. 7, passed; and I submit that that statute only applies to actions commenced after its passing. The word "brought" of itself is equiv-cal; but, coupled with the words "may be," its operation is clearly future. In this act of \*Parliament the word "may" is always so used, and, in some instances, is [\*11 accompanied by the word "shall."

Mr. Bellamy said, that Lord Tenterden, C. J., had granted certificates immediately after the passing of the act.

Mr. Justice Patteson.—I entertain no doubt about it. Russell, Serjt., and R. V. Richards, for the plaintiff. Greaves, for the defendant.

Certificate granted.

#### [Attorneys—A. Flint, and Johnson & W.]

By the statute 1 W. 4, c. 7, s. 2, which was passed on the 11th of March, 1831, it is enacted, "That, in all actions brought in either of the said Courts, by whatever form of process the same may be commenced, it shall be lawful for the Judge before whom my issue joined in such action shall be to be tried, in case the plaintiff or demandant thereis shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendent or tenant, to certify under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject, or not, to any condition or qualification, and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacatios or term; and the postes, with such certificate as a part thereof, shall and may be entered of record as of the day on which the judgment shall be signed, although the writ of distrias juratores or habeas corpora juratorum may not be returnable until after such day: gas juratores or naceas corpors jurasorum may not be actively to such judgment to postpose.

Provided always, that it shall be lawful for the party entitled to such judgment to postpose. the signing thereof."

## \*WELLS v. FLETCHER. July 1.

Persons who cohabit as man and wife, after a marriage de facto, supposed by both to be a good marriage in law, may, after the marriage is found to be a nullity, give in evidence, in a Court of justice, statements made by each other during the cohabitation.

Assumpsit to recover a sum of 141., for work and labour as a haymaker.

For the purpose of shewing that the plaintiff was a person in a superior station of life to that of a labourer, and that, at the time of the work and labour in question, he did not look for payment for what he did, a female witness was called on the part of the defendant. On her examination on the voire dire, by F. Pollock, for the plaintiff, she said that she had been married to the plaintiff, at St. Pancras Church, by banns.

Sir James Scarlett, for the defendant, asked her, whether she had not since

been divorced.

F. Pollock, objected, that, after proof of a marriage de facto, a woman could not, on the voire dire, shew that she was unmarried; as, without the sentence of divorce, it was impossible to tell, whether the divorce was a vinculo matrimonii, or only a mensa et thoro.

Sir J. Scarlett,—On the voire dire, a witness, who has disqualified himself by his statements, is at liberty to set himself right by his statements, without the

production of any documents.

The witness said, that she was married to a person named Duke; but, not seeing him for thirty years, she thought he was dead, and therefore married the

plaintiff; but she afterwards found that Duke was still living.

PATTESON, J.—There was no occasion for any divorce in this case; the second marriage is a mere nullity. Whatever doubt there may be as to the question—"Were you divorced?" unquestionably, in this view of the case, the \*13]

\*marriage is got rid of. I should be inclined to think, that the other question might be put, but there is no doubt that this may.

The witness was then examined, and was proceeding to state something which

the plaintiff had said while she was living with him.

F. Pollock, objected, that what occurred while they were living together as man and wife was protected, and could not be received against the plaintiff.

PATTESON, J. I think, now the connection is dissolved, it may be given in evidence.

The evidence was then received, and a verdict was eventually found for the defendant.

F. Pollock and R. V. Richards, for the plaintiff. Sir J. Scarlett and Wallinger, for the defendant.

[Attorneys-W. S. Paterson, and J. H. Webber.]

See the cases of Batthews v. Galindo, Vol. 3 of these Reports, p. 238, S. C. 1 M. & P. 565, and Hawkings v. Inwood, Vol. 4, p. 148.

# CLENDON v. DINNEFORD. July 1.

A. who was paying his addresses to a lady, lost her letters and two memorandum books containing remarks of his own; B. found them, and kept them, on the ground that the books contained matter injurious to him, and also shewed them to others: A. sent a person to demand them of B., who, at first, refused to give them up at all; but, before the person left, said he would not give them to him, but would 0. or D. C. went, and B. offered to give him the letters and one book, which C., after consulting with A., accepted, saying that he made a sacrifice to obtain the letters:—Held, that there was a conversion of the whole; but the verdict was only for nominal damages.

THE first count of the declaration stated, in substance, that the plaintiff was paying his addresses to a certain \*lady, and lost certain letters written to him by her, which came to the defendant's possession, who shewed them to other persons, and converted them to his own use; in consequence of which conduct on the part of the defendant, the match was broken off. The second count was nearly similar. The third count was a count in trover for certain letters and memorandum books. There was a count for a libel in a letter written to the father of the lady in question; and also several counts for words uttered to various persons, the lady's father not being one. These words were not actionable in themselves; and the only special damage stated in the declara-

tion was, the breaking off of the match with the lady. Plea—Not guilty.

The plaintiff and defendant were both, up to the month of July, 1830. assistants to a gentleman named Tebbs, a chemist and druggist, carrying a business in Bond Street. At that time the plaintiff quitted, and went down to his parents, who resided at Deal, in Kent. For some time previously, the plaintiff and defendant had not been upon very good terms, each being desires of obtaining the business of their employer, who was about to retire. Two or three days after the plaintiff had left, the defendant told Mr. Tebbs that he had found some letters and memorandum books, which the plaintiff had left behind him, in which he had written abusive things of him (Mr. Tebbs). The defendant held the papers, &c., in his hand, and wished Mr. Tebbs to look at them; but he declined. The defendant said he should keep them, as they were of some consequence to his character. The letters were those of a young lady residing at Deal, to whom the plaintiff had been for some time paying his addresses: and the books, which were two in number, contained copies of his answers to them, and other observations. The defendant shewed them to several other persons besides Mr. Tebbs. In the month of September, 1830, a person named Hannah, went to the defendant, by the plaintiff's authority, and demanded the letters and the two memorandum books. \*The defendant at first refused to deliver them at all; but, as Mr. Hannah was leaving, he said that he would not deliver them to him; but, if either Mr. Fenton or Mr. Chitty would call, he would deliver them up. In consequence of this, Mr. Chitty, who was the plaintiff's brother-in-law, went, and the defendant offered to deliver up the lady's letters and one of the books, saying, that he should keep the other book for his own justification, as it contained observations injurious to him. Mr. Chitty said that he could not take a part only, without consulting the plaintiff. He did accordingly consult the plaintiff, who authorized him to receive the part offered, as he thought it right to make some sacrifice to obtain the lady's letters. The letters and one book were therefore delivered up to Mr. Chitty's order. It appeared that the defendant said in his conversation with Mr. Hannah, that he should write to the friends of the young lady at Deal, and would "take devilish good care to break off the connection in that quarter."

The lady's father was called as a witness for the plaintiff, and stated, that, while the plaintiff was paying his addresses to his daughter, he received several anonymous letters in July and August; and, about the 14th of September, he received a letter signed with the defendant's name; after which he admitted that he broke off the connection, but denied that the contents of the letter influenced him in his conduct. He added, that he came to London, and had a conversation with the defendant, who spoke as a man who had been injured by the plaintiff; but he stated, that the conversation had no direct influence upon his mind, 50 as to induce him to break off the match, though it did induce him to hasten the communication of his resolution, which had been previously formed. It appeared, that he did not call upon the plaintiff for any explanation; but, on the contrary, when the plaintiff called upon him, refused to tell him anything that

had taken place.

\*The match was broken off by a letter written to the plaintiff by the [\*]6 lady's father, in which, after stating some pecuniary liabilities under which

the plaintiff was, as the chief reason, he desired the restoration of his daughter's letters, stating that she was indignant at finding that they had been so carelessly kept, as to have been shewn about by the defendant in London.

The letter from the defendant, complained of as the libel, was read; but, from the plaintiff's attorney not having been able to obtain any copy, it was not

set out at all correctly in the declaration.

Sir James Scarlett, upon this, contended that no part of the declaration was proved; and, therefore, that the plaintiff must be nonsuited.

PATTESON, J., intimated that the case must at least go to the Jury with re-

spect to the book which had not been returned.

Sir J. Scarlett.—The plaintiff cannot maintain trover for that book, without proving a fresh demand of it, as he consented to receive the other papers without it.

Denman, A. G. There is sufficient evidence of a conversion long before. Any improper keeping and using of books which had been improperly obtained, is a conversion. But, supposing him to hold them merely as a trustee, he was bound to deliver them up when they were demanded; he had no right to make such a condition as has been proved; the consent of the plaintiff, if obtained at all, was an extorted consent.

Kelly, on the same side. The law is, that, if the conversion is at any time complete, what happens afterwards does not destroy the right of action, it only \*17] makes \*a difference in the damages. And the finding, (knowing there was no right to use,) and keeping, reading, and communicating to others,

is a clear conversion.

PATTESON, J. I do not think it will be disputed that an actual conversion cannot be purged. I think the shewing of the letters is not a conversion; and it really is brought to the question, whether the plaintiff waived the delivery of the second book.

There had been two refusals before. Kelly.

Sir J. Scarlett. The defendant only says he will not give them to Hannah, but expresses his willingness to deliver them to Chitty or Fenton. This is not evidence of an intention to keep them, and convert them to his own use.

PATTESON, J. As far as I remember the cases, I think the refusal to deliver to one person, though accompanied by a declaration of willingness to deliver to another, is a conversion. I speak with hesitation; but that is my impression. I think there was a case in which a horse was, after detention, returned in as good a condition as it was in at first, and yet it was held to be a conversion.(a) I think it must go to the Jury, for them to say whether the whole amounts to a conversion.(a) It will only affect the damages. No special damage has been proved; for the only special damage is the loss of the marriage, and that does not appear to have been occasioned by the defendant's conduct.

Denman, A. G. The acceleration of the communication by the lady's father to the plaintiff, of his resolution to break off the match, is sufficient proof of the \*18] special damage. \*Besides, his letter states that his daughter was indignant ather letters having been shewn about.

Sir J. Scarlett then addressed the Jury, and contended that there was no con-

version proved.

PATTESON, J., in summing up, said—The special damage is not proved. The libel is not proved. The slander is not proved, for the words are not actionable in themselves, and the special damage is not proved to have been the consequence of them. It is therefore reduced to this question, what are the damages to be recovered in consequence of the conversion. I am of opinion that there is a conversion proved; therefore, the question is only as to the damages. can hardly tell the value of the books, nor what damages ought to be given in the case; because there has been a delivery of the letters and one book, and a

<sup>(</sup>a) See Mackinson v. Rawlinson, 9 Price, 460.

waiver of the delivery of the other. I should say, under these circumstances, that the plaintiff is entitled to nominal damages only. But it is for you to my whether you agree with me as to the amount. You will find what damages you think proper.

Terdict for the plaintiff, damages 1s. on the count in trover. And for the defendant on the other counts, with leave to move for a nonsuit.(a)

Denman, A. G., and Kelly, for the plaintiff. Sir J. Scarlett and Platt, for the defendant.

[Attorneys-Randall, and Brutton & Olipperton.]

\*BEFORE LORD TENTERDEN, C. J.

[\*19

## CROOKSHANK v. ROSE. July 2.

A publican took from a person, who boarded and lodged in his house, a bill and a note, both at one time, for his score, part of which consisted of a demand for spirits, but not to the amount of either bill or note; money was also paid on account:—Held, in an action on the securities, that, although they were given at the same time, the plaintiff might recover on one of them, and also that he might apply the money paid in reduction of the demand for spirits, although such demand could not be recovered, in consequence of the act of the 24 Geo. 2, c. 40.

Assumpsit on a promissory note for 10l. 3s. 6d. made by the defendant payable on demand, and a bill of exchange for 101. 7s., drawn by the plaintiff and

accepted by the defendant, payable at eighty-one days from the date.

It appeared that the defendant who was a seafaring man, lodged at a public house, which was kept by the plaintiff, and the bill and note were given at the same time for the defendant's score, amounting to 20%. 10s. 6d., being partly for board and lodging, and partly for spirituous liquors consumed by him in the public room; but the witness who proved it, said, that the demand for those liquors did not equal the amount either of the bill or the note. Small sums had been paid at different times on account.

Campbell, for the defendant, contended, on the authority of Scott v. Gilmore, 3 Taunt. 226, (cited ante, Vol. 4, p. 368, in a note in Owens v. Porter, which

see,) that the plaintiff could not recover.

LORD TENTERDEN, C. J.—It is quite clear that some part of the consideration is for spirits, but not to the full amount of either of the securities. Therefore it seems to me that the plaintiff may recover on one of them.

Campbell.—I submit, that, as they were given at one time, for one account,

they are both bad.

LORD TENTERDEN, C. J.—You may just as well say, \*that they are both good; you have no more right to say the one than the other; but money has been paid on account.

Campbell. The money paid must be applied to a legal debt.

Lord TENTERDEN, C. J. They may apply it to what part they please; may they not apply the cash to that which the act says they shall not recover?

Campbell. I submit that it is not a legal debt.

Talfourd, for the plaintiff. The act of Parliament says only that the party shall not recover—it does not avoid the debt.

Lord TENTERDEN, C. J. The act does not avoid the security, but the au-

hority cited goes to that extent. I think that, if the plaintiff takes a verdict or the amount of one of the securities, it will be right.

Campbell assented to this, and the plaintiff had a verdict for 101. 7s.

Talfourd applied for immediate execution.

Lord Tenterden, C. J., refused, saying that he did not think it a case in which he ought to give it.

Talfourd, for the plaintiff. Campbell, for the defendant.

[Attorneys-J. Pattison, and Shearman & F.]

# \*21] \*BROCKELBANK v. SUGRUE.(a) July 4.

A memorandum indorsed on a ship's policy of insurance, for a change of voyage, was signed by an agent of the insurance company. It was proved that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it; though, when a new policy was required, he always sent the proposals to the company:—Held, that this was sufficient proof of the agent's authority to sign such memorandums; and that the other policies on which such memorandums had been signed, need not be produced.

This was an action against the defendant, as a member of the St. Patrick's Insurance Company, on two policies of insurance, the eng on the ship Hebe, the other on her freight. The original policy on the ship was, at and from Liverpool to Quebec, during the ship's stay and loading there, and thence back to her port of discharge in the United Kingdom. The policy was dated June 30th, 1825. On the back of this policy the following memorandum, dated August 26th, 1825, was indorsed—"The Hebe being unavoidably detained beyond the intended time of sailing to Quebec, the voyage is changed, and the vessel proceeds from Liverpool to St. John's, New Brunswick, and at and from thence back to London; and, in consideration of one guinea per cent. additional, the company agree to continue on the risk until the vessel should be arrived back in London, or her port of discharge in the United Kingdom." This memorandum was signed by Mr. Stewart.

To prove his authority as an agent for the company, Mr. Mackey was called. He said, "Mr. Stewart signed for the company; we did not send policies to Ireland, to have such an alteration as this made in them. I have known losses paid on policies having such alterations signed by Mr. Stewart, without being

sent to Ireland."

Sir J. Scarlett. Those policies ought to be produced.

Lord TENTERDEN, C. J. I think not; we do not want the contents of the particular policies. The witness is only asked as to the course of dealing.

\*Mr. Mackey, in his cross-examination, said: "Proposals for policies were made to the agent in London. The proposals were sent to Dublin, and, if approved, a policy was returned, and handed to the assured. When the agent made an alteration, he always advised the company of it." In re-examination, Mr. Mackey stated, that such alterations as the one in question were made very frequently.

Sir J. Scarlett. I must object to the reading of this memorandum. An agent for receiving proposals has nothing in his agency which can authorize him to make a new policy on the back of the old one; and, if it is to be said that in this case there was such an authority, it must be strictly proved. The very nature of the agency proved shews that Mr. Stewart never was the general agent

of the company, as he was to send the proposals to Dublin.

Vol XXIV.—28

<sup>(</sup>s) This was a second trial of the case reported in 1 Barn. & Ad. 81, where it was held, that the memorandum indorsed on the policy in this case did not require a new stamp.

Lord TENTERDEN, C. J. Taking the whole of the evidence, there is proof of an agency for the purpose of making such alterations as this. If, when the company were informed of the alteration, they had disapproved of it, perhaps they might have repudiated it.

The memorandum was read.

The cause was referred.

F. Pollock and Follett, for the plaintiff.

Sir J. Scarlett and Campbell, for the defendant.

[Attorneys-Clutton & Co., and Oliverson & Co.]

\*Sittings at Westminster after Michaelmas Term, 1831. [\*23

## REX v. MOODY. Nov. 26

An insolvent debtor, omitting to state in his schedule debts due to him, is not indictable for perjury, although he has sworn to the truth of his schedule; but he must be indicted for a misdemeanor, under sect. 70 of the insolvent debtors' act, 7 G. 4, c. 57. Perjury under sect. 71 of that act, is only committed as to things falsely stated in the schedule. The form of oath at the end of an insolvent's schedule is an affidavit in writing, and may be so stated in an indictment for perjury.

Debts due to the insolvent are "effects or property," within sect. 70 of the insolvent

debtors' act.

INDICTMENT for perjury by an insolvent debtor. The indictment stated the petition of the defendant for his discharge, and the other proceedings in the Insolvent Debtors' Court; and that the defendant did make affidavit in writing, that the contents of the schedule were true; whereas in truth and in fact the contents of the schedule were not true, as several debts due to him (which were specified) were not included in it.(a)

(a) Although it was held that the omission of debts is not perjury within the 71st section of the insolvent debtors' act, yet, as the form of the indictment would be useful in drawing an indictment for the misdemeanor under sect. 70 of the act, we have subjoined it. It would be also useful in the drawing of any pleading in which it might be necessary to state the proceedings in the insolvent debtors' court. It was as follows:—

Middlesex, to wit-The jurors for our lord the king upon their oath present, that here tofore and after the passing of an act of Parliament made and passed in the seventh year of the reign of our late sovereign lord George the Fourth, intituled "An Act to amend and consolidate the laws for the relief of insolvent debtors in England," to wit, on the 31st day of May, in the seventh year of the reign of our said late lord George the Fourth by the grace of God of the united kingdom of Great Britain and Ireland then king defender of the faith, John Doble Moody, late of the parish of Saint Clement Danes, in the county of Middlesex, surgeon, being then a prisoner in actual custody within the walls of a certain prison in England (to wit, in the debtors' prison in Whitecross street, in the city of London), to wit, at the parish aforesaid, in the county of Middlesex, upon process for debt, did, within the space of fourteen days next after the commencement of such his actual custody, apply, by petition, in a summary way, to the Court for the relief of insolvent debtors in the said act of Parliament mentioned, and thereby petitioned for his discharge from such custody according to the provisions of the said act of Parliament, which said petition was then duly subscribed by the said John Doble Moody, then and there being such prisoner as aforesaid, and filed in the said Court, to wit, at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex, and that afterwards, and within a contain time and within a contain time and within a contain time and within a contain time. and within a certain time, to wit, twenty days after the said petition was so filed as aforesaid, to wit, on the 20th day of June, in the seventh year aforesaid, the said day and time having been then and there by the said Court thought reasonable in that behalf, the said John Doble Moody then and there being and continuing such prisoner as aforesaid, did, pursuant to the said act of Parliament, to wit, at the parish of Saint Clement Danes sforesaid, in the said county of Middlesex, deliver into the said Court a schedule, intituled, the schedule of John Doble Moody, late of 91, Piccadilly, and of Osnaburg Row, Pimlico, both in Middlesex, surgeon and apothecary and musical instrument maker (meaning himself,

\*24-\*25] The defendant's petition and schedule, filed in the \*Insolvent Debtor's Court, were put in, and his signature was \*proved the following words at the end of the schedule: "I, John Doble Moody, do hereby

the said John Doble Moody), and in and by which said schedule it was then and there stated and declared by the said John Doble Moody, amongst other things, that the said schedule then and there contained a full, true, and perfect account of all debts at the time of presenting the said petition owing to him the said John Doble Moody, or to any person or persons in trust for him or for his benefit or advantage, either solely or jointly with any other person or persons, and the names and places of abode of the several persons from whom such debts were due or owing, and of the witnesses who could prove such debts, so far as he the said John Doble Moody could set forth the same; which said schedule was then and there subscribed by the said John Doble Moody, then and there being and continuing such prisoner as aforesaid, and was then and there forthwith filed in the said Court: and the jurors aforesaid, upon their oath aforesaid, present that the said matters and things as stated and declared in and by the said schedule as aforesaid, then and there were material to a due and right adjudication upon the said petition and schedule of the said John Doble Moody by the said Court: and the jurors aforesaid, upon their oath aforesaid, further present that afterwards, to wit, on the 28th day of July, in the seventh year aforesaid, at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex, the said petition being then and there so filed, and the said schedule so then and there delivered into and filed in the said Court as aforesaid, the said John Doble Moody then and there being and continuing such prisoner as aforesaid, and contriving and intending to deceive and impose upon the said Court, and to cheat and defraud divers persons then and there being creditors of him the said John Doble Moody, and to obtain his the said John Doble Moody's discharge out of the custody in which he then and there was as aforesaid, came in his own proper person before Henry Revel Rey-nolds, Esq., John Greathed Harris, Esq., Thomas Barton Bowen, Esq., and William John Law, Esq., then and there being respectively commissioners of the said Court, to wit, at the Court-house in Portugal street, Lincoln's Inn Fields, at the parish of Saint Clement Danes, in the said county of Middlesex, the time and place last aforesaid having been in due manner appointed by the said Court for the hearing of the matters of the said petition and schedule, and the said John Doble Moody then and there in due form of law was sworn, and did take his corporal oath upon the holy gospel of God, before the said Henry Revell Reynolds, John Greathed Harris, Thomas Barton Bowen, and William John Law, touching and concerning the truth of the matters contained in the said petition and schedule, the said Henry Revell Reynolds, John Greathed Harris, Thomas Barton Bowen, and William John Law, then and there being respectively such commissioners as aforesaid, acting under the powers of the said act of Parliament, and then and there having sufficient and competent authority to administer an oath to the said John Doble Moody in that behalf; and that the said John Doble Moody being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there, upon his oath aforesaid, falsely, maliciously, wickedly, wilfully, and corruptly did say, depose, swear, and make affidavit in writing, that the contents of his the said John Doble Moody's said petition filed in the said Court, and also of his said schedule, and of all and every part thereof respectively, were true; whereas, in truth and in fact, the contents of the said schedule, and of all and every part thereof, were not then and there true; and whereas, in truth and in fact, the said schedule did not then and there contain a full, true, and perfect account of all debts at the time of presenting the said petition owing to the said John Doble Moody, or to any person or persons in trust for him or for his benefit or advantage, nor did the said schedule then and there contain the names and places of abode of the several persons from whom such debts were due or owing, and of the witnesses who could prove such debts, so far as he the said John Doble Moody could set forth the same, as the said John Doble Moody, at the time of his so swearing and making affidavit as aforesaid, well knew, (to wit) at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex; and whereas, in truth and in fact, at the time of presenting the said petition, there had been and then were divers debts owing to the said John Doble Moody, and for his benefit and advantage, (to wit) a certain debt and sum of 111. 2s. 11d. from Ulysses Bagenal, Lord Downes, a certain debt and sum of 21. 19s. from one Sarah Vickers, a certain debt and sum of 21. 4s. 6d. from one Thomas Ashmore, a certain debt and sum of 11. 3s. 6d. from one Benjamin Keene, a certain debt and sum of 4l. 4s. 6d. from one Eliza Lucy Vestris; a certain debt and sum of 71. 4s. 6d. from Granville Somerset; a certain debt and sum of 11. 7s. from one Charles Wyndham; a certain debt and sum of 2l. 10s. from one Madame Cossagne; a certain debt and sum of 6l. 16s. from one John Prosser; and a certain debt and sum of 7l. 0s. 6d. from one Edward William Lake, all which said several last-mentioned debts and sums of money, and the names and places of abode of the said respective persons from whom the

[\*26

swear, that the contents \*of my petition, filed in this honourable court, and also of this my schedule, and of all and every part thereof respectively, are true. So help me God."

same then and there had been and were due and owing as aforesaid, were, at the time when the said John Doble Moody so swore and made affidavit as aforesaid, omitted and not contained in the said schedule, and could and might at the said last-mentioned time have been set forth in the same by the said John Doble Moody, (to wit) at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex, as the said John Doble Moody, at the time of his so swearing and making affidavit as aforesaid, well knew. (to wit) at the said parish of Saint Clement Danes, in the county of Middlesex aforesaid and so the jurors aforesaid, upon their oath aforesaid, do say that the said John Doble Moody, on the said 28th day of July, in the seventh year aforesaid, at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex, before the said Henry Revel Reynolds, John Greathed Harris, Thomas Barton Bowen, and William John Law, so to aforesaid having sufficient and competent authority to administer the said oath to the said John Doble Moody, falsely, maliciously, wickedly, and wilfully, by his own act asc consent, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great displeasure of almighty God, in contempt of our said lord George the Fourth, the then king, and his laws, to the great damage of the said creditors of the said John Doble Moody, against the form of the statute in such case made and provided, and against the

peace of our said lord George the Fourth, the then king, his crown and dignity. In an indictment for the misdemeanor under sect. 70 of the insolvent debtors' act [set out post, p. 29), if the party were charged with omitting debts due to him, it would be proper to specify those debts in the indictment, as, if they were not stated, the indictment

would be open to an objection, founded on the same reasons as those on which the decision proceeded in the case of Rex v. Hepper, ante, Vol. 1, p. 608.

In the case of Rex v. Bradbury, which was tried before Mr. Justice Gaselee, at the Warwick Summer Assizes, 1830, in which Mr. Hill was for the prosecution, and Mr. Amefor the defence, the defendant was convicted and had judgment against him on the following count, which was the third count of the indictment, the other counts failing: it was

as follows:-

And the jurors aforesaid, on their oath aforesaid, do further present, that, heretofore, to wit, on the 4th day of August, in the tenth year of the reign aforesaid, at Warwick afortsaid, in the county aforesaid, the said first-mentioned Robert Bradbury was duly brought before Henry R. Reynolds, Esq., one of the commissioners of the Court for relief of insivent debtors in England, and duly appointed and empowered then and there to examin the said Robert Bradbury touching the matters of a certain schedule by him the said Robert Bradbury therefore delivered into the Court aforesaid, to wit, at Warwick aforesaid, in the county aforesaid, and purporting to contain such things as well required to be contained in such a schedule, according to the statute in such case made and provided. And the jurors aforesaid, on their oath aforesaid, do further present that the said Robert Bradbury did then and there state and declare, and it then and there was and still is stated and declared by the said Robert Bradbury, in and by the said schedule, and it then and there was and is still contained in and by the said schedule, to the tenor and effect following; that is to say [it here set out the matter verbatim], as by the said schedule will fully appear; and the said Robert Bradbury then and there subscribed the said schedule. and did there afterwards, to wit, on the 30th day of June, in the year aforesaid, at Warwick aforesaid, in the county aforesaid, file the same in the said Court. And the jurors aforesaid, on their oath aforesaid, do further present that the said Robert Bradbury. So being before the said Henry Revell Reynolds, Esq., so being such commissioner as aforesaid, in the said Court was duly sworn, and did take his corporal oath upon the holy gospel of God, concerning the truth of the contents of the said schedule (the said Henry Revell Reynolds, Esq., then and there having a lawful and competent power and authority to administer the said oath to the said Robert Bradbury in that behalf); and that the said Robert Bradbury, being so sworn, did then and there, to wit, on the day and year last mentioned, to wit, at the said Court house at Warwick aforesaid, in the county aforesaid, upon his oath aforesaid, before the said Henry Revell Reynolds, Esq., so having such power and authority, falsely, corruptly, knowingly, wilfully, and maliciously depose and swear that the contents of the said schedule, and all and every part thereof were Whereas, in truth and in fact [here were set out the different assignments of perjury.] And the jurors aforesaid, on their oath aforesaid, do further present that the said matters so declared and stated by the said Robert Bradbury, and contained in his said schedule. were material in the matters of the said petition and of the said schedule, and it, during the time aforesaid, became and was material to ascertain the truth thereof, to wit, in the county aforesaid. And the jurors aforesaid, on their oath aforesaid, do say, that the said Robert Bradbury, on the 4th day of August, in the year aforesaid, before the said Henry

It was also proved that the words "by the Court," written \*under the jurat, were of the handwriting of the chief clerk of the Insolvent Debtors' Court.

\*Busby, for the defendant.—This is charged as perjury committed in an affidavit in writing.

Lord TENTERDEN, C. J.—This is an affidavit at the end of the schedule.

I am quite clear that it is an affidavit in writing.

All the proceedings in the Insolvent Debtors' Court, which were stated in the indictment, were put in and read. In the schedule, the debts mentioned in the indictment were not specified; and in an account-book of the insolvent they were marked "paid;" however, one of the persons, a Mrs. Vickers, from whom the indictment charged that a debt was due to the insolvent, stated that she had not paid the debt so due from her till after the discharge of the defendant, and that she had paid it to a person named Davis, who had been the defendant's assistant.

Adolphus, for the prosecution, wished to call another person to prove that a debt not stated in the schedule was due from him to the insolvent at the time of his petition; but this debt was not specified in the indictment. nor was the name of the alleged debtor mentioned in it at all.

Lord TENTERDEN, C. J.—I think you are confined to persons mentioned in the indictment. The defendant is to have notice of what he is charged with omitting.

The witness was not examined.

Busby, for the defendant—By the 60th section of the Insolvent Debtors' act,(a) the wilfully omitting property from a schedule is made an offence per se; and that is the offence if any, committed by the defendant. By the 71st section, (b) any one torswearing himself is to suffer the \*same penalties as in cases of perjury. Now, I should submit the perjury clause is

Revell Reynolds, Esq., so being such commissioner as aforesaid, in the said county, to wit, in the county aforesaid, the said Henry Revell Reynolds, Esq., having such power and authority as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, did commit wilful and corrupt perjury, in contempt of our lord the King and his laws, to the evil example of all others, against the form of the statute in such case made and provided, and against the peace of our said

lord the King, his crown and dignity.

(a) By the stat. 7 Geo. 4, c. 57, s. 70, it is enacted, "That in case any prisoner shall, with intent to defraud his or her creditors or creditor, wilfully and fraudulently omit in his or her schedule, so sworn to as aforesaid, any effects or property whatsoever, or retain or except out of such schedule, as wearing apparel, bedding, working tools and implements, or other necessaries, property of greater value than 201., every such person so offending, and any person aiding and assisting him to do the same, shall, upon being thereof convicted by due course of law, be adjudged guilty of a misdemeanor, and thereupon it shall and may be lawful for the Court before whom such offender shall have been so tried and convicted, to sentence such offender to be imprisoned and kept to hard labour for any period of time not exceeding three years: and that in every indictment or informa-tion against any person for such offence, it shall be sufficient to set forth the substance of the offence charged on the defendant, without setting forth the petition, or conveyance or assignment to the provisional assignee, appointment of assignee or assignees, or any conveyance or assignment whatever, or balance sheet, order for hearing, adjudication, order of discharge or remand, or any warrant, rule, order or proceeding of or in said Court, except so much of the schedule of such prisoner as may be necessary for the purpose."

(b) By this section it is enacted, "That, if any prisoner who shall apply for his or her discharge under the provisions of this act, or any other person taking an oath under the provisions of this act, shall wilfully forswear and perjure himself or herself in any oath to be taken under this act, and shall be lawfully convicted thereof, he or she so offending shall suffer such punishment as may by law be inflicted on persons convicted of wilful and corrupt perjury; and that in all cases wherein by this act an oath is required, the solemn affirmation of any person, being a quaker, shall and may be accepted and taken in lieu thereof; and that every person making such affirmation, who shall be convicted of wilful false affirmation, shall incur and suffer such and the same penalties as are inflicted

and imposed upon persons convicted of wilful and corrupt perjury."

affirmative, and applies to that which the party states affirmatively; and that, with respect to omissions, the other section applies. The indictment, therefore, ought to have been, not an indictment for perjury, but for the offence under

the 70th section of the act.

Adolphus, for the prosecution.—The offence of perjury is quite a distinct offence from that created by the 70th section of the statute; and, although, the latter offence may have been committed, yet the crime of perjury has been committed also, to give it effect. If a man took up a schedule, and were told to put in things left out, and he would not do so, he would be within the 70th section; but, if he swore to that schedule, he would perfect the offence of perjury. The 70th section does not confine the operation of the perjury clause, but the offence under that section may be committed when there is no perjury.

Busby.—To come within the 70th section, the omission must be in a schedule

"so sworn to as aforesaid."

LORD TENTERDEN, C. J.—Those words are certainly in the 70th section, and I think that debts must be taken to be "effects or property." There are many cases in which perjury would not be committed unless some act of Parliament \*declared that the false swearing should be perjury. This act of Parliament appears to contemplate two cases—those of omission and those of commission; and I must consider that the 71st section applies to those cases which are not included in the 70th. I think the defendant must be acquitted.

Verdict—Not guilty.

Adolphus and Follett, for the prosecution.

Busby, for the defendant.

[Attorneys-Knight, and Drawbridge.]

## GASKELL, Administrator of ISABELLA JACKSON, v. MARSHALL, Knt., and Another. Nov. 30.

An intestate died in the month of August: her next of kin took out letters of administration in the same month, and went and lived in her house till the month of November. when the goods of the intestate in the house were seized under a fieri facias against the administrator for a debt of his own:—Held, that an action lay against the sheriff by the administrator, in his representative capacity, for this seizure. But, semble, that, if the administrator had remained in possession for a very long time, it would have been otherwise.

TRESPASS against the Sheriff of Middlesex, for taking furniture which had belonged to the intestate at the time of her decease, and detaining it till a sum

of money was paid. Plea-Not guilty.

It appeared that the intestate died on the 13th of August, 1830; and that, on the 20th of August, the plaintiff, being her nephew, took out letters of administration, and went with his wife to live in the intestate's house, in which this furniture was. It was distinctly proved that the furniture belonged to the intestate at the time of her decease, and that it was taken by the defendants in the month of November. 1830.

Gurney, for the defendants, opened, that the furniture was taken under a writ of fieri facias, which had issued against the plaintiff for a debt of his own; and he \*contended that, if an administrator, instead of disposing of the goods of his intestate, used them as his own, and held himself out to the world as their owner, they might be taken under an execution issued against him; and he relied on the case of Quick v. Staines, Knt., 1 B. & P. 293, where it was held, that, if the executrix use the goods of her testator as her own, and afterwar. It marry, and then treat them as the goods of her husband,

he shall not be allowed to object to their being taken in execution for her husand's debt.

Lord Tenterden, C. J. I own that it strikes me that the marriage makes all the difference between the two cases. I think that the time that the plaintiff had been in possession is not sufficient to shew that he had made these goods his own. If the plaintiff had been in possession of the goods for a very long time, it might have been otherwise.

Verdict for the plaintiff.  $(\sigma)$ 

Sir J. Scarlett and Platt, for the plaintiff.

Gurney, for the defendants.

[Attorneys-He vitt, and Smith & B.]

\*33] \*PARSONS qui tam v. CHAPMAN. Dec. 6.

The 2nd section of the stat. 10 Geo. 2, c. 28, inflicting a penalty of 50% on persons performing, or causing to be performed, plays, &c., without letters-patent, &c., is not repealed by the stat. 5 Geo. 4, c. 83.

Proof that a party was the acting manager of a theatre, and that he paid the salary of and dismissed one of the performers, is sufficient proof that he caused the performances; and if he caused the performances, it is not material whether he did so as the agent of others or not.

DEBT for penalties under the stat. 10 Geo. 2, c. 28, s. 2. The first six counts of the declaration charged, that the defendant, without authority by virtute of letters-patent, and without license from the Lord Chamberlain, did act a certain part in a certain entertainment of the stage. The counts, from the seventh to the twenty-first, charged, that the defendant did cause to be acted a certain entertainment on the stage; and the counts, from the twenty-second to the thirty-sixth, charged, that he did cause to be acted a certain part in a certain entertainment of the stage.(b) Plea—Nil debet.

- (a) In the case of Howard v. Jemmet, 3 Burr. 1369, Lord Mansfield said, "If an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator, not even in money which specifically can be distinguished and ascertained to belong to such testator; and not to the bankrupt himself." In the case of Farr and others v. Newman, 4 T. R. 621, it was held that the goods of a testator, in the hands of his executor, cannot be seized in execution in a suit against the executor in his own right. But, in the case of Whale v. Booth, Id. 625, n., Lord Mansfield said, "The general rule, both of law and equity, is clear that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they cannot be followed by the testator's creditors. It is also clear, that, if at the time of alienation the purchaser knows they are assets, this is no evidence of fraud."
- (b) The first count of the declaration stated—"That the said defendant heretofore, and within the space of six calendar months next before the commencement of this suit, to wit, on the 10th March, 11 Geo. 4, in the Parish of Saint Pancras, in the county aforesaid. and within twenty miles of London and Westminster, without authority by virtue of letters-patent from his said Majesty, or from any or either of his said late Majesty's predecessors, and without license from the Lord Chamberlain of his said late Majesty's household for the time being, or from any other Lord Chamberlain of the King's household for the time being, and without having obtained any such license or authority so to do, as was and is required by the statute in that case made and provided, and without any lawful authority whatsoever so to do, [unlawfully did act, represent, and perform, for hire, gain, and reward, a certain part in a certain entertainment of the stage, to wit, in a certain entertainment of the stage, called the Gipsy's Prophecy, contrary to the form of the statute in such case made and provided, whereby] and by force of the statute in such case made and provided, the said defendant forfeited for his said offence the sum of 50L; and thereby and by force of the said statute, an action hath accrued to the said plaintiff, (who sues as aforesaid), to demand and have of and from the said defendant, as well for himself the said plaintiff as for the said poor of the said parish, the said sum of 501., so forfeited as aforesaid, parcel of the said sum above demanded.

The next five counts merely varied in the names of the pieces performed.

The eeventh count was exactly similar, substituting the following for the words within

## SCARTH, Gent., One, &c., v. GARDENER, Esq. Dec. 10.

To bring a party within the stat. 52 Geo. 3, c. 93, for not producing his game certificate, it is not necessary that the demand of it should be made on the land on which he was sporting; but the demand must be made so immediately after the party has left the land, as to form a part of the same transaction.

It is not necessary that the person making the demand should produce any certificate: and if the other party refuses to produce his, he takes the risk of whether the person

demanding is one having a right to make such demand.

If a person refuses to produce his game certificate, or to tell his name or residence, the person demanding need not go on to ask in what place, if any, he is assessed to the game duty.

If a plea justifying a libel state that an information was laid before a magistrate, as examined copy of the magistrate's conviction, reciting the information, is sufficient

proof of the information.

The declaration stated that the defendant had published a libel of and concerning the plaintiff. The libel was headed—"Conviction of attorney for poaching," and professed to give an account of an appeal of the plaintiff against a conviction of the defendant, "for not producing a game certificate on demand, and refusing to give his name," &c. There was no plea of the general issue, but there were five pleas of justification; and in the first of them, (which was the only one relied on), it was stated (inter alia) that the plaintiff had shot over certain preserves within the manor of Harleyford, and on those occasions did elude the vigilance and pursuit of the gamekeepers by refusing to produce a game certificate, or declare his name and place of residence, as is by law required; and that one William Goodey came before the defendant, being a justice and commissioner of taxes, and upon the oath of Edward Merry, a creditable witness, exhibited his information. It then stated the information, which alleged that Merry was the gamekeeper of the Hon. Henry Walker, that the plaintiff was killing game, and that Merry had required the plaintiff to produce his game certificate, and that he refused to produce it, and also to tell \*his Christian and surname, and place of residence, and the parish or place, if any, in which he was assessed. This plea went on to state the conviction of the plaintiff before the defendant on the statute 52 Geo. 3, c. 93, and the plaintiff's appeal and the affirmance of the conviction. Replication—de injuria.

Platt, for the plaintiff, having opened the pleadings, Sir J. Scarlett, for the

defendant, stated his case.

It appeared that the plaintiff was out shooting in the neighbourhood of Henley upon Thames; and that Edward Merry, the gamekeeper of the Hon. Henry Walker, seeing him shooting in a field within his manor, asked him to produce his game certificate, which he would not do; and that he also asked the plaintiff his Christian and surname, and residence, and also where he was assessed (if any where) to the game duty, which the plaintiff would not tell him. It also appeared that another gamekeeper, named House, seeing the plaintiff sporting in a field, went after him; but, before he overtook the plaintiff, the latter had got into a public road; and there House asked him to produce his certificate; and on his refusing to do so, he asked him his name and residence; but these the plaintiff also refused to tell; and House did not go on to ask him in what parish or place he was assessed to the game duty.

An examined copy of the conviction of the plaintiff before the defendant was put in. It had been procured from the office of the clerk of the peace. It recited the information of William Goodey, exhibited on the oath of Edward

Merry, as stated in the plea.

Campbell, for the plaintiff, objected that the information must be put in.

Lord Tenterden, C. J.—The conviction which is put in is sufficient evidence of it.

\*40] Campbell, in reply.—With respect to the demand of the \*certificate by House, that amounts to nothing. By the act of Parliament it is required that the party should be first asked for his certificate; and, if that is not produced, he must be asked his Christian and surname, and residence, and in what parish or place (if any) he is assessed.

Lord Tenterden, C. J.—If he refused to tell his name and residence it was

quite useless to go on to ask any other question.

Campbell.—The second gamekeeper, House, when he asked for the certificate,

did not do so on the land, the plaintiff being then on the turnpike road.

Lord TENTERDEN, C. J., (in summing up).—I am not prepared to say that the demand of the certificate must be made on the land. It might happen, that, seeing the gamekeeper, a person might get into the road before the keeper could come up to him, and thus the statute might be evaded. However, I think that the demand, if not actually made on the land, must be made immediately, and so as in some degree to form a part of the same transaction. It is not necessary that a gamekeeper making the demand should produce any certificate; and, if the other party refuse to produce his certificate, he does so at the risk of whether the party demanding it is a gamekeeper, or other person having a right to demand it.

His Lordship asked the Jury, in case they found for the defendant, to inform him what damages they would give if the facts stated in the plea did not amount to a justification of the whole of the statements of the libel.

The Jury found a verdict for the defendant on the first plea; and said they should give 1s. damages, in case the plea should

not be sufficient.

\*41] \*Campbell, Comyn, and Platt, for the plaintiff. Sir J. Scarlett and Talfourd, for the defendant.

### [Attorneys—Scarth, and Routledge.]

By the statute 52 Geo. 3, c. 93, schedule L, "Every person who shall use any dog, gun, net, or other engine, for the purpose of taking or killing any game whatever, or any wood-cock, snipe, quail or landrail, or any conies, or shall take or kill, by any means whatever, or shall assist in any manner in the taking or killing, by any means whatever, any game, or any woodcock, snipe, quail, or landrail, or any coney, by virtue of any deputation or appointment, duly registered or entered as gamekeeper for any manor or royalty in England, Wales, or Berwick upon Tweed, or for any lands in Scotland," is made chargeable with the game duty, and must take out a game certificate in the manner therein prescribed. And by s. 11 of this schedule, "if any person shall be discovered doing any act whatever, in respect whereof such person shall be chargeable as aforesaid, by any assessor or collector of the parish where any such person shall then be, or by any commissioner for the execution of this act, acting for the county, riding, division, or place in which such person shall then be, or by any lord or lady, or gamekeeper of the manor, royalty, or lands, wherein such person shall then be, or by any inspector or surveyor of taxes, acting in the execution of the said acts or this act, for the district in which such person shall then be, or by any person duly assessed to the duties granted in this schedule, for consolidated therewith, or by the owner, landlord, lessee, or occupier of the land in which such person shall then be, it shall be lawful for such assessor, collector, commissioner, or gamekeeper, inspector or surveyor, or other person as aforesaid, or such owner, landlord, lessee, or occupier of land as aforesaid, to demand and require from the person so acting the production of a certificate issued to him for that purpose, which certificate every such person is hereby required to produce to the person so demanding the same, and to permit him to read the same, and (if he shall think fit) to take a copy thereof, or any part thereof; or in case no such certificate shall be produced to the person demanding the same as aforesaid, then it shall be lawful for the person having made such demand to require the person so acting forthwith to declare to him his Christian and surname, and place of residence, and the parish or place (if any) in which he shall have been assessed to the duties by this act granted or consolidated therewith; and if any such person shall, after such demand made, wilfully refuse to produce and shew a certificate usued to him for that purpose, or, in default thereof as aforesaid, to give in to the person so demanding the same his Christian and surname, and place of residence, \*and the parish or place (if any) in which he shall have been assessed; or shall produce any false or fictitious certificate, or give any false or fictitious name, place of residence, or place of assessment, every such person shall forfeit and pay the sum of twenty pounds, to be sued for, recovered, and applied in the manner hereinafter directed."

By the stat. 7 & 8 Geo. 4, c. 30, s. 28, any person found committing any offence against that act may be immediately apprehended, without warrant; and it was held, in the case of Hanway v. Boultbee, ante, Vol. 4, p. 350, that, to justify an apprehension under that section, the party apprehended must be either taken in the fact or else in quick pursuit.

### BEFORE MR. JUSTICE J. PARKE.

(Who sat for the Lord Chief Justice.)

## HYDE v. MOAKES. Dec. 12.

A., the landlord of premises, sued B. as assignee of a lease, for rent due, with a count for use and occupation. At the trial, A. put in the lease, which was a lease to W., who had taken the benefit of the Insolvent Debtors' act. It was proved, that B. had occupied the premises, and had treated A. as landlord, and had paid rent to him; but that the lease had never been assigned:—Held, that A. could not recover against B., either for the rent or for use and occupation.

DEBT for rent against the defendant, as the assignee of a lease, with a count for use and occupation. The defendant pleaded to the first count, that no inte-

rest passed to him as assignee; and to the second count, nil debet.

On the part of the plaintiff, a lease, dated in the year 1819, (which was still subsisting,) and which was granted to a person named Worcester, was put in; and it appeared that Worcester had been discharged under the Insolvent Debtors' Act, and that, in the year 1824, the defendant was in possession of the premises, but how he came into possession was not shewn. The defendant was, at that time, in partnership with a person named Elisha, who was his father-in-law, and they continued to occupy the premises, and pay the rent, down to the year 1828. In that year, Elisha and the defendant dissolved their partnership, and the defendant wrote to the plaintiff, apprizing \*him of the dissolution; at the same time saying, that he would continue to occupy the premises.

Letters were produced, in which the defendant recognised the plaintiff as land-lord, promising payment of the rent; but Elisha, being called as a witness, proved that there had never been any assignment of the lease: and it was then conceded by the plantiff's counsel, that the plaintiff could not recover on the first count.

Mr. Justice J. PARKE held, that the plaintiff could not recover on the count for the use and occupation, as there was no express substitution of the defendant for the original lessee as tenant.

His Lordship directed a

Verdict for the defendant.(a)

Barstow, for the plaintiff.

Sir J. Scarlett and Comyn, for the defendant.

## [Attorneys-Hyde and Elkins & Co.]

In the ensuing Term, Barstow moved for a rule to shew cause why there should not be a new trial, on the ground that the plaintiff was entitled to recover on the count for use and occupation. But the Court refused a rule.(b)

(a) For the report of this case we are indebted to the kindness of one of the learned counsel engaged in it.

(b) In the case of Phipps v. Sculthorpe, 1 B. & A. 50, where premises had been let to N. F. H. for a term, determinable on a notice to quit, and, pending the term, the defend-

# \*BEFORE LORD TENTERDEN, C. J.

# BRIANT v. ECKIE, Gent., One &c. Dec. 18.

A. having a cause of action against B., is discharged under the Lords' act, but does not execute any assignment, alleging that he has no property. After his discharge, he gives B. a release: this release is good; and therefore, if in an action by A. against C., it appear that A. might sue B. if he did not recover against C., A. may, notwithstanding this discharge, release B. and make him a competent witness.

Assumpsit. The declaration stated, in substance, that, in consideration that the plaintiff would enter into a bond to the sheriff of Surrey, the defendant undertook to indemnify him. Plea—General issue.

It was opened on the part of the plaintiff, that the sheriff of Surrey would not seize certain goods under an execution, in a cause of Noakes v. Humphreys, without an indemnity; and that the plaintiff, being a client of the defendant's, was desired by him to join Mr. Noakes, the then plaintiff, in the bond to the sheriff, and that he (the defendant) said he would save the plaintiff harmless. It was further stated by the plaintiff's counsel, that the plaintiff did execute the bond, and was afterwards obliged to pay a sum of money.

To prove the agreement of the defendant to save the plaintiff harmless, Mr.

Noakes was called.

The defendant objected that he was not a competent witness, as he would be liable in an action by the plaintiff if the latter did not succeed in the present action.

To obviate this objection, the plaintiff released Mr. Noakes.

The defendant.—This release, I submit, is not good, as the plaintiff, since the cause of action against Mr. Noakes accrued to him, has been discharged under the Lords' act. To prove which, I have here examined copies of all the proceedings.

Lord TENTERDEN, C. J.—Has any assignee been appointed under the Lords' act?

\*45 ] \*The defendant.—No, my Lord. When Mr. Noakes came up under the Lord's act, he swore he had nothing to assign, and therefore no assignment was executed.

LORD TENTERDEN, C. J.—The words of the Lord's act 32, Geo. 2, c. 28, s. 13, are, that "no release of any such prisoner or prisoners, his or her executors or administrators, or any trustee for him, her, or them, subsequent to such assignment and conveyance, shall be pleadable or be allowed of in bar of any action or suit, which shall be commenced by any such assignee or assignees of any such prisoner or prisoners, for the recovery of any of his, her, or their estates or effects." Was this release executed after the plaintiff's discharge under the Lord's act?

Sir J. Scarlett.—Yes, my Lord.

The defendant.—I submit that this cannot be a good release; the Lords' act requires the party to assign all his property; and if this party had a cause of action against Mr. Noakes, would not the Court call upon him to amend his schedule, and assign it; and, if his assignee sued Mr. Noakes, would a release by the plaintiff be any defence? Can this therefore be a good release?

ant applied to the plaintiff, who was the landlord, for leave to become tenant instead of N. F. H., and, on the plaintiff consenting, the defendant offered "to stand in the shoes of N. F. H., and offered to pay the plaintiff the whole rent due for the then current quarter: it was held, that although the term of N. F. H. had not been determined, the plaintiff might maintain an action for use and occupation, against the defendant, and that the latter could not set up the title of N. F. H.

LORD TENTERDEN.—This release does not come within the provisions of this act of Parliament; and I must, therefore, receive the witness.

Mr. Noakes was examined. Verdict for the plaintiff.

Sir J. Scarlett and R. V. Richards, for the plaintiff. The defendant in person.

## [Attorneys-Vansandau and Eicke.]

\*In the ensuing Term, Curvood moved for a rule to shew cause, why there should not be a new trial. But the Court refused the rule.

# DICKENSON, Gent. v. HATFIELD. Dec. 16.

If, since the stat. 9 G. 4, c. 14, a defendant by a letter admit a balance to be due, without stating the amount, this will take the case out of the statute of limitations, so as to entitle the plaintiff to nominal damages.

The object of the stat. 9 Geo. 4, c. 14, was to procure that in writing for which words

were previously sufficient.

Assumpsit for 51. 8s. 6d. for a balance due on a promissory note. Pleas-

General issue, and the statute of limitations.

It appeared that the defendant gave the plaintiff a promissory note for 23*l*. in the year 1820, to be paid by instalments; and that in April 1824, there were 4*l*. due upon it; when the plaintiff wrote to the defendant on the subject, and received an answer from the defendant expressing regret that the balance was not paid, and saying that his brother should shortly call and pay it. At the bottom of this letter was a postscript, directing that the postage of the letter should be put to the defendant's account. The present action was commenced in January, 1830; so that six years did not intervene between the date of this letter and the commencement of the action.

Comyn, for the defendant.—I submit that the defendant is barred by the statute 9 Geo. 4, c. 14; for, though the defendant by his letter admits that something is due, he does not specify any particular sum. And it was decided in the Court of Common Pleas, in the last Term, that a written acknowledgment of a debt, without stating the amount, was not sufficient to take the case out of the statute, as Lord Tenterden's act requires that an acknowledgment of

the whole debt should be stated in writing.(a)

\*Barstow, for the plaintiff, submitted, that even if the Court was with the defendant on this objection, he was still entitled to a verdict for the postage of the letter. Upon the question as to to the construction of the act of Parliament he was stopped by the Court.

Parliament he was stopped by the Court.

Lord TENTERDEN, C. J.—I am of opinion that this debt is not barred by the statute. The object of the statute was to procure that in writing for which words were previously sufficient. Here there is an acknowledgment of a balance

<sup>(</sup>a) Kennett v. Millbank, 8 Bing. 38. This was an action on a promissory note in which the statute of limitations was pleaded. To take the case out of the statute a composition deed was put in. This deed was executed by the defendant, and recited that he was indebted to the plaintiff and others; but the amount of the debt was not specified. The plaintiff never executed the deed, and there was a proviso that if all creditors, whose debts amounted to 10L, did not execute the deed by a certain day, the deed should be void. It was admitted at the trial that the note sued on was the only debt due from the defendant to the plaintiff. Held, that this did not take the case out of the statute of limitations. See the cases of Dixon v. Deveridge, ante, Vol. 2, p. 109, and Braithwaite r. Churchill, Id., p. 341.

due, but what that balance was we are at a loss to know. The plaintiff is entitled to a verdict for a shilling damages.

Verdict for the plaintiff, damages 1s.

Barstow, for the plaintiff. Comyn, for the defendant.

[Attorneys-Dickenson & K., and Egan & W.]

LEAVE was reserved to the defendant to move to enter a nonsuit; but he acquiesced in the verdict, and no motion was made.

## \*48 ] \*BRADSHAW v. BENNETT. Dec. 17.

In assumpsit by vendee against vendor to recover back a deposit paid on the purchase of real property, the defendant at the trial produced (under a notice to produce) the agreement which had been signed at the foot of the conditions of sale:—Held, that it was not necessary to call the subscribing witness to prove the execution of the agreement.

Where, in the particulars of sale, property was stated to be held under the C. estate upon three lives, and it appeared in an action to recover back the deposit, that one of the lives had dropped before the sale, and that the property was not held directly under the C. estate:—Held, that the defendant could not call the auctioneer to prove that he stated before the sale that the life had dropped; but that the defendant might give evidence to shew that, before the sale, the plaintiff had read the original lease under which the property was held.

A party recovering back a deposit paid on the purchase of real property is not entitled to

interest.

Assumpsir for money had and received. Plea—General issue. This action was brought by the vendee against the vendor to recover back a deposit paid on the purchase of certain property, alleged to be held under the Clayton estate.

The plaintiff had purchased the property at auction, and had signed the usual

agreement at the foot of the conditions of sale.

This agreement was produced by the defendant under a notice to produce-Campbell, for the defendant, objected that the subscribing witness must be called.

Kelly, for the plaintiff, cited the case of Doe dem. Tyndale v. Hemm-

ing.(a)

Campbell.—The instrument is admissible without calling the subscribing witness only where the party has a benefit under it; for instance, if there was a lease, and the party enjoyed the land under it; but this is a case where a subscribing witness is most wanted. It is an action on the instrument, which the defendant says he is not to be bound by. The subscribing witness is necessary to prove what occurred when this agreement was entered into.

Lord Tenterden, C. J.—What are the cases in which it would not be neces-

sary to call the subscribing witness?

• Campbell.—Where the argument has been acted upon.

J. Williams, for the plaintiff.—Here the deposit money has been paid under it.

Campbell.—This was an action founded upon the contract, which was not so either in the case of Rex v. Middlezoy, 2 T. R. 41, or in the case of Gordon v. Secretan, 8 East, 548.

J. Williams.—Here both parties are claiming under this agreement. I am seeking to get back the money, and the defendant is seeking to retain it, by virtue of this instrument.

<sup>(</sup>a) 9 D. & R. 15. And see also the cases of Pearce v. Hooper, 3 Taunt. 60; Orr v. Morris, 6 Moore, 347; and Burnett v. Lynch, 8 D. & R. 368. All the cases on this subject are abstracted in 1 Phill. on Ev. 448.

Lord TENTERDEN, C. J. This is an agreement which the defendant produces, and under which he claims an interest; I think that the principle therefore applies. The agreement may be read.

The agreement was put in; it had been signed by the plaintiff, but not by the

defendant

Lord TENTERDEN, C. J. This is a very strong case of not calling the subscribing witness. He was only to prove the plaintiff's signature, and not the defendant's.

The particulars of sale were read. They stated the property to be held on three lives, but it was admitted that at the time of the sale only two lives were in existence, the third having died after the printing of the conditions of sale, and before the day of the auction. An objection was also made, that the property was not held directly under the Clayton estate.

The conditions of sale were read, and contained the usual condition, that any misdescription or mistatement should not vitiate the sale, but a compensation be

allowed.

\*To obviate the first of these objections, Campbell, for the defendant, proposed to call the auctioneer, to prove that he stated before the sale that one of the persons, on whose life the property was held, was dead; and, as to the other point, he proposed to prove, that before the sale the plaintiff, who was stated to be a conveyancer, had read over the lease under which the property was held.

J. Williams objected that the evidence of the auctioneer was not receivable;

and cited the case of Powell v. Edmunds.(a)

Lord TENTERDEN, C. J. On the authority of that case I cannot receive the evidence; I think that a very wholesome case. You propose to prove that the plaintiff read the original lease; that you may do, as it does not contradict the particulars of sale. Before the sale the auctioneer ought to have altered the particulars with respect to the lives, so as to have made them conformable to the fact.

Campbell. That could have been easily done.

Some other objections were raised when—

Lord TENTERDEN, C. J., suggested that a special case should be stated; and that one of the questions to be raised by it should be, whether the evidence of the auctioneer ought to have been received, to prove that he stated the decease of one of the parties, on whose life the property was held.

Campbell. Would your Lordship allow us to add a question, [#51

whether the other side ought to have called the subscribing witness?

Lord Tenterden, C. J. I think not; I do not like to reserve points where I have no doubt.

Verdict for the plaintiff, subject to a case.

J. Williams, for the plaintiff, asked that interest should be added to the amount of the verdict.

Lord TENTERDEN, C. J. I think not; I do not know of any case of this kind in which interest has been allowed. (b)

J. Williams and Kelly, for the plaintiff.

Campbell and Hutchinson, for the defendant.

# [Attorneys-Horsley and Kempster.]

(a) 12 East, 6. In that case the printed conditions of sale, which was of timber, did not state any particular quantity; and it was held, that parol evidence was not admissible to prove that the auctioneer warranted it to be a particular quantity, because it varied the written contract.

(b) For the authorities in equity on this point see Sugd. Vend. and Purch. pp. 208,

**42**6.

# First Sitting at Westminster, in Hilary Term, 1832.

### BEFORE MR. JUSTICE J. PARKE.

### TROTTER v. SIMPSON and Another. Jan. 13.

The building act, 14 G. 3, c. 78, s. 100, limits actions to be brought within three months. A. had begun to build a party wall, partly on the soil of B., more than three months before the action, but had not completed it till within that time:—Held, that B. might recover for such part of the trespass as was committed within the time limited; but that, if nothing had been done within the three months, he must bring ejectment.

TRESPASS for injuring the plaintiff's house. Pleas—General issue, and leave and license. Replication, denying the license.

\*521 \*It appeared, that the alleged trespass was committed in the building

\*52] It appeared, that the alleged trespass was committed in the building of a party wall, a part of which was stated to extend too far over the

plaintiff's premises.

For the defence, the 100th section of the building act, 14 Geo. 3, c. 78, was relied on. It was alleged that this party wall was built in August, 1830; that the plaintiff had given notice of action, under that section of the building act, on the 14th of December, 1830, and that the writ was sued out on the 19th of January, 1831.

For the plaintiff it was stated, that the wall had not been completely finished,

till within three months of the commencement of the action.

Mr. Justice J. PARKE. If any part of the trespass was within the three, months, the plaintiff may recover for that part, which will carry the costs; and if he is too late with his action altogether, he must bring an ejectment.

Campbell, for the plaintiff.—The soil is ours, and every fresh course of bricks

laid on is a fresh trespass.

\*537

Mr. Justice J. PARKE. If anything was done to the wall within three months of the commencement of the action, the plaintiff may recover something, and get his costs.

The cause was referred, to ascertain whether any part of the trespass had been committed within three months of the commencement of the action, and to direct a compensation to be paid, and a conveyance to be executed, so as to avoid the bringing of an ejectment.

\*Campbell and Talfourd, for the plaintiff.

Comyn for the defendant.

#### [Attorneys-Walter and Coles.]

By the stat. 14 Geo. 3, c. 78, s. 100, it is enacted "That no action or suit shall be commenced against any person or persons, for any thing done in pursuance of this act, until twenty-one days after notice in writing of an intention to bring such action or suit has been given to the person or persons against whom such action or suit shall be brought, nor after the expiration of three calendar months next after the fact committed; and every such action or suit, the cause whereof shall arise within the said city of London, or the liberties thereof, shall be laid and tried in the said city of London, and not elsewhere; and every such action or suit, the cause whereof shall arise in any part of the limits aforesaid, out of the said city of London and liberties thereof, shall be laid and tried in the county of Middlesex, and not elsewhere; and the defendant or defendants in every such action or suit may plead the general issue, and give this act and the special matter in evidence, at any trial or trials to be had thereupon, and that the matter or thing for which such action or suit is brought was done in pursuance and by the authority of this act: And if the said matter or thing appear to have been so done, or if it appear that such action or suit was brought before the expiration of twenty-one days after such action exaction as aforesaid, or that sufficient satisfaction was made or tendered before such action was brought; or if any such action or suit be not commenced within the time herein for that purpose limited, or be laid in any other county or place than as aforesaid; then the Jury, in every such action or suit, shall find for the defendant or defendants therein:

Vol. XXIV.—29

and if a verdict be found for the defendant or defendants, or if the plaintiff or plaintiffs in any such action or suit become nonsuited, or discontinue, or suffer a discontinuance of any such action or suit; or if, in any such action or suit, judgment be given for the defendant or defendants therein on demurrer, or by default, or otherwise; then, and in any of the cases aforesaid, the defendant or defendants shall have judgment to recover treble costs of suit, and shall have such remedy for recovering the same, as any defendant or defendants may have for costs in other cases by law."

In the case of Pratt v. Hillman, 6 D. & R. 360, it was held, that if a person bona fide intending to pursue the authority given by the building act, erects a party wall, without in fact pursuing its directions, and thereby injures his neighbour, he is liable to an action;

but it must be brought after twenty-one days' notice, and within three months.

# \*Second Sitting at Westminster, in Hilary Term, 1832. [\*54

#### BEFORE MR. JUSTICE J. PARKE.

HEMING and Another, Gent., two, &c. v. WILTON, Gent., one, &c. Jan. 17.

A. brought an action for an attorney's bill against B., but only recovered a small sum for money lent, as there had been no bill delivered:—Held, that A. might recover the amount of the attorney's bill in another action, brought after the bill was delivered, although this was a part of his demand in the first action; and that it was not necessary that he should have been nonsuited in the first action to entitle him to bring the second.

Assumpsit for an attorney's bill. Plea-General issue.

It was opened by Kelly for the plaintiff, that this action was brought to recover the same demand for business done, which was the subject of the case reported ante, Vol. 4, p. 318, in which the plaintiffs only recovered a sum of 4! for money lent, but could not recover for the business done, as no bill had been delivered under the stat. 3 Jac. 1, c. 7, s. 1.

Butt, for the defendant. I submit that the plaintiffs cannot recover. There was a previous action, in which the claim was made a part of the demand, and in which the plaintiffs obtained a verdict for 4l.; they, therefore, cannot suc-

ceed in another action for the same thing.

Mr. Justice J. PARKE. This was a part of the plaintiff's demand, which was not due at the time of the former action, because a certain step (the delivering a bill) had not been taken.

Butt. Does not your Lordship think, that they should have elected to have

been nonsuited in the former action?

\*Mr. Justice J. PARKE. No; as this was a demand not then due.

Verdict for the plaintiffs.

Kelly, for the plaintiff. Butt, for the defendant.

[Attorneys-Heming & B., and Wilton.]

# COURT OF COMMON PLEAS.

Sitting at Westminster after Trinity Term, 1831.

BEFORE LORD CHIEF JUSTICE TINDAL.

## LONG v. CHUBB. June 14.

The declaration in an action for libel alleged that the plaintiff was a good and faithful subject, &c., and that he was a medical practitioner, and stated the libel to have been published of and concerning him, and of and concerning him in his said practice. No evidence was given of any license or authority to practise, nor was the plaintiff mentioned in the libel as a regular medical man, but merely as "Physician extraordinary to several ladies of distinction," and "doctor, or rather quack:"—Held, that this did not withdraw the claim to damages in the medical capacity from the consideration of the Jury, but that they might give such damages as they thought right, both for that and the libel on the plaintiff's private character.

LIBEL. The declaration stated, that before, and at the time, &c., the plaintiff was a good, true, just, and faithful subject, &c., and that before, and at the time, &c., he had been and was a medical practitioner, and as such had practised, and was continuing to practise with great reputation and success, whereby he had acquired, and was then daily and honestly acquiring, sundry great gains, &c. Yet, that the defendant, greatly envying, &c., and contriving, and wickedly and maliciously intending to injure the plaintiff in his reputation, and also in his said practice, on, &c., at, &c., published of and concerning the said plaintiff, and of and concerning him in his said practice, a certain false, scandalous, malicious, and defamatory libel, &c., &c., &c.

\*The libel, (which was published while a prosecution against the plaintiff for manslaughter(a) was pending, to which it alluded), was contained in a penny pamphlet, purporting to be "The Life of John Driscoll, self-styled Mr. John St. John Long, the Harley Street Quack, Physician Extraordinary to several ladies of distinction, with whom his universal success obtained for him the appellation of the female destroyer." The following motto was on the title page:—

"When age and infirmities sink to the tomb,
The mind is prepared by decay or disorder;
But when beauty's cut off in life's opening bloom,
We curse the vile quack who committed the murder."

The first page set out in the declaration, in addition to the title and motto, purported to give a history of the plaintiff's early years; but the only portion of it which bears upon the point in the cause, was that which spoke of persons who since "had the misfortune to come within his doctrinal prescriptions." The only other material part was that which, after a statement that he obtained his living by painting portraits, went on to say, "and we could relate several ancedotes of a very peculiar description, in which he was engaged, one of which was no doubt the cause of his changing his profession from a painter to a doctor, or rather quack."

It was proposed on the part of the plaintiff to read a pamphlet which had been published since the cause had been set down, and which was purchased at the defendant's shop of a person representing herself as his wife. It contained libellous observations on the plaintiff, in reference to a postponement which had taken place at the trial.

(a) This was the second prosecution, on which he was acquitted. For an account of it, as well as of the first, in which he was sentenced to pay a fine of 2501., see Vol. 4 of these Reports.

\*Spankie, Serjt., objected.—It is a distinct libel, for which the defendant is responsible, and cannot be given in evidence in this case.

TINDAL, C. J.—I think it is admissible, as something that relates to this very cause.

It was then read.

No proof was given of any license or other authority from any public body to the plaintiff to practise in any medical capacity; nor indeed, was suggested that he had received any such.

Spankie, Serjt., for the defendant.—The plaintiff must be nonsuited. The declaration avers that he is a medical practitioner; which must mean that he is an authorized practitioner, recognised by the law; and this is not admitted by the libel. The libel does not anywhere speak of him as a regular medical practitioner.

TINDAL, C. J., was of opinion that the case must go to the Jury, and —

Spankie, Scrit., then addressed them for the defendant.

TINDAL, C. J., (in summing up) said—The declaration states, that the plaintiff was a medical practitioner, and goes on to state that the libel was published of and concerning him in his character of a medical practitioner, and in his private capacity. There is no proof in this case that the plaintiff has brought himself within any of the regular degrees, physician, surgeon, apothecary, or licentiate. But if you think that the libel speaks of him as a medical practitioner, though you would not give him such damages as you would give to a regular practitioner, yet the matter is not wholly withdrawn from your consideration. But the \*main part of the libel seems to be that which reflects upon him in his private character. There is no doubt as to the libel on the private character, for there are several things which are clearly libellous, and must be taken to be false, as the defendant had an opportunity of putting a justification on the record, and of proving the facts if they were true. Fair and candid criticism is not a libel, but a malevolent attack on an individual is. You are not to give damages for the publication which was purchased at the defendant's shop after this action was commenced, because it may be made the subject of complaint in another action. It is only evidence to remove any doubt which might be entertained by you, of the defendant's motives in publishing the first Verdict for the plaintiff, damages 100%. pamphlet.

Wilde, Serjt., C. Phillips, and Tomlinson, for the plaintiff. Spankie, Serjt., Kinglake, and C. Jones, for the defendant.

[Attorneys-Harmer, and in Person.]

### PLANCHE v. COLBURN and Another. June 14.

An author was engaged to write for a certain sum an article to appear among others in a work called "The Juvevile Library." Before he had completed his article, and before any portion of it was published, the work in which it was to appear was discontinued: Held, that the publishers were not entitled to claim the completion of the article, that it might be published in a separate form for general readers, but were bound to pay the author a reasonable sum for the part which he had prepared:—Held also, that such reasonable sum was recoverable on a quantum meruit in a common count for work and labour.

THE first count of the declaration stated, that the defendants were publishers of books, and were designing for publication a work to be entitled "The Juvenile Library," and had applied to the plaintiff to write for them a certain volume on costume, to form part of the said work, which the plaintiff had agreed to do; and thereupon, in consideration of the \*premises, &c., the defendants undertook to pay the plaintiff the sum of 100% for the said volume,

whenever, after the writing of the same by him, and the delivery thereof to them, they should be thereunto requested. It then averred, that the plaintiff commenced writing the volume, and wrote a great part of it, and was ready and willing to complete it, and deliver it to the defendants; yet, they not regarding their promise, but intending to injure and defraud him, did not nor would permit him to complete it, but, on the contrary, wholly discharged him from completing it, and refused to pay him either the 100%, or to make him any compensation or remuneration whatsoever for the part which he had written, or for his loss of time, trouble, and expenses, &c.

The second count stated, that the defendants were indebted to the plaintiff in 100% for work and labour, care, and diligence, in and about the composing and writing a certain work for them, and in and about the making of certain drawings; and also for journeys and attendances relating to the business. The third count was similar, except that it was on a quantum meruit. Plea-The general

issue.

From the evidence of Mr. Jerdan, the editor of the Literary Gazette, it appeared, that about September, 1830, the plaintiff, who was the author of several dramatic entertainments, was engaged by him, with the knowledge of the defendants, Messrs. Colburn & Bentley, who were the publishers of a work called "The Juvenile Library," to write for that work an article to illustrate the history of armour and costume from the earliest times, for which he was to be paid 100 guineas. It appeared, that the plaintiff went into the country to Dr. Meyrick's, a great proprietor of ancient armour, where he made various drawings; and also, that he had prepared a considerable portion of manuscript, when, after three volumes had been published, the Juvenile Library was discontinued.

\*\*GOT\*\*

The plaintiff claimed \*\*a sum of 50 guineas for the part which he had prepared, and the trouble he had taken in the business.

Spankie, Serjt., for the defendants, contended, that the engagement, as set out in the declaration and also in point of fact, was an engagement to pay for the article when complete; and this the defendants always had been and still

were willing to do.

He called a witness, who proved, that in the month of November a conversation took place between the plaintiff and the defendant Bentley, in which the latter told the former, that if he would finish his work he should have his money, as they were perfectly willing to publish it; that the plaintiff said it was better for a separate publication than for the Juvenile Library, as in treating it for children he had been very much hampered, and there was great difficulty in

adapting it for juvenile comprehension.

Wilde, Serjt., in reply.—The defence set up is no answer to this action. is one thing to write an article for an Encylopædia or a Juvenile Library, and another thing to write a separate work on the subject; different styles of writing are required for children and grown persons. That which was written with ingenuity, adapted to young minds, would make a man ridiculous, if published for grown up persons; such, in this case, was not the contract made, and the defendants have no right to call on the plaintiff to publish on such terms. author, also, has an interest beyond the mere payment for a particular article. The kind of work is to be taken into consideration, with reference to his reputation, and the effect it will have on his future performances.

Dodd, for the defendant, called his Lordship's attention \*to the fact, that the second count did not state that the article was to be published in the Juvenile Library, but was only a promise to pay 100 guineas for the article, which, it appeared from the evidence, the defendants had offered to do.

Wilde, Serjt. The contract was to publish in the Juvenile Library, and that

is sufficient.

TINDAL, C. J. I do not think it turns upon the second count, but upon the quantum meruit in the third count.

His Lordship afterwards (in summing up) said—The plaintiff does not seek to

recover the whole sum contracted for, but only a fair remuneration for that part of the article which he had prepared, and which was rendered useless by the discontinuance of the work in which it was to appear. The object of the defendants evidently was, to have a publication adapted to persons in the younger The question you have to consider is, what degree of credit classes of society. you give to the defence; which, it appears to me, must amount to this, or it amounts to nothing-That, after the contract was broken, an entirely new arrangement was made, to furnish the matter for publication in a separate form. It seems, that in the month of November the plaintiff thought that the subject was one better suited for separate publication; but undoubtedly, up to that time, he had been preparing it for juvenile readers; and the form and size of the proposed new work were not settled on that occasion. It might be, that the plaintiff considered the subject-matter was better adapted for a separate publication, without admitting that the MS. and drawings already prepared were suited to such a publication. It will be for you to say, whether you think that this was a separate bargain, in which the plaintiff gave up the old contract altogether; for if you do, then you must find your verdict for the defendants. The question is, was the first agreement entirely\* abandoned with the consent of the plaintiff, and an entire new agreement made between the parties?—for only in such case can the verdict be for the defendants.

Verdict for the plaintiff—Damages 501.

Spankie, Serjt., submitted that the verdict could not be taken on the quantum meruit, and that the special count did not accord with the evidence.

TINDAL, C. J., thought that the plaintiff might recover on the quantum meruit;

but said, that he would take a note of the objection.

Wilde, Serjt., and Kelly, for the plaintiff. Spankie, Serjt., and Dodd, for the defendants.

[Attorneys-Lithgoe and Sharon & T.]

A motion was made, but the Court refused a rule.

# Adjourned Sittings at Westminster after Trinity Term, 1831.

#### GLENESTER v. HUNTER. June 17.

A member of a committee of management, taking an active part in the concerns of a charitable institution supported by voluntary contributions, is liable for goods furnished by a tradesman for the use of the institution, although it appear that such tradesman did not furnish them on any contract with the committee, but, having at first furnished goods on the credit of an individual, who, previously to the formation of a committee, had the sole management, continued to send them in afterwards on orders given, as before, by the servants of the institution, without any inquiry as to who was liable to pay him.

Assumpsit for goods sold and delivered. The plaintiff was a brtcher, and the defendant one of the committee of managers of the Royal Western Hospital. The claim was for meat furnished for the use of the hospital from the 8th of May to October, 1829. The institution had at first \*been under the management of a person named Sleigh, on whose credit the plaintiff had for some time furnished goods, before any committee of the governors was formed; and it appeared that the goods in question were ordered by the servants of the hospital, in the same manner as they had previously been. The defendant became a member of the committee in March, 1829. The committee was in the habit of meeting about once a-month. At a meeting on the 6th of April, 1829, the defendant acted as chairman, and it appeared from the minutes (which were always signed

by the chairman), that Mr. Sleigh called the attention of the committee to the advantage of purchasing provisions by wholesale, in which the committee concurred. Subscriptions to the institution were paid in to the account of the committee with a banker. The committee examined other tradesmen's bills, and ordered them to be paid, sometimes in full, sometimes in part only; and also engaged and discharged servants. On one occasion, when drugs were wanted, it was regularly moved and seconded that they should be bought; and on another occasion, the form of a letter was agreed to, which was to be sent to the ground landlord of the premises, stating that if he would co-operate with the committee in procuring funds, they would take a lease on certain terms. The defendant attended at various meetings of the committee, during the period in which the plaintiff's demand accrued, and took an active part in the business. Mr. Sleigh was also a member of the committee, and originated most of the propositions which were adopted by the committee. The plaintiff's bill was headed "Mr. Sleigh's Hospital." Three receipts had been given for sums paid on account, one was "Received of Mr. Sleigh;" another "Received of Mr. Sleigh & Company, the Committee of the Royal Western Hospital," the words "Mr Sleigh & Company" being struck through with a pen; and the third was " Received of the Governors of the Royal Western Hospital."

\*Wilde, Serjt. for the plaintiff, contended, that although he was only a subscriber to a public charity, and had no personal interest in the subject-matter, yet, as a committee man, he had the means of limiting the engagements of the institution, and also of being acquainted with the extent of its resources. When a tradesman sees respectable gentlemen managing a concern of this kind, may he not reasonably expect to be paid by them. The cases of Cullen v. The Duke of Queensberry, (a) and Horsley v. Bell, (b) establish the

principle for which I contend.

Spankie, Serjt. for the defendant. In point of law, when a man seeks to charge one of a number of persons having no interest in the matter, he must shew that those persons made the contract with him, or that he furnished the goods on their credit. Cullen v. The Duke of Queensberry, and Horsley v. Bell, differ from the present case; for, in both, the parties sued had made the agreement with the parties suing; and, in the latter case, much stress is laid upon the improbability of a tradesmen making a contract on the credit of tolls, which it was in the power of the defendant to raise or not at pleasure. But, in the present case, there is no power to raise money.

wilde, Serjt. in reply. Though, under Horsley v. Bell and the other cases, I admit that persons may so limit \*their responsibity as to prevent their being made personally liable to a tradesman; yet, I contend also, under those cases, that when there is a committee receiving funds, paying money, meeting at stated periods, engaging and discharging servants, &c., it must be taken that they are liable, unless they have distinctly intimated to the tradesman that

they do not intend to be personally answerable.

TINDAL, C. J. (in summing up) said—This is an action for goods sold and delivered; and the question for you is, with whom was the contract for the sale and delivery of those goods made. But, when I say this, I do not mean the very individual who received the meat or gave the order, because, in all probability, it would be a menial; but you are to look and see who were the masters of those persons. It is not necessary that a tradesman should know, at the

(a) 1 Brown's Chancery Cases, p. 101. The marginal note of this case is, 4 Committee of a voluntary society entering into agreements with tradesmen, for the whole, sufficient to make them parties to a bill, and not necessary to include all the subscribers."

<sup>(</sup>b) Ib. p. 101, n.\*. This was a bill filed by the undertaker of a navigation at Thirsk in Yorkshire, against the commissioners (named in the act of Parliament for carrying it on), who had signed the several orders. The principal question was, whether the defendants were liable in their private capacities, or the plaintiff had given credit to the fund; and it was held that they were personally liable.

time of furnishing the goods, who the person was for whom they were obtained; but, if they are obtained by an agent, and it is afterwards found out that he had a principal, the tradesman may sue the principal. The question, therefore, will be in this case, whether the meat was supplied on a contract made, personally and individually, with Mr. Sleigh, or on the credit of the persons who managed this institution; for, if there are persons who manage institutions of this description, they make themselves liable for the orders given by their servanta The question therefore is, whether the committee did so conduct and hold themselves out as the managers and employers of the persons who gave the orders, as that any tradesman, at the time knowing this, might reasonably conclude that he was supplying his goods on their credit. It appears, that the defendant became a committee-man in March, 1829, and that the debt was incurred during the time that he continued so. The plaintiff rests his claim to a verdict on the acts of these persons, claiming, as committee-men, to control the proceedings. It appears that, on one occasion, Mr. Sleigh called their attention to \*the advantage of purchasing provisions by wholesale, in which the committee concurred—Why should they be interested in this matter, unless the funds, over which they had the control, were liable to the payments? The nature of the letter to the ground landlord seems to shew that the committee considered themselves as the persons who were to acquire the funds by which the concern was to be carried on. The examination of bills, and the signing of checks for payment, shew that the committee were not acting as if the concern was under the control of Mr. Sleigh only. In the case of drugs, it appears that a motion was made and seconded, that they be bought; and if the person who furnished them brought an action, there is no doubt that the committee who ordered must pay. The question is, whether you see any difference between articles ordered for the first time by the committee, and those things, which, being necessary for the ordinary support of the charity, had been at first furnished on the credit of Mr. Sleigh alone, and continued to be supplied without any alteration in the mode of ordering. If persons hold themselves out, they make themselves virtually liable, as much as if they actually made the contract; and the question is, whether these gentlemen, the defendant and others, did so act, as that they might be considered as the masters and employers of the servants by whom the goods were obtained. On the part of the defendant it was shewn, that, on some occasions, goods were paid for by Mr. Sleigh, which had been furnished by this very plaintiff; and the defendant says, that the plaintiff had no right, having begun on Sleigh's credit, to change: and undoubtedly he had not, if matters remained as they were. But, if Sleigh had left and parted with the concern, the plaintiff, if he went on supplying, might sue the new person, though at the time he did not know of the change. His Lordship, after further commenting upon the evidence, left the case to the Jury, who found a

Verdict for the plaintiff.

\* Wilde, Serjt., and R. V. Richards, for the plaintiff. Spankie, Serjt., and J. H. Lloyd, for the defendant.

[\*67

[Attorneys-Shuter and Beechey.]

Vide the case of Pink v. Scudmore, post, p. 71.

## DOE on the Demise of FINLAYSON v. BAYLEY. June 17.

In ejectment against a weekly tenant, the notice proved was, to quit on Wednesday, the 4th of August. The witness who was called to prove that Wednesday was the expiration of the current week of the tenancy, said, "that he guessed" the defendant came in "about a Tuesday or a Wednesday, but had no recollection which:"—Held, insufficient.

EJECTMENT. to recover possession of a house in Park Road, Regent's Park. A witness proved, that he understood from the defendant, that he took the house of Mr. Finlayson, at three guineas per week. A notice was left with the maid-servant, at the house, on the 28th of July, 1830, requiring the defendant to quit possession on Wednesday the 4th of August.

Russell, Serjt., for the defendant, objected that the notice was not sufficient, as it did not appear that Wednesday was the expiration of the current week of

the tenancy.

To remove this objection a witness was called, who said that he negotiated the letting of the house, with a person named Bradfield, who had often acted as agent for the defendant; and that he gave Bradfield possession about nine o'clock, and the defendant came about ten. It was then proposed to read a letter written by Bradfield.

Russell, Serjt., asked his Lordship, whether he thought the evidence of agency

was sufficient?

\*TINDAL, C. J. I think it is, the time is so near. Bradfield taking possession at nine, and the defendant coming at ten, there was no time for

any intermediate letting.

The witness then said, that the house of which he spoke was not the house in question, but another, a few doors off, which the defendant occupied for eight months, and then removed to the house in question; he guessed that it was about a Tuesday or a Wednesday that he removed, but he had no recollection which. It appeared that Bradfield's letter related to the first house only.

Russell, Serjt. This evidence does not supply the deficiency. According to

the man's statement it is a guess whether it was Tuesday or Wednesday.

TINDAL, C. J. It seems to me that there is nothing to leave to the Jury; but I will take any evidence which the plaintiff has to offer.

Wilde, Serjt., for the plaintiff, said that he did not think that the evidence

could be carried any farther.

TINDAL, C. J. Then the plaintiff must be called.

Nonsuit.

Wilde, Serjt., and Kelly, for the plaintiff. Russell, Serjt., for the defendant.

#### [Attorneys-Fielder and Coe.]

See the case of Doe dem. Campbell v. Scott, 4 Moore & Payne, 20.

#### \*697

### THWAITES v. SAINSBURY. June 18.

Practice.—The plaintiff's counsel has a right to begin and state the facts, although by a rule of Court the defendant is under obligation to admit the plaintiff's case.

Assumpsit for goods sold and delivered.

By a rule of Court, obtained by consent, it was ordered that the defendant should admit the plaintiff's case.

Manning having opened the pleadings-

Spankie, Serjt., for the defendant, claimed the right to begin.

Bompas, Serjt., for the plaintiff resisted it.

TINDAL, C. J. I am of opinion that the plaintiff's counsel has a right to begin and state the case. It is not like the case of an issue, proof of the affirmative of which lies on the defendant.

Bompas, Serjt., and Manning, for the plaintiff. Spankie and Andrews, Serjts., for the defendant. As to the right to begin, see the cases of Rex v. Yeates, Vol. 1 of these Reports, p. 323; Cooper v. Wakley, Vol. 3, p. 474; Cotton v. James, Ib. p. 505; Curtis v. Wheeler, Vol. 4, p. 196; Williams v. Thomas, Ib. 234; and Turberville v. Patrick, Ib. 557; and the cases respectively there referred to.

### DAVIES and Others v. HALTON. June 21.

Semble, that there is not any custom in the cloth trade, by which a tailor, who receives cloth from a clothier which he does not approve, is bound to pay for it, if, when sent back, it does not reach the seller, unless he shews that he has delivered it to the seller's order in writing.

Assumpsit for goods sold and delivered. Pleas—non assumpsit, tender, and set off.

\*The plaintiffs were clothiers in Gloucestershire, and the defendant a tailor in London.

There was a dispute between the defendant and the London agents of the plaintiffs as to two ends of cloth, which the defendant had delivered without any written order to a person, who, it was alleged, was in the employ of those agents, and who had pawned the cloth instead of carrying it to them. There was contradictory evidence as to the employment; but it was insisted on the part of the plaintiffs, that there was a custom in the trade never to return goods without a written order from the party who had sent them in. To prove this three witnesses were called; two of them said, that it was always the custom for a written order to be given; and the third stated, that it was the practice of the plaintiff's agents, and of another house in the trade, but he did not know whether it was of any more.

Storks, Serjt., for the defendant.—The custom is not proved. If it was the practice of the agent's house, there is no evidence that it was communicated to the defendant. It is the tradesman's duty, if there be a particular practice, to communicate it. There does not appear to have been any previous dealing between the parties from which it might be known. Then, if the practice is relied on as amounting to a general custom of the trade, it is absurd. Is it to be argued that goods are never to be returned without a written order? Trade

cannot be carried on if such is to be the rule.

On the part of the defendant much evidence was given as to the agency of the person to whom the two ends of cloth were delivered; and a witness in the trade proved that, in cases where he knew the porter, he had delivered back goods without any written order.

The question in the cause was at last narrowed to the point as to the two

ends—and

\*TINDAL, C. J., left it to the Jury to say, first, when they were delivered back; and secondly, whether they were delivered to a duly authorized agent.

The Jury found for the defendant, thereby establishing the agency, and of course negativing the existence of the custom relied upon by the plaintiffs.

Wilde, Scrit., and Steer, for the plaintiffs.

Storks, Serjt., and Thesiger, for the defendant.

## [Attorneys-Thornbury and Locke.]

See as to the customs of trade, &c., Wood v. Wood, Vol. 1 of these Reports, p. 59: Sawell v. Corp, Ib. 392; Hogarth v. Jackson, Vol. 2, p. 595; Handaysyde v. Wilson, Vol. 3, p. 528; and Bleaden v. Hancock, Vol. 4, p. 152.

## PINK v. SCUDAMORE, HICKS, and SLEIGH. June 22.

If a builder do work at an intended hospital on the order of the physician and surgeon, they being announced to deliver lectures there, and being members of the provisional committee, such builder is not bound to look solely to the funds of the hospital for payment, but may sue the persons who gave the orders, unless he was distinctly informed that the dealing was to be on the terms of looking for payment to the funds of the hospital only.

Assumpsir for builder's work done at a projected hospital, called "The Western Hospital." The defendant Hicks pleaded the general issue, and the other

defendants suffered judgment by default.

It appeared that Mr. Sleigh, one of the defendants, had projected the hospital as a charitable institution, at which the other defendants were to be physician and surgeon, and to deliver lectures. To shew a joint liability to the present demand, workmen were called, who proved that all the three defendants consulted together, and gave directions to the workmen as to various things for the accommodation of the patients; and that, by the permission of the provisional committee, the defendant Hicks had drawn checks for some medicines for the \*72] patients of the hospital, \*and also a check for 10*l*., the proceeds of which had been paid to the plaintiff. All the defendants were members of the

provisional committee for managing the intended hospital.

Spankie, Serjt., for the defendant Hicks. If persons engage in a commercial speculation, it may be inferred that the parties who are to participate in the profits are to be liable for the expenses; but, in a work of charity, it is clear, that the parties, if medical men, devote their time, and if not so their subscriptions to the charities; but no one is deceived; the persons who deal with them knowing that they look for payment to the sums subscribed. The defendants, it is true, gave directions as to the accommodation of the patients; that was mere advice, but no order. This is not like the case of a person giving directions about the house he is himself to inhabit. If a seaman came on board a ship, and, seing any thing that he did not approve of, were to say, pull down that bulk head, would that make him liable to the ship builder? In the building of this Court my learned brother and myself suggested many alterations, but no one ever thought of making us liable to pay for it. Could it be supposed that the plaintiff worked at the hospital on the credit of the physician and the surgeon. It is known that the committee of a charitable institution are constituted to take care of the funds subscribed, and not to be liable to the tradesmen. Committees of trading companies act for gain, but the committees of charitable institutions do not. That, therefore, excludes the inference that things are done on their credit: the inference that arises where the parties act for gain being excluded.

TINDAL, C. J., (in summing up.) The question here is, whether there was any contract by all these three defendants. Where no one is present at the making of any contract, and there is no correspondence, a Jury must look at \*73] the facts, to see who the contractors are; and they must \*look at the acts of the parties while the work is going on. The plaintiff relies on the fact of the defendants giving orders; and he also says, that if there was any profit, the defendants were jointly to derive it, as they were to give lectures; and it is shewn that Mr. Hicks made a payment for part of the plaintiff's claim. On the part of Mr. Hicks it is contended, that the design originated with Mr. Sleigh; and that all that Mr. Hicks did was as a surgeon, to carry on the objects of the hospital. The defendants, no doubt, thought the funds of the hospital would be sufficient to exonerate them, but still the tradesmen are not bound by that, unless they were distinctly told that they were to deal on the terms of looking Verdict for the plaintiff.

to the hospital only.

Wilde and Jones, Serjts., and R. V. Richards, for the plaintiff. Spankie and Storks, Serjts., and Godson, for the defendant Hicks.

[Attorneys-Shuter and Hill.]

See the case of Glenester v. Hunter, ante, p. 62.

## COLLIER, M. D., v. SIMPSON. June 23.

Slander.—The words imputed the prescribing of medicines in improper doses, and the defendant justified:—Held, that medical books, which were stated by the medical witnesses to be works of medical authority, could not be put in, to shew that such doses were sanctioned; but, that the medical witnesses might be asked their judgment, and the grounds of it, which might in some degree be founded on these books as a part of their general knowledge.

SLANDER. The declaration stated, that the plaintiff was a physician, and that the defendant spoke certain words, imputing that the plaintiff had prescribed improper medicines for a child. Pleas—General issue, and several pleas of justification, stating that the plaintiff prescribed corrosive sublimate in too large doses. Replication—de injuria.

It appeared that the complaint under which the child laboured was water on

the brain.

\*Wilde, Serjt., proposed to shew that the prescriptions were proper, and the doses not too large; and wished to put in medical books of authority, to shew what was the received opinion in the medical profession.

TINDAL, C. J. I think I cannot receive medical books.

Wightman. When foreign laws are to be proved, it frequently happens that a witness produces a foreign law, and states it to be a book of authority.

TINDAL, C. J. Physic depends more on practice than law. I think you may ask a witness, whether, in the course of his reading, he has found this hid down.

Sir H. Halford, the President of the College of Physicians, was called. He stated that he considered the medicine proper, and that it was sanctioned by books of authority. He stated that the writings of Dr. Merriman and Sir Astley Cooper were considered of authority in the medical profession.

Bompas, Serjt. I submit that medical books cannot be cited—more especially those of living authors. Sir Astley Cooper and Dr. Merriman might be

called.

Wilde, Serjt. I wish to shew that these books are acted upon by persons in

the medical profession.

TINDAL, C. J. I do not think that the books themselves can be read; but I do not see any objection to your asking Sir Henry Halford his judgment, and the grounds of it, which may be, in some degree, founded on books, as a part of his general knowledge.

Verdict for the plaintiff—Damages, 40s.

\*Wilde, Serjt., and Wightman, for the plaintiff. Bompas, Serjt., and Kelly, for the defendant.

[\*75

[Attorneys-Mayhew & Co., and Lonedale.]

# HEWITT v. PIGGOTT, Esq. June 23.

A. brought an action against the Sheriff for a false return of nulla bona to a fiera facias issued against the goods of B. B. had filed a bill of discovery against A., on which

there had been a decree or order, that A. should bring into the Court of Chancery all letters written by B. or any other person to him respecting the original debt. A., under this decree or order, brought in various letters:—Held, that none of them could be read in evidence on the part of the defendant in the present action, without first putting in the bill and answer.

Action against the Sheriff of Somersetshire for a false return of nulla bona to a writ of fi. fa., issued upon a judgment obtained in Easter Term, 1828,

against the Earl of Egmont, upon a bond debt for 4000l.

The defence was, that in 1824 the whole of the property of the noble Earl was conveyed to trustees for the benefit of creditors; and, that although the plaintiff had not in fact executed the deed, his debt, upon which the judgment was obtained, was inserted with the others in the deed; that he was fully acquainted with this arrangement at the time, and had requested, that payment might be made out of the trust funds of a bill of exchange drawn by him upon the Earl of Egmont for 300*l*., and had written various letters expressing his wish to have debentures for his debt like the other creditors, according to the provisions of the deed.

It appeared that a bill of discovery had been filed in Chancery, on the part of the Earl, against the plaintiff Hewitt, and that his answer contained a schedule of letters in his possession from the Earl and other persons relating to these transactions. An order or decree was subsequently made in the suit, requiring the present plaintiff to bring all the said letters, papers, &c., mentioned in his answer, into the proper office of the Court, to be deposited there.

Wilde, Serjt., for the defendant proposed to put in this order, with a view to introduce a letter written to the \*present plaintiff, which had been so

deposited by the plaintiff under it.

Cross, Serjt., objected, that to make any part of the proceedings in equity evidence in this cause, the bill and answer must be put in, upon which the order in question was founded; and that it was not competent to the defendant to select a particular document, which might bear a very different interpretation from its prima facie import, when explained by the other part of the proceedings to which it related.

TINDAL, C. J. The object of putting in this order is merely to introduce a letter which it is alleged the plaintiff produced from his own custody, and placed in the Six Clerks' Office. I think the order is admissible of itself, being an act of the Court, not affecting the rights of either of the parties; but it is another

question whether the letter can be given in evidence.

The order was then read.

A clerk from the Six Clerks' Office then produced several bundles of letters and papers as having been deposited there under the said order, from among

which the letter in question was taken.

Cross, Serjt., objected to its being read, unless the bill and answer, of which this letter was in fact made a part, either by being set out in the answer, or being therein referred to and described, were also read. It might be the fact, that the present plaintiff had, in his answer in Chancery, given such explanations with respect to the letter, as would destroy or materially alter the effect for which it was attempted to give it in evidence on the other side.

\*777] Wilde, Serjt. The letter is not written by the present \*plaintiff, and, therefore, it cannot be made evidence against him in the ordinary way, by proof of the handwriting. But it appears, by the order, that it has been in his possession for a considerable time, and it may be inferred that he is not only well acquainted with its contents, but has acted upon it. He will have full opportunity of giving any fair and legitimate explanation of its contents here, which he may have given in his answer in Chancery; and the defendant ought not to be required to put in the whole proceedings, by which he would probably

have to produce as his evidence the partial statements of the plaintiff in his own favour, which have nothing to support them.

TINDAL, C. J.—The letter cannot contain any statement made by the present plaintiff himself at the time it was written, because it is a letter written and sent to him. It is not proposed to put in with it any letter in reply, written by the present plaintiff; but, it may be that his answer in Chancery contains such a contradiction or explanation of any parts of the letter which may seem to bear against his right to recover in this action, as will at once wholly neutralize its effect. I think, therefore, that the letter is inadmissible without the bill and answer.

The letter was not read. Verdict for the defendant.

Wilde and Jones, Serjts., and Follet, for the plaintiff.

Cross, Spankie, and Andrews, Serjts., and Steer for the defendant.

[Attorneys-Vines & A., and R. Hill.]

See the case of Fairlie v. Denton, Vol. 3 of these Reports, p. 103.

\*Adjourned Sittings in London after Trinity Term, [\*78 1831.

BEFORE LORD CHIEF JUSTICE TINDAL.

## BUDD v. FAIRMANER. July 2.

A receipt on the sale of a colt contained the following words after the date, name, and sum, "for a grey four years old colt, warranted sound in every respect:"—Held, that such part as related to the age was a representation only, and not a warranty.

The declaration stated, that in consideration that the plaintiff would deliver to the defendant a certain mare, and also pay him 10th in exchange for a certain colt, the defendant undertook, and then and there faithfully promised that the said colt was then and there a four years old colt. It then averred that the plaintiff delivered the mare and paid the 10th, "yet the said defendant contribing and fraudulently intending to injure the said plaintiff, did not perform or regard his said promise and undertaking, but thereby craftily and subtilly deceived the said plaintiff in this, (to wit) that the said colt, at the time of the making of the said promise and undertaking of the said defendant as aforesaid, was not a four years old colt, but on the contrary thereof was much less than a four years old colt, (to wit) a three years old colt, whereby the said colt became and was of no use to the plaintiff," and whereby also the said plaintiff "was put to great charges and expenses in feeding, keeping, and taking care of it," &c.

The action was brought to recover the expense of keeping the colt mentioned in the declaration for a year, it being contended, on the part of the plaintiff, that the defendant warranted the colt to be, at the time of the bargain for it. a four years old, whereas, in point of fact, it was only a three years old. When the bargain was made, the following receipt was signed by the defendant—

"Received, August 4th, 1830, of Mr. Budd, ten pounds for a grey four years old colt, warranted sound in every respect.

John Fairmaner."

\*From the evidence of several veterinary surgeons it appeared, that, on the 4th of August, 1830, when the colt was sold it was only three years old, and could not be strictly called a four years old till the 1st of May, 1831; but they admitted on cross-examination, that by four years old was sometimes meant three off or rising four, and sometimes four off or rising five. They said

also, that till it was actually four years old, it was not suitable for a carriage

horse, as which it appeared the plaintiff meant to use it.

Andrews, Serjt., for the defendant, contended that the plaintiff must be nonsuited, as there was no evidence of any warranty that the colt was a four years old colt: the warranty, according to the terms of the receipt, being confined to the soundness; and the other part being description only. He referred to Richardson v. Brown.(a)

Wilde, Scrit., for the plaintiff.—The case of Richardson v. Brown is distinguishable from the present, as there the warranty was separate from the rest of the contract. There are numerous cases which shew that where a man sells an article of a given description, he warrants it to be of that descrip-

TINDAL, C. J.-I am of opinion that the first part of the receipt contains a representation, and that the latter part a warranty. In the case of a represen-'ation, to render liable the party making it, the facts stated must be untrue to his knowledge; but in the case of a warranty, he is liable whether they are within his knowledge or not.(c) The plaintiff \*has not made out his case as stated in the declaration, and therefore he must be called.

Nonsuit.

Wilde and Spankie, Serjts., and Kelly, for the plaintiff. Andrews and Russell, Serjts., and Erle, for the defendant.

[Attorneys-Sylvester & W., and D. Willoughby.]

In the ensuing Michaelmas Term, Wilde, Serjt., obtained a rule nisi for setting aside the nonsuit. He cited on the motion the cases of Gardner v. Gray; (d)

Bridge v. Wain; (e) and Yeates v. Pim. (f)

On a subsequent day in the term, Andrews, Serjt., shewed cause.—The nonsuit was right. The language of the receipt is decisive, it warrants the soundness only. In moving for this rule it was argued, that every representation amounts to a warranty. But the cases cited do not \*bear out that position. As to Gardner v. Gray, that was the case of waste silk in a sale note, which turned out not to be marketable; and it was held that it ought to have been. With respect to Bridge v. Wain, the case of the scarlet cuttings, the cuttings differed much, some being marketable and others not, and a warranty of their being marketable was implied. In the case of Yeates v. Pim, which related to prime singed bacon, it was only held that no custom of trade could be set up in contradiction of a written description. But this case turns upon the words of the receipt. Richardson v. Brown is in point, in our favour.

(a) 1 Bing. 344; and 8 J. B. Moore, 338. The words relied upon in that case were "To be sold, a black gelding five years old, has been constantly driven in the plough—Warranted." And it was held that the warranty was only of soundness.

(b) Vide the cases referred to in the argument in banc.
(c) Vide Salmon v. Ward, Vol. 2 of these Reports, p. 211.
(d) 4 Camp. 144. That case decides, that where, before or at the time of sale, a specimen of the goods is exhibited to the buyer, if there be a written contract, which merely describes the goods as of a particular denomination, this is not a sale by sample; but there is an implied warranty that the goods shall be of a merchantable quality of the denomination mentioned in the contract.

(e) 1 Stark. N. P. C. 504. That case decided that where goods we're described in the invoice as scarlet cuttings, a warranty was to be inferred that they answered the known mercantile description of scarlet cuttings.

(f) 2 Marsh. 141; 6 Taunt. 446; Holt, 95. That case decides that an usage of trade cannot be set up in contravention of an express contract. It was a case in which A. agreed to sell to B. a quantity of prime singed bacon, which B. weighed and examined and paid for by a bill at two months, but before the bill became due, he gave notice to A. that the bacon did not answer the contract. And it was held that B. could not give in evidence a custom that the buyer was bound to reject the contract, if at all, at the time of examining the goods.

There was also a case of Dickinson v. Gapp, tried in the Common Pleas, at the adjourned sittings in London after Hilary Term, 1821, in which the receipt given was in these words,: "September 7th, 1820, Received of Robert Dickinson 100%. for a bay gelding, got by Cheshire Cheese, and warranted sound." According to the evidence, it appeared that the gelding was not got by Cheshire Cheese, but the defendant believed that it had been. Dallas, C. J., held that it was a representation merely, and that the warranty was confined to the soundness. That case is precisely in point with the present. The case of Jendwine v. Slade, (a) and Williamson v. Allison, 2 East, 446, go to shew that a representation does not bind, unless it is known to be false. With respect to the colt's being useful or not, that was a matter which both parties could judge of.

ALDERSON, J. Where a vessel was sold as a copper fastened vessel, to be taken with all faults, and it turned out not to be copper fastened, it was held

that the warranty was broken.

Andrews, Serjt. The written receipt shows clearly what the intention was.

\*Russell, Serjt., on the same side. The cases of Gardiner v. Gray, and Yeates v. Pim, were cases of a general contract to supply an article of a given description; and it was held, that the article supplied must answer that description. Those decisions only show that a purchaser is entitled to an article which is saleable in the market, according to the description given. But in this case there is an express warranty as to the part intended to be warranted. The principle to be extracted from Dunlop v. Waugh(b) and Jendwine v. Slade, as applicable to this case, is, that what a man says about the age of a horse at the time of the sale, may be information given according to his belief only. The receipt shows the warranty to be confined to soundness. According to the evidence of Mr. Sewell, at the trial, it appears that the phrase "four years old" varies in its meaning.

ALDERSON, J. Unless it were sold on its birth day it never could be sold as

exactly four years old.

Wilde, Serjt., in support of the rule. I mean to contend, that this is a warranty that the colt was a grey four years old colt. If a man sells a horse as an entire horse, or as a mare or gelding, has not the purchaser a right to claim a horse answering the description? The colt was bought to match, and it was bought also for use. Now, if it was not grey it would not match, and if it was not four years old, it was too young for use. Supposing it to be a running horse, the age would be of importance. If the word "warranted" was not used, would not the description amount to a warranty? No particular words are necessary to constitute a warranty. The cases as to scarlet cuttings and waste silk were cited, not to show that the things must be \*marketable, but that they must answer their description. The words "Riga hemp" and "Prime yellow Dantzic tallow," have been held to amount to a warranty. What would otherwise amount to a warranty may be cut down by something subsequent; but it must be something relating to the same matter and not to a wholly different matter. Where words amount to a warranty, and afterwards there is an express warranty, the implied warranty will not be cut down thereby. Selling a thing as of a given description, is a warranty that it is of that descrip-If a horse is sold as "a perfect horse, warranted sound," because he is warranted sound he is not to be the less a perfect horse. The description in this case is of a four years old colt; and the mention of the age at all shows that it was material. With respect to ships, if a ship be stated to be "American," or "copper fastened," that description will not be affected by a subsequent war-

(b) Peake, N. P. C. 123. That case decides, that "it is not a warranty to sell a harse as of the age stated in a written pedigree, if at the time the seller declared that he knew nothing of the horse's age, but what he learned from the written pedigree."

<sup>(</sup>a) 2 Esp. 572. That case decides, that the putting down the name of an old artist in a catalogue as the painter of a particular picture, is not such a warranty as will subject the seller to an action.

ranty to sail before a given day. The word "American" might imply a warranty of neutrality, and so become material.

ALDERSON, J. A warranty must be complied with, whether it is material or

not; but it is otherwise as to a representation.

Wilde, Serjt. The case of Sheperd v. Kain, (a) is important in my favour, for there a ship was sold "as a copper-fastened vessel," but it was to be taken with all faults; and yet it was held that the purchaser had a right, under those words, to have a vessel entirely copper fastened.

\*84 ] \*Spankie, Serjt., on the same side.—If there had been no warranty added, the words, "a grey four-years old colt," would have been clearly a warranty. The maxim, "expressum facit cessare tacitum," applies only where both warranties are of the same matter. But warranties are divisible; and in this case there is a division between the express and the implied warranties.

The case of Gray v. Cox(b) is also in point.

TINDAL, C. J. In this case there is a written instrument to show the contract. We are to interpret according to the proper construction from the face of the instrument; and it appears to me that the intention was to confine the warranty to the soundness; and that what precedes the warranty is a description or representation only. What a man warrants, he must make good, whether he knew the fact or not. But for what he represents, if there is a latent defect, and he acts bona fide, he is not answerable. In the case of Parkinson v. Lee, (e) Mr. Justice Lawrence draws the distinction between a warranty and a representation. In the present case, as it appears to me, the purchaser takes a warranty as to the soundness, and takes the age upon representation. As to the merits, there is different evidence with respect to the meaning of the term "four years old," it being in some cases rising four, and in others four off. I use this fact for the purpose of showing "that the terms may have a varying construction; and, therefore, one part may be warranted, and the other not. The case of Browning v. Wright, 2 Bos. & Pul. 13, shows the limitation of an express warranty. Shepherd v. Kain was decided on the ground that there was not any express warranty. Richardson v. Brown, and Dickinson v. Capp, are directly in point. I am of opinion that the rule must be discharged.

GASELEE, J., concurred.

Bosanquet, J. We must construe this instrument according to the intention of the parties. Where a party sells by a sale note, he must sell such an article as the sale note expresses. So in a policy, the introduction in the margin of the word "American," or "neutral," may mean that it is intended to warrant those facts. What is the instrument in question? It is not a sale note, but a receipt given upon a sale. Can we infer from the terms used in the commencement of the receipt that there is a warranty as to the age? It seems to me, that Richardson v. Brown and Dickinson v. Gapp are decisive on this point.

Alderson, J. As at present advised, if the word warranted had been the

(b) 6 D. & R. 200; 4 B. & C. 108; and 1 C. & P. 184. "If an article is sold for a particular purpose, and at the usual market price, and it turns out to be defective, an action is maintainable against the seller, though there was no warranty at the time of the sale."

But see the observations there, as to the form of such action.

<sup>(</sup>a) 5 B. & A. 240. According to that case, where an advertisement for the sale of a ship described it as "a copper-fastened vessel," adding, that it was to be taken with all faults, without any allowance for any defects whatsoever; and it appeared that the ship was only partially copper-fastened, it was held, that the description amounted to a warranty, and that the vendor was liable as for a breach of it, notwithstanding the words "with all faults," &c.

<sup>(</sup>c) 2 East, 314. That case decides, that upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and, therefore, if there be a latent defect unknown to the seller, arising from the fraud of the grower of whom he purchased, such seller is not answerable, though the hops turn out to be unmerchantable.

last word, I should have held that it extended to the whole. But here. I think Rule discharged.(a) it is confined to the soundness only.

#### BEFORE MR. JUSTICE BOSANQUET.

F\*86

(Who sat for the Lord Chief Justice.)

### ELTON v. LARKINS. July 4.

It is not necessary to defeat an action on a policy of insurance on a ship, on the ground of concealment of material facts, fraud that should be made out; but it is enough, if the information be withheld, although the party withholding may only have erred in

In general, it is not necessary, that the assured should communicate the time of sailing. yet, if it be such as to make the ship a missing ship, then it becomes a material fact,

and should be communicated.

Whether underwriters at Lloyd's must be taken, under all circumstances, with reference to insurances, to be cognizant of the contents of the foreign lists filed in the reading room there—Quære.

This was an action on a policy of insurance of the ship Fanny, on a voyage

from Cadiz to London, with liberty to touch at Exmouth.

From the evidence given at first, on the part of the plaintiff, it appeared that the insurance was effected on the 29th of December, 1828, though the date of the policy was in January, 1829. The plaintiff's son swore, that his father, on the 29th December, told the broker, that the ship was to sail on the 23d of November, and asked him if he had done anything as to the insurance; that the broker said, there was no risk in it—that he would take it himself for ten guineas, and that he could get it done at from 25s. to 30s. The same broker was concerned in freighting the vessel on an intended voyage from London to St. Michael's, after she should return from Cadiz.

A waiter from the reading-room at Lloyd's proved that lists, containing accounts of the sailing &c., of vessels from foreign ports, came by the post, and were filed, which lists the underwriters were in the habit of looking at; and that the defendant attended in the reading-room most days. A list was put in, which arrived at Lloyd's, from Cadiz, on the 22d of December, it contained an account of the sailing of the Fanny from that place, on the 25th of November. A witness was also called, who stated that a vessel varied in coming from Cadis to London from twenty to fifty days, and that the time was always very uncer-

\*Spankie, Serjt., for the defendant. The plaintiff, the owner of the ship, was in possession of important information, which, if the underwriter had also been possessed of, he would either have declined the insurance altogether, or have undertaken it at an increased rate. The plaintiff did not communicate this to the underwriter, and therefore he cannot recover on the policy. The law clearly is, that the effect of not communicating information, does not depend upon whether the party in possession of it considered it important or not, but whether it turns out to be so in the opinion of a Jury. This was decided in the case of a life policy in Von Lindenau v. Desborough.(b) The plaintiff had

(a) See, in addition to the cases cited in the argument, Geddes v. Pennington, 5 Dow.

<sup>164,</sup> and those collected in Harrison's Index, Vol. 2, pp. 422 to 425.

(b) Vol. 3 of these Reports, 353. That case, inter alia, decides, that if the assured, at the time of effecting the policy, conceals anything, which it is material for the insurer to know, the policy is void; and it makes no difference whether the assured considered it material or not; and what amounts to a misrepresentation or to a material concealment, is a question for the Jury.

received a letter from his captain, containing important information as to a vessel called the Traveller, which sailed from Cadiz on the 22d of November. and was driven into Kinsale, in Ireland, in great distress. On the part of the plaintiff, reliance is placed upon the fact, that there are lists at Lloyd's which may be referred to. But is it to be argued, that an underwriter can be expected to look. at these lists with reference to vessels with which he has no connection, and in the fate of which he has no interest; especially when it may be in a language which perhaps he does not understand?—at all events, the circumstance of there being such lists is not sufficient to excuse the plaintiff, who had the information in his pocket, from communicating it to the broker. The letter of the captain contained these words "I have now to inform you, that the last boat from & Son is now alongside, which completes the cargo; and I am in great hopes to sail from here to-morrow, or Sunday morning, the 23d. One vessel sails to-morrow direct for \*London, the schooner Traveller having been detained thirty days." Now, this, I submit, was a most material letter to be communicated; and if it had been communicated on the 29th of December, the broker would have known when the ship was expected to sail, and he would have known also when the Traveller sailed, and might have found out that she was in distress. The Fanny was, in fact, a missing ship, and out of time on the 29th of December, when the policy was effected. The plaintiff wished to be his own insurer, and to take the risk, and he did it as long as he could. If the time of sailing had been communicated by shewing the letter, it would immediately have ap. peared to any intelligent underwriter, that the ship was out of time. The case of a fifty-days passage is an extreme case, which does not enter into averages; the witness who proved it, admitted that thirty days was the average time, and reckoning from the 23d of November, the day mentioned in the letter, it would have been more than thirty days. The vessel also was to touch at Exmouth, and her arrival there would be six days earlier than her arrival in London, and would be known in London by the post.

On the part of the defendant, several underwriters were called; and from their evidence it appeared, that it was not the practice at Lloyd's to consult the foreign lists, unless some particular circumstance rendered it desirable; and that, with reference to the ship in question, if they had been told the day at which she was expected to sail, they would have inspected the lists, but not

otherwise.

It was also proved, that a vessel called the William sailed from Cadiz on the 30th of November, and arrived in London on the 16th of December; that the Traveller sailed from Cadiz on the 21st of November, and was towed dismasted, by a steam-boat, into Kinsale, in Ireland, on the 20th of December. The unage was very uncertain; but that, judging from the circumstances of the arrival of the William, and the distress of the Traveller, they should have thought the Fanny a missing ship on the 29th of December, and would not have insured

her at the rate in question.

The broker who effected the policy was also called. He denied that, at the time of the insurance, any thing was said by the plaintiff as to the time of sailing, or as to any letter he had received from his captain; but stated that, about the second week in January, he asked the plaintiff when he expected the Fanny, and his reply was, that he had been expecting her every day for some days past; that he then asked him, what his last communication was respecting her, upon which he took from his pocket the letter of her captain, dated the 21st of November—which he, the broker, read, and then said: "This letter ought to have been communicated to me at the time of effecting the insurance;" to which the plaintiff replied, that he did not consider it material, otherwise he should have done so. On his cross-examination, he admitted that he did not apply to the underwriters to put their names on the policy till the end of January, some time after he had seen the letter in question. He denied that he had ever said, that the underwriters had not a leg to stand on.

To contradict him in this, two witnesses were called, one of them the plaintiff's son, who in addition stated, that, in a conversation with his father, a few days after the insurance, the broker had said, "I find the ship sailed on the

25th, and not as you told me on the 23rd."

Wilde, Serjt., in reply.—First, if the underwriters know a fact, the assured need not tell it them; and, secondly, if they provide the means of gaining that knowledge, and it is their duty as men of business to resort to those means, and they do not, the case is the same. In Friere \*and Another v. Woodhouse,(a) it was considered that it was not a concealment, to withhold a fact which was mentioned in Lloyd's lists; and that case is in point here. The underwriters, if they want to know when a vessel sailed, should ask the question. The lists are kept for the purpose of giving information; and if they give it, it is the same as if the assured gave it. In this case, all the information that was requisite, was to be found in the lists—and it was not necessary that the letter should be communicated.

Bosanquer, J., (in summing up), said—The only question is, whether or not the plaintiff has withheld a letter, the communication of which was necessary, to put the parties to this insurance upon a fair and equal footing. It seems that the vessel sailed from Cadiz on the 25th of November; and that the first communication on the subject of the insurance took place on Friday, the 26th of December. There was a further conversation on Saturday the 27th. and on Monday the 29th the insurance was effected by the broker; and the question is, whether the passage in the captain's letter, which has been read, ought or ought not to have been communicated by the plaintiff to the broker, it being admitted that the letter itself was not communicated, though there is a contradiction in the evidence as to whether the time of sailing was mentioned. It has been truly said, that it is not necessary, in order to establish a concestment which will defeat the policy, that fraud should be made out; but it will be enough, if it is a material communication, that it was withheld, although the party may have only erred in so doing. The question as to whether it was material in this case, rests upon two grounds: the first, as to the day of sailing of the vessel in question; and the second, as to \*the expected day of sailing of the Traveller. Generally speaking, it is not necessary that the assured should communicate the time at which the vessel sailed; it has been so determined; but, if the time be such as to make the ship a missing ship, then it becomes material. Neither is it necessary for the assured to communicate such facts as lie properly within the knowledge of the insurer. According to the evidence for the plaintiff, the expected time of sailing was communicated before the insurance was effected. But this is denied in the evidence for the defendant. It seems that in Lloyd's lists, there was an account of the sailing of the vessel in question, on the 25th of November.

His Lordship left the contradictory evidence to the Jury, who found their Verdict for the plaintiff.

Wilde, Serjt., and Maule, for the plaintiff. Spankie, Serjt., and Barnewall, for the defendant.

[Attorneys-Oliverson & Co., and Blunt & Co.]

## EVERETT and Others v. LOWDHAM and Another. July 4.

A defendant's attorney, who has been subposnaed on the part of the plaintiff may, at the desire of his counsel, remain in Court during the trial of the cause, although an order has been made for the witnesses on both sides to withdraw.

<sup>(</sup>a) Holt's N. P. C. 572; see also Durrell v. Beverley, Id. 283, and the cases there colected.

Assumests on a guarantic given to secure advances of money made during an election for members of Parliament for the borough of Camelford.

Spankie, Serjt., for one of the defendants, applied to have the witnesses ordered out of Court, with the exception of the attorney who instructed him, and who had been subposned on the part of the plaintiffs.

Wilde, Serjt., for the plaintiffs, objected to the attorney's remaining.

\*92] \*Russell, Serjt., who was with Spankie, Serjt., suggested, that if the objection were to prevail, it would always be in the power of one party to deprive his opponent of the assistance of his attorney by subprenaing him as a witness. The case of Pomeroy v. Baddeley, reported in R. & M. 430, was referred to, in which Mr. Justice Littledale excepted the attorney in the cause from a general order for the witnesses to withdraw, on a statement by counsel that he could not conduct the case without his assistance.

Bosanquer, J., under the circumstances, allowed the attorney to remain in

Court.

Wilde and Jones, Serjts., and D. Pollock, for the plaintiffs.

Spankie and Russell, Serjts., and Tomlinson and Butt, for the respective defendants.

[Attorneys-Sweet & Co., and Lowdham Co., - Coles.]

See the case of Beamon v. Ellice, Vol 4 of these Reports, p. 585, and the cases there collected.

## COURT OF EXCHEQUER.

Second Sitting in London in Trinity Term, 1831.

BEFORE MR. BARON VAUGHAN.

#### FISHER v. FILMER. June 7.

An attorney brought an action against the petitioning creditor, under a commission of bankrupt, for business done previous to the assignment:—Held, that, notwithstanding the 14th sect. of the bankrupt act, (6 G. 4, c. 16), he might maintain the action without proof that his charge had been allowed by the commissioners, according to the provisions of that section, as the whole was matter of investigation before the taxing officer.

Assumpsit on an attorney's bill. The defendant was the petitioning creditor in a commission of bankrupt, and \*the charges were for business done previous to the assignment.

Cooper, for the defendant, submitted that the plaintiff must be nonsuited, because it did not appear that the bill had been taxed by the commissioners, as required by the 14th section of the bankrupt act.(a)

(a) The 14th sect. of the 6 Geo. 4, c. 16, enacts, "That the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission unti, the choice of assignees; and the commissioners shall, at the meeting for such choice, ascretain such costs, and by writing under their hands direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission; and all bills of fees or disbursements of any solicitor or attorney employed under any commission for business done after the choice of assignees, shall be settled by the commissioners, except that so much of such bills as contain any charge respecting any action at law, or suit in equity, shall be settled by the proper officer of the Court in which such business shall have been transacted and the same, so settled, shall be paid by the assignees to such solicitor or attorney: pro

Andrews, Serjt., for the plaintiff, referred to Crowther v. Davis, MS., as

having already decided the point.

Cooper. In that case the bill was for costs incurred after the assignment. There has not been any decision upon this point, which relates to costs incurred previous to the assignment. By the bankrupt act, at a specific time the amount is to be ascertained. And it is the duty of an attorney to get his bill for costs previous to the assignment allowed by the commissioners; and, unless he has done so, he is not in a situation to maintain an action upon it.

\*VAUGHAN, B. May not all this be matter of inquiry before the officer? It strikes me, that when a retainer and cause of action are proved, then the rest is matter of investigation on taxation. It is in effect calling upon me to tax the bill. Cannot the attorney recover for the retainer

and the other part of the suit?

Cooper.—I apprehend that an attorney cannot bring an action for his bill

during the progress of a suit.

VAUGHAN, B., after some further consideration, at first intimated an intention of reserving the point for the consideration of the Court; but afterwards, on the request of *Andrews*, Serjt., said that he would not do so.

The Jury, therefore, under his Lordship's direction, found a verdict for the plaintiff, for the full amount of the bill. His Lordship telling them that, in his opinion, it must go to be taxed by the proper officer.

Andrews, Serjt., and Talfourd, for the plaintiff.

Cooper, for the defendant.

[Attorneys-Fisher and Sutton.]

## SMITH and Another v. BROWN. June 7.

When two persons are in partnership as attorneys, it is sufficient, under the statutes 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23, if their bill for business done is signed in the name of the firm, without the Christian name of either partner.

Assumpsite on an attorney's bill. At the time when the business was done, the two plaintiffs were in partnership as attorneys; but, the partnership was at an end at the time when the bill was delivered. One of the plaintiffs \*signed it in the name of the firm, viz. "Smith & Jago."

J. Williams, for the defendant, objected that this was not evidence of the delivery of a signed bill, as required by the statutes 3 Jac. 1, c. 7, s. 1, and 2 Geo. 2, c. 23, s. 23, inasmuch as, without the Christian name, the signature of

neither partner could be said to be complete.

VAUGHAN, B.—I think there is so much in the objection, that I will reserve the point. It appears to me that the object of the statute was, that the client should know the name of the attorney. And when mention is made of the name of a party, I think it must mean the Christian and surname.

Verdict for the plaintiff.

Talfourd and Swan, for the plaintiff.

J. Williams and Wightman, for the defendant.

[Attorneys-E. Smith and W. Murray.]

In the course of the Term, a rule nisi was obtained on the part of the defend-

vided that any creditor who shall have proved to the amount of 20% or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a Master in Chancery, who shall receive for such settlement, and the certificate thereof, 20s. and no more."

ant; which, after argument, was discharged, the Court being of opinion that the signing was sufficient. Vide Crompt. & Jervis, Vol. 1, p. 542.

\*96] \*Sitting in London, after Trinity Term, 1831.

BEFORE LORD LYNDHURST, C. B.

#### DIXON v. ROBINSON. June 15.

A bond was conditioned for the payment, on a certain day, being a year from the date, of a certain sum, with interest thereon, at the rate of 5l. per cent.:—Held, that a stamp covering the amount of the principal was sufficient.

DEBT on a bond.—Plea, non est factum. The bond was conditioned for the payment on a certain specified day, being at the end of a year from the date, of the sum of one thousand pounds, with interest thereon, at the rate of five per cent. It was stamped with a 5*l*. stamp, being the proper stamp, according to the stamp act,(a) for a bond "given as a security for the payment of any definitive, and certain sum of money, exceeding 500*l*. and not exceeding 1000*l*."

For the defendant it was argued, that the stamp was not sufficient, as the sum for the payment of which the bond was in fact given as a security, was the sum of 1,050*L*, being 1,000*L* the principal, and 50*L* for the year's interest. The word in the statute was "payment" not repayment;" therefore, it could not have reference to any sum advanced as a loan. The fair test by which to try the question was, to consider how much the obligor was entitled to receive, and the obligee bound to pay by virtue of the bond, and to treat that sum which the instrument did actually secure as the sum which it was given to secure.

Lord LYNDHUEST, C. B., directed a verdict to be taken for the plaintiff, and said he would reserve the point for the opinion of the Court; but, upon being informed that the plaintiff was entitled to judgment of the preceding \*term, and it being suggested on the part of the plaintiff that some case had been decided on the question, his Lordship said, that it should stand over till the next morning; and if the plaintiff's counsel should then produce a case, shewing that the stamp was sufficient if it covered the principal sum, without the interest, then he would direct judgment of the preceding term; otherwise he would adhere to his former resolution of reserving the point.

On the following moning, Wightman for the plaintiff, cited the case of Pruessing v. Ing,(b) and relied upon the words of Lord Tenterden in that case as very

strong upon the question of the sufficiency of the stamp.

Payne, for the defendant, contra contended that the words of Lord Tenterden amounted to no more than an obiter dictum, and also as the decision was given at once upon motion, it was liable to all the objections (if indeed any such were tenable,) sometimes urged against decisions given "in the hurry of Nisi Prius." He also referred to the cases of Israel v. Benjamin, (c) and Dicksen v. Cass. (d)

(4) 55 Geo. 3, c. 184, Schedule, Part 1.

<sup>(</sup>b) 4 B. & A. 204. That was not the case of a bond, but of a bill of exchange. However, Lord Tenterden, the only Judge who gave an opinion, and for aught that appears by the report, the only one at the time in Court, said that it had been the constant practice under similar provisions applicable to bonds to measure the stamp duty by the principal sum secured.

<sup>(</sup>c) 3 Camp. 40. That was the case of a bill of exchange, drawn for "50% sterling, with all legal interest for the same." The bill had a 2s stamp, which, under the stamp act then in force, covered the amount of 50% only. Garrow, for the defendant, contended (d) See next page.

Lord LYNDHURST, C. B., expressed his opinion that the stamp \*must be measured by the amount of the principal sum; and therefore, directed that the plaintiff should have judgment of the term.

Wightman, for the plaintiff. Payne, for the defendant.

[Attorneys-Wrigglescorth & R., and Ashurst.]

## Adjourned Sittings in London after Trinity Term, 1831.

#### FIRMIN v. CRUCIFIX and STAFF. June 22.

The statements in a special plea, on which judgment has been given for the plaintiff or demurrer, cannot be used at the trial of the cause as an admission on the record by the defendant; but the case must be tried on the general issue, without any reference to the special plea at all.

Assumpsit on a bill of exchange, accepted by the defendant Staff in the name of Lardners & Co. The question in the cause was, whether or not the defendant Crucifix was in partnership with Staff, carrying on business under the firm of Lardners & Company. The pleas were non assumpsit, and a special plea which stated that the said supposed bill of exchange was accepted by the said defendants in respect of mustard, which the plaintiff warranted to them, and which turned out to be bad. This plea was demurred to by the plaintiff, as not raising a material issue; and judgment by default was given for him.

\*Thesiger, for the plaintiff, relied on the statements in that plea as an admission upon the record, shewing the connection between the two de-

fendants.

Hutchinson, for the defendant Crucifix, contended, that the case must be tried upon the general issue, without any reference to the special plea.

Lord LYNDHURST, C. B.—That the plea is out of the question. It is for the

Jury to decide upon the general issue.

The case then proceeded; but the Jury were not satisfied that Crucifix was a partner; and, therefore, the verdict was For the defendants.

Thesiger, for the plaintiff.

Hutchinson, for the defendant Crucifix.

[Attorneys-Best and Davies.]

#### MEREDITH v. FLAXMAN. June 24.

If a man employing an officer attends with the officer, who seizes in his presence the

that the stamp was insufficient, as the bill was to carry interest from the date of it, and, therefore, a larger sum was payable upon it than 50l. The defendant had paid money into Court, and Lord Ellenborough decided that he was thereby precluded from taking the objection. His Lordship was also inclined to think that the stamp was sufficient. Garrow afterwards moved the Court on the same ground. The Judges did not decide that the stamp was sufficient; but were clearly of opinion that the objection could not be taken after the payment of money into Court.

(d) 1 B. & Ad. 343. A bond was given in a penalty of 2000L, conditioned for the payment of all such sums as the obligees (bankers) should advance to the obligers on account of the accepting or paying any bills, &c., to the amount of 1000L, together with such temful charges and allowences as were usually charged by bankers in such cases, and interest: Held, that a 5L stamp (the proper stamp for a bond given to secure a sum exceeding 500L, but not exceeding 1000L,) was insufficient for this bond, which was to secure the banker's

charges as well as the 1000L

goods of a third person under an execution which he has sued out, he makes himself responsible for the officer's acts. And, semble, that in such a case, where he is present and interferes, he ought to point out to the officer what goods are to be taken, and what not; also, if in such a case an unjustifiable assault be committed by the officer, the party authorising the seizure will not be answerable for it, unless it be shewn in some way to have been committed by his direction.

TRESPASS for breaking and entering the plaintiff's room, and taking his goods,

and assaulting and beating his wife.

The defendant pleaded not guilty, and also justified the entry and assult, on the ground that a warrant had issued from the Lord Mayor's Court of London to take the goods of a person named Salt, which were in the room in question, and he entered for the purpose of taking them; and while he was endeavouring

to get at them, the plaintiff's wife obstructed him.

\*The defendant in this action had been plaintiff in an action in the Mayor's Court, and had obtained a verdict and judgment against Mr. Salt, a surgeon, the upper part of whose house the plaintiff and his family had occupied for about two years. The greatest part of the goods taken had been at one time the property of Salt. And the main question of fact in the cause was whether there had been any transfer of them by Salt to the plaintiff. But it appeared that there were a table and two pictures, which were the property of the plaintiff, having been brought by him from his former lodgings. It did not appear that the defendant himself was in the room at all, and the assault upon the wife was committed by one of the officers, who went in under the warrant. The defendant, however, was proved to be near at hand during the seizure, and in communication with the officers; and a witness stated that he heard him say to the broker, "I'll be damned but I'll have them;" but he could not say of what they were speaking.

On the part of the defendant it was contended, that, for the assault, he was

clearly not liable to answer.

On the part of the plaintiff it was said, that, as he authorized the seizure, he was answerable for any violence which took place in the execution of it.

was answerable for any violence which took place in the execution of it.

Lord LYNDHURST, C. B.—You must show, in some way, that the violence

offered to Mrs. Meredith was done by the direction of the defendant.

No further evidence was given; and no further notice was taken of this point in the course of the cause. Salt swore that he transferred the goods to the plaintiff for a sum of 371. 10s.

On the part of the defendant, evidence was given to shew that it was highly

improbable that any such transfer had bona fide taken place.

\*LORD LYNDHURST, C. B., (in addressing the jury) said—supposing you should think that no money was paid, and consequently that there was no transfer of the goods which belonged to Salt, yet there is another point which may affect the verdict. There was a part of the goods taken, viz. a table and two pictures, which were confessedly the property of Mr. Meredith. If a man employing an officer chooses to attend with the officer, who seizes, in his presence, the goods of a third person, under the execution he has sued out, he makes himself responsible for the officer's act; but, if he is not there, and does not personally interfere in the matter, he is not liable. The questions, therefore, for your consideration will be, whether the goods said to have been transferred were the property of Meredith or of Salt; and, if of Salt, then whether these particular articles, viz. the two pictures and the table, were the property of Meredith, and were taken among the rest by the authority of Flaxman; for, if they were, then he is liable. It will be for you to say, whether he was so acting as to identify himself with the particular goods taken. As it seems to me, he ought to have pointed out to the officers what was to be taken, and what not. He was there in communication with the officers, and it appears to me, that by this he has made himself responsible for their acts. The question will be, whether these goods with the rest were taken by the direct authority of

Flaxman; for, if they were, then he will be liable; if not, then these goods must share the same fate as the rest. If you think he left it entirely to the officer and the broker to act according to their discretion, then he will not be responsible.

> The jury found for the plaintiff, damages 40s. for the table and picture, saying they thought the officers were acting under the directions of the defendant.

Adolphus, Price and Humfrey, for the plaintiff. Thesiger and Erle, for the defendant.

[Attorneys-Becke and Willoughby.]

\*FAREBROTHER and Another v. WORSLEY and Others, Executors [\*102 and Executrix of JOSHUA HURST, deceased. June 24.

If a Sheriff defends an action for a false return as well as he can, he may recover his costs from the sureties of his bailiff who executed the writ; though he has a verdict against him, on the ground that evidence was not produced, which, in another and subsequest suit between other parties, involving the same question, was obtained.

Semble, that, if in such an action, after he has obtained a rule nisi for a new trisl, he compromises the suit, with the assent of some of the sureties, by paying a less sum for damages than would be recoverable, and a less sum for costs than were incurred—be may recover his own costs against the surety who did not assent, if it appears that the

compromise was, under the circumstances, reasonable.

Semble, also, that in such a case the words "costs of any application to the Court toucking or concerning any matter, wherein the bailiff should act or assume to act as bailiff, comprise the costs of an application to the Court to set aside the judgment on which the execution was founded, the return to which gave rise to the action against the Sheriff.

COVENANT. The substance of the declaration, as it regarded the points in the cause which are here reported, was, that the deceased, Joshua Hurst, covenanted with the plaintiffs, as Sheriff of Middlesex, as a surety with others of their bailiff, Joshua Hurst the younger; one part of which covenant was, "that the said bailiff should and would well and truly pay to the said Sheriff, his under-sheriff, or deputies, or one of them, the costs and charges of defending any action, and of prosecuting or opposing any motion in or application to the Court, touching or concerning any matter, wherein the said bailiff should act or assume to act as bailiff to the said Sheriff." It then stated certain motions which the plaintiffs were obliged to make, and a certain action in the Exchequer which they were obliged to defend, in consequence of a return to a writ made by the bailiff's direction.

The defendants pleaded, that the plaintiffs were not damnified; and also, as to the costs of defending the action in the Exchequer, that they were incurred

by the plaintiffs unnecessarily.(a)

The plaintiffs replied, taking issue on the plea non damnificatus, and alleging, that the costs in the action in the Exchequer were necessarily incurred. Various sums were sought to be recovered, which, as they had been paid by the Sheriff in respect of matters for which, according to the deed, the bailiff gave directions in writing, it is not necessary to introduce here. But it appeared, \*that, in the month of May, 1827, a judgment was obtained by Mr. Wilton against Mr. Chambers, for 16,000%, in consequence of which a writ of execution in the consequence of which a writ of execution in the consequence of which a writ of executions in the consequence of which a writ of executions in the consequence of which a writ of executions in the consequence of which a writ of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions in the consequence of which a write of executions is a consequence of which a write of executions is a consequence of the conseque tion, indorsed to levy 1800l., was delivered to Hurst the bailiff, who, under Wilton's direction, levied to a considerable amount on goods at Enfield, as the

<sup>(</sup>a) There was another plea, which was held bad on demurrer after argument, vide l Crompt. & Jervis, 549.

goods of Chambers. Immediately after the levy, notice was given to the bailiff, by the assignees under a commission of bankrupt which had been issued against Chambers, that the goods belonged to them and not to Chambers. The sheriff returned nulla bona—upon which Wilton commenced an action in the exchequer for a false return. The sheriff applied to the Court of King's Bench to set aside the judgment in Wilton v. Chambers, and obtained a rule nisi, which was not made absolute. The costs amounted to 81%. Upon proof of this being tendered—

Erzkine objected, that it was not evidence against the defendants, as it would have relation to circumstances precedent to the time at which the bailiff began to act, and there was no evidence that he had authorised the application.

Lord LYNDHURST, C. B. What has the Sheriff to do with the judgment in

Wilton v. Chambers?

Jervis. There would have been an end of the matter altogether, if the application had succeeded. It was made under the advice of counsel; the object was to defeat the action of Wilton v. Farebrother.

Lord Lyndhurst, C. B. I will take the evidence; we shall see how it

connects itself with the case afterwards.

It appeared also, that the cause of Wilton v. Farebrother was tried, and a special verdict found, and a rule nisi for a new trial obtained; this was after\*104] wards abandoned by \*consent, and the cause was compromised, by an agreement on the part of the sheriff to pay 200l. damages, and 400l. costs. This was less than the actual amount of the costs. The agreement was made with the assent of the other sureties, but not with the assent of the defendants, the executors. It appeared, however, that they did not require the sheriff to proceed, but only said they would have nothing to do with it. The sheriff's costs in this action were sought to be recovered, but not any part of the sum paid for the compromise. It was also sought to recover a sum of 80l. 14s., being the costs of an application by the sheriff to postpone the trial of Wilton v. Farebrother, till a cause of Bernasconi v. Farebrother, involving the bankruptcy of Chambers, which had been tried once in the Court of King's Bench. should have been tried again.

Bench, should have been tried again.

Erskine for the defendants. It is for the jury to say, under the direction of his lordship, whether the sheriff can recover any part of the costs of the cause of Wilton v. Farebrother, as it was compromised without the consent of the executors. It is admitted, that they were not parties to the compromise, therefore, they cannot be fairly implicated in any of the consequences arising from it. As the sheriff thought proper to enter into a compromise with some of the sureties, to those sureties he must look, and not to those who refused to be parties to any such agreement. The costs, also, of putting off Wilton v. Fare-

brother were spontaneously incurred, and cannot be recovered.

Lord LYNDHURST, C. B. I have no doubt about these costs, my only doubt

is as to any costs which are the result of a compromise.

Jervis, for the plaintiffs. The question is, did the executors protest against the compromise, did they insist on the sheriff's going on and defending? It was necessary that the action should be defended, and it was defended up to a certain time, and the sheriff exercised a sound discretion in compromising it.

Erskine. The sheriff should not have come to such a compromise, unless he could shew that, if he had gone on, he must have been defeated. In Wilton v. Farebrother, the bankruptcy was to be made out by the sheriff, and he did not prove the trading satisfactorily. That has since, in another case, been established; and if the sheriff had gone on, he would eventually succeeded, and received his costs from Wilton.

Lord LYNDHURST, C. B. There is no question for the jury. There is no evidence at present before the court, whether the sheriff exercised a sound dis-

cretion in what he did. He has compromised a defended cause.

Jervis. It appears that Wilton's costs exceeded in amount the sum paid

for them on the compromise.

Lord LYNDHURST, C. B. There is no knowing, if a new trial had been obtained, and a verdict had passed for the sheriff, what arrangement the court would have made with respect to the costs. It does not follow that the court would have granted a new trial on payment of costs. It is possible, that, if the cause had gone on, Wilton would have had to pay the costs.

Erskine. If the costs were incurred in consequence of the sheriff's neglecting to put in evidence which was in his power, who ought to bear them? Surely the sheriff, whose conduct occasioned them, and not the bailiff, who had

nothing to do with the matter.

Lord Lyndhurst, C. B. I should say, not at all; they conduct the defence,

and do it as well as they can; they are defending for the bailiff.

\*Erskine. Then, with respect to the 811., the costs of the application [\*106] to set aside the judgment?-

Lord LYNDHURST, C. B. I think, as to the 811., that it was an extremely

reasonable act, to apply to the court to get rid of the judgment.

Erskine and Manning. It is not within the covenant. The words are, "all costs of any motion in, or application to, the court touching or concerning my matter, wherein the said bailiff shall act or assume to act."

Lord Lyndhurst, C. B. I think that covers such a transaction. I think the words, "touching or concerning," bring it within the covenant; but you

shall not be concluded by my opinion here.

Verdict for the plaintiffs, for the amount in the particulars of demand, with leave to move to reduce the damages by the two sums objected to: viz., the sheriff's costs of the compromised action, and those of the motion to set aside the original judgment; the whole bill of costs to be subject to taxation.

Jervis and Burchell, for the plaintiff. Erskine and Manning, for the defendants.

### [Attorneys-Smith & Son, and Arrowsmith.]

Manning, (Erskine having been promoted to the office of Chief Judge of the New Court of Bankruptcy,) obtained a rule, pursuant to the leave given at the trial, which, after argument, was Discharged.

## OLD BAILEY MAY SESSION, 1831.

BEFORE MR. JUSTICE LITTLEDALE, MR. BARON VAUGHAN, AND MR. JUSTICE BOSANQUET.

## \*REX v. GEORGE SMITH. May 16.

[\*107

It was the duty of the prisoner, who was a clerk in the Stamp Office, to cut off the corners of parchments which bore the blue paper stamps allowed for as spoilt, by the commissioners of stamps, and to put the blue paper stamps and the small pieces of parchment so cut off, and which were glued to them, into the fire, without separating them. Instead of doing this, he separated a blue paper stamp from the small piece of parchment to which it had been glued, and glued it to a new skin of parchment, on which the words "This indenture" had been written. The Jury found, that he had no fraudulent intent when he cut the stamp from the skin of parchment, but that he had when he separated the blue paper from the small piece of parchment; and that he then intended to apply the stamp to a parchment intended to be used as an indenture:-Held, that this was a capital offence. And it being uncertain whether the stamp so

separated was impressed before or after the passing of the stat. 55 Geo. 3, c. 184, it was held, that the party might be properly convicted on a count stating the stamp to be the impression of a die made and used "in pursuance of the statute made and provided for denoting a certain duty, being one of those under the management of the commissioners of stamps."

INDICTMENT on the stat. 55 Geo. 3, c. 184, s. 7. The first count of the indictment stated that the prisoner, on the 16th day of April, 1 Will. 4, feloniously and fraudulently did cut, tear, and get off from a certain piece of parchment, a certain impression of a die, provided, made, and used in pursuance of an act passed, 55 Geo. 3, intituled "An Act, &c." for denoting a certain duty, to wit, of 25t., with intent fraudulently to use it upon another piece of parchment. In the third count, the intent laid was an intent to use the impression on "another piece of parchment chargeable with duty." The fifth count stated it to be the impression of a die which had been theretofore made and used "in pursuance of the statute made and provided for denoting a certain duty, being one of the duties under the \*care and management of the commissioners of stamps of Great Britain." The second, fourth, and sixth counts laid an

intent to use the stamp on vellum instead of parchment.

It appeared, that the prisoner was a junior clerk in the office for the allowance of spoiled stamps; and that, on the 9th of April, he was attending at that office, and it was his duty to cut off the corners of parchments, &c. on which the stamps allowed for as spoilt were, and to put the stamp, and the small piece of parchment to which it was glued, into the fire. It was proved that parchments are stamped by glueing a square piece of blue paper to the parchment, and stamping it with a heavy stamper. It was also proved, that one of the witnesses had procured for the prisoner two skins of parchment, on each of which the words "This indenture," were written; and that afterwards he desired the same witness to sell those two skins of parchment, each of the skins then bearing a 251. stamp affixed to it on blue paper; each of those blue paper stamps having been separated from the piece of parchment to which it had originally been glued. It appeared that 25l. stamps were used before the 55 Geo. 3; but by the stat. 55 Geo. 3, c. 184, the commissioners of stamps have a power of To shew this to be ordering that dies before used, may be used after that act. a stamp used under that statute, the order-book of the commissioners of stamps was produced. In this book was contained an order of the commissioners of stamps, directing this die to be continued in use. This order was signed by the secretary who was dead, but his handwriting was proved. None of the witnesses could say whether the two blue paper stamps, which were the subject of the present indictment, had been impressed before or after the passing of the stat. 55 Geo. 3, c. 184.

Adolphus, for the prisoner. There are in this case two objections; the stat. 001 55 Geo. 3, c. 184, s. 7, makes it a felony \*to fraudulently "cut, tear, or get off, or cause or procure to be cut, torn, or got off the impression of any stamp or die which shall have been provided, made, or used in pursuance of this or any former act, for expressing or denoting any duty or duties under the care and management of the commissioners of stamps, or any part of such duty or duties, from any vellum, parchment, or paper whatsoever, with intent to use the same for or upon any other vellum, parchment, or paper, or any instrument or writing charged or chargeable with any of the duties hereby granted." Now, supposing, for the sake of argument, that these 25% stamps are the stamps cut off by the prisoner, at the office for the allowance of spoilt stamps, still he did not fraudulently cut them off, because it was his duty; and the bad intention of converting them might have occurred after they were cut The offence contemplated by the act, was the fraudulently cutting off stamps from one parchment and affixing them to another. The other objection is this, that the first four counts state that these were the impression of a die made and used in pursuance of the 55 Geo. 3, c. 184; now, the witnesses cannot say whether these very impressions did not exist before that time. It is said, that the *fifth* and *sixth* counts merely state the die to have been used under the statute in such case made and provided. Now, we have no proof of its use under any previous statute.

Manning, on the same side. This is not a case in the contemplation of the Legislature. The words relate to a case of fraudulently cutting off the stamp from one deed and putting it on another, and not to cases where the person does it in the discharge of his duty; and if such a case as this had been meant, there would have been a provision for the carrying away and dealing with stamps pro-

perly cut off in the first instance.

C. Phillips, on the same side. The first objection is \*perhaps rather a question for the Jury, as it will be for them to consider, whether the prisoner, had any bad intention at the time he cut off the stamps, or whether he did it in the discharge of his duty. The second objection does not appear to be met by the commissioners' order; and the prosecutors are bound to prove distinctly that these pieces of blue paper did not exist till after the passing of some statute "in such case made and provided." This section of the act of Paliament, 55 Geo. 3, requires, as I submit, that the stamps should be transferred to some vellum or parchment chargeable with duty. Now, if these parchments had been complete indentures, they would have been such; but the blank parchments are not liable to duty; and it is no fraud on the revenue, unless the stamp was transferred to some complete instrument.

Denman, A. G. for the prosecution. As to the objection that these impressions may have been in existence before the 55 Geo. 3, I would say, that these stamps either existed before that act or they did not. If they did, they were the impressions of stamps used under the act of Parliament then in existence. With respect to the objection, that the stamps were not affixed to complete instruments, I submit that the words "vellum, parchment, and paper," are three descriptions, distinct from that of "instrument chargeable with duty." It is said, that putting the stamps upon blank parchment was no fraud on the revenue. I admit that it was not immediate, but it would be a fraud as soon as the indenture was filled up. It is also objected, that the prisoner had no bad intent when he cut of the corner of the skin of parchment on which it originally was; but it appears, that he afterwards got off the blue paper stamp from the small piece of parchment on which it was glued, which was no part of his duty, as he ought to have burnt the whole together; and this I submit clearly shews what his intention was.

\*Gurney. Whether the prisoner, when he cut off the corner of [\*111 the skin of parchment at the Stamp Office, had any bad intent, is immaterial, because he must have had it when he separated the blue paper from the bit of parchment to which it was glued. With respect to the last objection, it is not necessary that the stamp should be actually transferred to any instrument; it must be cut or taken of with intent to use, and we produce the parchment to which it was transferred, to shew the intent. With respect to the other objection, that the impression was not made from a die used under the stat. 55 Geo. 3, chap. 184, if the other side get rid of the first four counts, they bring themselves within the 5th and 6th counts.

R. Scarlett cited the case of Rex v. Holland Palmer, (a) and contended, that the words "vellum, parchment or paper, or any instrument chargeable," must be taken in the disjunctive.

Adolphus in reply. It is essential that the party shall feloniously cut off the

<sup>(</sup>a) 2 East's P. C.893. That was an indictment on the stat. 23 Geo. 3, c. 49, s. 20, which makes it a felony to expose to sale "any paper liable to a stamp duty, with any counterfeit impression thereon, knowing," &c. The prisoner sold blank papers with forged receipt stamps on them. The Judges held, that the prisoner was rightly convicted, and that pieces of paper destined and prepared for receipts must be taken to be paper liable to stamp duty.

stamp. Now, I submit, that here he did not fraudulently cut it off, as he did it in the discharge of his duty. The Attorney-General put the case upon a very nice point, for he contends, that the separating the blue paper from the bit of parchment to which it is glued constitutes the offence. But I submit, that, if the party had not a guilty intent at the time of the original removing of the stamp, it is not a capital felony; and, with respect to the other point, I submit that there is no evidence that the die from which this stamp was struck was struck by the commissioners of stamps at the time when this impression was taken.

Mr. Justice Bosanquer. It does not appear to me that any of the points are sufficient to induce the Court to withdraw the case from the consideration of the Jury. The first objection is, that this act of Parliament applies only to cases where the party wrongfully cuts off the stamp from some instrument. However that is got rid of by the observation of one of the learned counsel, that it is a question for the Jury, whether the prisoner cut off this stamp for any unlawful purpose; but there is another view of the case in which I am disposed to concur; which is this: admitting that the prisoner originally cut off the corner of the skin of parchment which bore the stamp, without any bad intent, still, if he separated the blue paper stamp from the small piece of parchment, having then a fraudulent intent, I think his offence would be within the act of Parliament. The offence in the act is the cutting a stamp from any parchment with intent to transfer it to any other parchment, &c. It has been contended, that the words "charged or chargeable" apply to the words "vellum, parchment," &c. It is true, that in this case there was no complete instrument written on the parchment to which these stamps were transferred. But still the question is, whether the same construction ought not to apply as in Palmer's case: and it also appears, that each of these skins have the words "This Indenture" written upon them. If the impression was fraudulently detatched from one parchment, in order to be annexed to some other parchment intended to be used as an indenture, the offence is complete. The only other objection is, that it is not shewn that this was an impression of a stamp used under the stat. 55 Geo. 3, c. 184. Now, if these impressions were made before the 55th Geo. 3, they cannot be taken as impressions from a die under that act of Parliament. \*113] If they were \*made after that period, I think that the earlier counts are sustained; but, if they were made before, the latter counts of the indictment apply.

Mr. Justice LITTLEDALE. There are several questions to be left to the Jury,

and there are important points which may be considered hereafter.

The prisoner was called on for his defence.

Mr. Justice Bosenquer (in summing up). In this case several questions arise. The first question is, whether these are the impressions of a die used under the authority of the commissioners of stamps; for, if so, they must have been used under the stat. 55 Geo. 3, c. 184, or some former act of Parliament. You must also find whether these impressions were made before the 55th Geo. 3; because, if they were, the Judges will consider the case upon the latter counts only. The next question is, whether the prisoner took off these impressions with a fraudulent intent, to annex them to some other piece of parchment; and whether he intended to annex them to some piece of parchment, which, when used, would be liable to the payment of duty? You will also consider, whether he intended to misapply them at the time he cut them from the corners of the skins at the Stamp Office, where he was acting in discharge of his duty. If you think that he fraudulently removed the stamp from a parchment, with intent to place it on some other parchment, I think you ought to find him guilty. But I wish you also to give me your opinion-1st, whether these impressions were made before or since the year 1815; 2d, whether, at the time he cut off the stamp in the discharge of his duty, he intended to apply it to some other Piece of parchment; 3d, whether, at the time he detached the blue paper from the small piece of parchment to which it was glued, he intended to apply it to any other parchment; and 4th, whether he intended to apply the stamp to a \*parchment to be used as an indenture, which would be liable to stamp duty when complete.

The Jury found the prisoner guilty.

In answer to the questions of the learned Judge, they said—lst. That they had no means of knowing whether the impressions were made before or

since the 55th Geo. 3.

2d. That they acquitted the prisoner of fraudulent intent at the time he

cut the stamps from the skins at the stamp office.

3d. That they found him guilty of fraudulent intent at the time he separated the blue paper from the small piece of parchment to which it was glued.

4th. That they found him guilty of intending to apply the stamp to a

parchment which was intended to be used as an indenture.

Mr. Justice BOSANQUET directed a verdict of guilty to be entered on the 5th and 6th counts, and reserved the case for the opinion of the Judges.

Denman, A. G., Gurney, Alley, and R. Scarlett, for the prosecution. Adolphus, Manning, and C. Phillips, for the defence.

### [Attorneys-Timms and Harmer.]

This case was afterwards considered by the Fifteen Judges, who held the conviction right.

By the stat. 55 Geo. 3, c. 184, s. 7, it is enacted—"That if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any stamp or die, or any part of any stamp or die, which shall have been provided, made, or used, in pursuance of this act, or in pursuance of any former act or acts relating to any stamp duty or duties, or shall forge, counterfeit, or resemble, or cause or procure to be forged, counterfeited, or resembled, the impression or any part of the impression of any such stamp or die as aforesaid, "upon any vellum, parchment, or paper, or shall stamp or mark, or cause or [\*115 procure to be stamped or marked, any vellum, parchment, or paper, with any such forged or counterfeited stamp or die, or part of any stamp or die as aforesaid, with intent to defraud his Majesty, his heirs or successors, of any of the duties hereby granted, or any part thereof; or if any person shall utter or sell, or expose to sale, any vellum, parchment, or paper, having thereupon the impression of any such forged or counterfeited stamp or die, or part of any stamp or die, or any such forged, counterfeited, or resembled impression, or part of impression, as aforesaid, knowing the same respectively to be forged counterfeited, or resembled; or if any person shall privately and secretly use any stamp or die which shall have been so provided, made, or used, as aforesaid, with intent to defraud his Majesty, his heirs, or successors, of any of the said duties, or any part thereof: or if any person shall fraudulently cut, tear, or get off, or cause or procure to be cut, torn, or got off, the impression of any stamp or die which shall have been provided, made, or used, in pursuance of this or any former act, for expressing or denoting any duty or duties under the care and management of the commissioners of stamps, or any part of such duty or duties, from any vellum, parchment, or paper whatsoever, with intent to use the same for or upon any other vellum, parchment, or paper, or any instrument or writing charged or chargeable with any of the duties hereby granted; then and in every such case every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons in committing any such offence as aforesaid, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy."

And by the stat. 12 Geo. 3, c. 48, s. 1, it is enacted, "That if any person or persons, at any time after the 1st day of August, 1772, shall write or engross, or cause to be written or engrossed, either the whole, or any part of any writ, mandate, bond, affidavit, or other writing, matter, or thing whatsoever, in respect whereof any duty is or shall be payable by any act or acts made, or to be made, in that behalf, on the whole or any part of any piece of vellum, parchment, or paper, whereon there shall have been before written any other writ, bond, mandate, affidavit, or other matter or thing, in respect whereof any duty was or shall be payable as aforesaid, before such vellum, parchment, or paper, shall have been again marked or stamped, according to the said acts; or shall fraudulently erase or scrape out, or cause to be erased or scraped out, the name or names of any person or persons, or any sum, date, or other thing, written in such writ, mandate, affidavit, bond,

or other writing, matter, or thing, as aforesaid; or fraudulently cut, tear, or get off, any mark or stamp, in respect whereof, or whereby, any duties are or shall be payable, or denoted to be paid or payable as aforesaid, from any piece of vellum, parchment, paper, playing cards, outside paper of any parcel \*or pack of playing cards, or any part thereof, with intent to use such stamp or mark for any other writing, matter, or thing, in respect whereof any such duty is or shall be payable, or denoted to be paid or payable as aforesaid; then, so often, and in every such case, every person so offending in any of the particulars before mentioned, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons to commit any such offence or offences, as aforesaid, shall be deemed and construed to be guilty of felony; and, being thereof convicted by due course of law, shall be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, according to the laws in force for the transportation of felons: and if any such person or persons so convicted or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he, she, or they shall be so transported as aforesaid, such person or persons, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he, she, or they shall be apprehended."

#### BEFORE THE HON. CHARLES EWAN LAW, COMMON SERJEANT.

#### REX v. CULLEN. Dec. 11.

A forced paper was in the following form—"Per bearer two 11—4 superfine counterpanes. T. Davis, E. Twell." It was not addressed to any person:—Held by the 15 Judges, that it was neither an order nor a request within the stat. 1 Will. 4, c. 66, s. 10, (the forgery consolidation act).

THE prisoner was indicted for that he, on &c., at &c., feloniously did utter, dispose of, and put off to one John Smith, a certain forged request for the delivery of goods, which is as follows:—"Per bearer, two 11—4 superfine counterpanes. T. Davis, E. Twell," with intent to defraud John Lainson and others, he the said Charles Cullen well knowing the said request to be forged. The indictment also contained a count, calling the instrument a forged order.

\*117] \*The prisoner having been found guilty on this and on other charges of the same description, which, by the 1 Will. 4, c. 66, s. 10,(a) the act upon which the indictment was framed, rendered him liable to be transported for life.

F. V. Lee, for the prisoner, objected, in arrest of judgment, that the instrument set out in the indictment was neither an "order" nor "request," within the terms of the act of Parliament. First, it was not an order, because it was not directed to any person; and to be so, it ought not only to purport to be signed by some person who might command the delivery of the goods; but it ought also to be directed to a person who was compellable to obey it. And he cited Rex v. Clinch, 2 East, P. C. 938, Rex v. Williams, 1 Leach, 114, Rex v. Mitchell, Fost. 119. Secondly, it was not a request, for a request was the act of asking something from another, which, in this case, was not done, for al-

(a) By which it is enacted, "That if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any court-roll or copy of any court-roll relating to any copyhold or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money, or any warrant, order, or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years or less than two years."

though the act of presenting the paper, in effect, might be so, yet in words it was not; and he, therefore, submitted it fell within the principle of the above decisions.

The prosecutor stated, that such orders were common in the trade.

\*The Common Serjeant thought, upon the authority of the cases cited, that it was not an order; but he had some doubts whether it was not a request; and, as the point was new, and of some importance to commercial men, he said he would submit it to the Fifteen Judges; which he did, and they were of opinion that the conviction was improper, as the instrument was neither an order nor request within the 1 Will. 4, c. 60, s. 10.

The prisoner was discharged.

## OLD BAILEY JULY SESSIONS, 1831.

BEFORE MR. JUSTICE GASELEE AND MR. JUSTICE J. PARKE.

### REX v. BACKLER. July 2.

On an indictment for forging a check, purporting to be drawn by G. A. upon Messrs. J. L. & Co., proof that no person named G. A. keeps an account with or has any right to draw on Messrs. J. L. & Co., is prima facie evidence that G. A. is a fictitious person.

FORGERY. The first count of the indictment charged the prisoner with forging a check, with intent to defraud Thomas Blackwell and another. There was a second count for uttering with the like intent; and two similar counts, charging the forgery and uttering to be with intent to defraud Samuel Jones Loyd and others.

The check was as follows:—
"No. 24.

No. 23, Lothbury, London, May 24, 1831.

Messrs. Jones Loyd & Company,

Pay to —— Newman, Esq. or bearer, ten pounds.
G. Andrewes."

£10 0 0.

It appeared that the prisoner went to Mr. Blackwell, and asked change for the check for Mr. Newman of Soho Square, in whose service he stated himself to have been for three months. The prisoner also said, that Mr. \*Newman had put his name on the check. Mr. Newman was not called as a witness; but it was proved, that the name on the check was not of his handwriting, and that the prisoner had never been in his service. It was also proved, by a clerk of Messrs. Jones Loyd & Co., that No. 43, Lothbury, was their banking house, and that no person of the initial and name of G. Andrewes kept any account there, or had any right to draw checks on their house.

Mr. Justice J. Parke (in summing up.)—You must be satisfied not only that the prisoner uttered this check, but also that it is a forgery, and that he knew it to be so. Now, we find that he stated that he was a servant of Mr. Newman, and that Mr. Newman had put his name on the back of the check: but it is shewn, not only that the name is not of Mr. Newman's hand-writing, but that the prisoner never was in his service. There is no proof as to who this G. Andrewes is, and the question therefore is, whether there is evidence sufficient to satisfy you that Andrewes is a fictitious person. That being a negative, it is not easy to prove, and the evidence from which you are asked to infer it, is that this check is drawn upon Jones Loyd & Co., no person of that initial and name having any right to draw on them. My learned brother and myself, after conferring, think that this is sufficient prima facie evidence that he is a fictitious person; and if there was any such real person either keeping cash at

this banking house or not, the prisoner might have produced him or have given some evidence on the subject. If it had turned out that a person named Andrewes had drawn upon Jones Loyd & Co., without funds, that would have been a fraud and not a forgery; but, we think, in point of law, that there is sufficient evidence of Andrewes being a fictitious person, more especially as the prisoner does not produce any evidence, nor even make any statement as to who Andrewes is.

Verdict—Guilty, on the second count.

See the case of Rex v. King, post, p. 123.

### \*1207

#### \*REX v. BOURNE. July 2.

A. was fighting with his brother; and to prevent this B. laid hold of A., and held him down upon a locker on board the barge in which they were, but struck no blow. A. stabbed B.:—Held, that if B. did nothing more than was sufficient to prevent A. from beating his brother, and had died of this stab, the offence of A. would have been murder; but that if B. did more than was necessary to prevent the beating of A.'s brother, it would have been manslaughter only.

INDICTMENT on the stat. 9 Geo. 4, c. 31, ss. 11, 12, for stabbing and wounding James Lightfoot, with intent to murder him. There were two other counts, laying the intent to be to disable him, and to do him some grievous bodily harm.

The prosecutor stated that the prisoner and his brother, who was a boy about six years younger than himself, were fighting on board the barge Alfred, which was lying in the West India Docks, and in which he (the prosecutor) also worked; that he laid hold of the prisoner to prevent him from beating his brother, and held him down on a locker, but did not strike him; and that the prisoner stabbed him with a knife just above the knee.

The prisoner in his defence said, that the prosecutor had knocked him

Mr. Justice J. Parke (in summing up.)—The prosecutor states that he was merely restraining the prisoner from beating his brother, which was quite proper on his part; and he says, that he did not strike any blow. If you are of opinion that the prosecutor did nothing more than was necessary to prevent the prisoner from beating his brother, the crime of the prisoner, if death had ensued, would not have been reduced to manslaughter; but if you think that the prosecutor did more than was necessary to prevent the prisoner from beating his brother, or that he struck any blows, then I think that it would. You will, therefore, consider whether any thing was done by the prosecutor more than was necessary, or whether he gave any blows before he was cut.

Verdict—Guilty, on the third count.

#### \*1217

## \*REX v. PEARSON. July 3.

An indictment for stealing a bank note did not conclude contra formam statuti:—Held, by the fifteen Judges, that it was bad.

SEE ante, Vol. 4, p. 572. In this case the fifteen Judges decided that the 11th and 12th counts of the indictment were bad, as they did not conclude contra formam statuti.

## OLD BAILEY JANUARY SESSION, 1832.

BEFORE MR. JUSTICE PARK, MR. JUSTICE J. PARKE, AND MR. BARON BOLLAND.

#### REX v. BRIDGET CULKIN. Jan. 7.

A. was charged with suffocating B. by placing both her hands about the neck of B.—Held. that A. might be convicted on this indictment if B. was suffocated in any manner, either by A. or any other person in her presence, she being privy to the commission of the offence.

The phrase "about the neck," in an indictment for murder, is good, and is not open to

the same objection as "about the breast."

MURDER. The indictment charged that the prisoner in and upon one Margaret Duffy "did make an assault, and that the said Bridget Culkin, with both her hands about the neck of the said Margaret Duffy, the said neck and three of the said Margaret Duffy then and there feloniously, wilfully, and of her malice aforethought, did grasp, squeeze, and press, and by the grasping, squeezing, and pressing aforesaid," did suffocate and strangle the deceased.

It appeared that Margaret Duffy, a child of about six years of age, had been suffocated for the purpose as was supposed of being dissected. The surgeon said, that her death had been caused by the pressure of a hand on the back of the neck, another hand being held over the mouth. There was evidence tending to shew that a man and woman had committed the offence; and there was much circumstantial evidence tending to shew the guilt of the pri-

soner.

\*Clarkson, for the prisoner, objected that the mode of the death was improperly stated in the indictment, as it was not stated that the hand over the mouth was the cause of the death.

Mr. Justice PARK. It is the same kind of death.

Mr. Justice J. PARKE. If the death was proved to be by suffocation at all it would be sufficient.

Clarkson. The indictment states the pressure to have been about the neck. In stating a wound, it is laid down by Lord Hale, (a) that about the breast, circiter pectus, would not be sufficient.

Mr. Justice J. PARKE. About the breast might mean only near the breast,

but about the neck means round it.

The prisoner was called on for her defence.

Mr. Justice J. PARKE (in summing up.)—If you are satisfied that this child came by her death by suffocation or strangulation, it is not necessary that the prisoner should have done it with her own hands; for, if it was done by any other person in her presence, she being privy to it, and so near as to be able to assist, she may be properly convicted on this indictment.

Verdict—Not guilty.

Adolphus and Heaton, for the prosecution. Clarkson, for the prisoner.

## [Attorney for the prosecution—T. T. Taylor.]

(a) In 2 H. P. C. 185, it is laid down, that an indictment for murder, stating the wound to be super brachium, or manum, or latus, without saying whether right or left, is not good; nor is circiter pectus, nor super partes posteriores corporis; but super faciem or caput, or super dextram partem corporis, or in infima parte ventris, are certain enough. See the case of Rex v. Tye, Carr. Supp. 35.

#### \*REX v. KING. Jan. 9.

**F\*123** 

Where a bill purported to be accepted by "Samuel Knight, Market-place, Birmingham."—
It was held, on an indictment for the forgery of the acceptance, that the result of inquiries made at Birmingham by the prosecutor, who was not acquainted with the place, was evidence for the Jury, though neither the best nor the usual evidence given to prove the non-existence of a party whose name is used.

THE first count of the indictment charged the prisoner with having forged a bill of exchange, drawn by one Thomas Webb, accepted by one Samuel Knight, and indorsed by the said Thomas Webb, with intent to defraud a person named Beit.

In the other counts of the indictment the prisoner was charged respectively with uttering a bill knowing it to be forged; with forging the acceptance; with uttering the bill, knowing the acceptance to be forged; with forging the indorsement, and with uttering the bill knowing the indorsement to be forged.

From the evidence of Mr. Beit, the prosecutor, who was a dealer in German silver, it appeared that the prisoner applied to him about the beginning of the month of June, saying that he wished to purchase some German silver, that his name was King, of King-square, which was chiefly his property, and derived its name from him; that he was out of business himself, but was requested to make the purchase by some friends in the country. He left at that time without taking any of the metal; but came again on the 9th, and brought with him a person whom he described as a manufacturing man. The metal was to be paid for in cash, and the prisoner took from his pocket the bill of exchange in question, and said it had a little time to run, and he could not very well get it discounted, and therefore he would leave it with the prosecutor till the Monday following. He did not come again at all. The bill purported to be accepted by "Samuel Knight, Market-place, Birmingham." The second indorsement on the bill was proved to be in the prisoner's handwriting. The prosecutor stated that he went twice to Birmingham to inquire after Knight, and on the second occasion, inquired at the bank there, and at a place where the overseers of the poor met. He also stated that he had made \*inquiries at Not-\*124] of the poor met. He also believe the bill purported to be drawn, for Thomas Webb, the drawer, but was not able to hear anything of him. On his crossexamination, he admitted that he was a stranger to both these places, and that he had not procured any person from either place to prove that such persons as Knight and Webb, were not known at them. On his re-examination he stated, that he had made inquiries in King-square, but could not hear of any such person as the prisoner there.

Carrington, for the prisoner, submitted that the evidence of the prosecutor did not satisfactorily show that the signatures, "Samuel Knight" and "Thomas Webb," were not those of real persons. He referred to the case of a prosecution at the instance of the King's College, in London, where, to prove that a certain name was fictitious, the two-penny postman, and also a police officer of the district in which the person was described as residing, were called as witnesses; and he contended, that in the present case, witnesses should have been called, who were well acquainted with Birmingham and Nottingham respectively.

Mr. Justice J. PARKE (after conferring with the other Judges present) said—I have consulted with my learned brothers, and they are of opinion with me that it is evidence to go to the Jury. It is not, certainly, the most satisfactory evidence; nor is it the evidence that is usually given in such cases; but it is evidence. It will be for the Jury to say whether it is sufficient.

The prisoner, in his defence, said that he took the bill from Thomas Webb, the drawer and gave him value for it.

Two witnesses were called on his behalf, who stated that they knew Thomas Webb and that the drawing and indorsement were of his handwriting. They described \*him as having lived at one time at Nottingham, and at another in Weymouth-terrace, Hackney-road.

The prosecutor said, that the person who came with the prisoner was described as living in Weymouth-terrace, but his name was said to be Smith. No

such person, however, could be found on inquiry there.

Mr. Justice J. PARKE (in summing up) said—The first question for your consideration will be, whether you are satisfied that the acceptance in the name of Samuel Knight is in the name of a person not in existence. There is some evidence of this. The prosecutor says, he was twice at Birmingham, and on the second occasion inquired at the bank, and at a place where the overseers met. Certainly this is not the most satisfactory evidence. A banker from Birmingham, or an overseer, might have been called. On the other hand the prisoner, who best knows the state of the matter, has not called any body to prove that there is such a person as Samuel Knight, whose writing it is. If he had done this, it would have been satisfactory. It will be for you to say whe ther the inquiries made by Beit are sufficient, in the absence of any evidence on the part of the prisoner. If you think they are, then you will find him guilty, otherwise not. With respect to the indorsement of Webb, the prisoner has produced evidence. It may be a fraudulent transaction altogether; yet, if the signatures are those of persons actually in existence, though the bill may be false and fraudulent, still it cannot be said to be forged.

Verdict—not guilty.

Carrington for the prisoner.

The prisoner was also indicted for stealing the metal; but it appearing from the prosecutor's statement that he parted with the property in the article, an acquittal was taken; but he was afterwards ordered to be detained in custody on a charge of conspiracy, for which a true bill had been found. See the case of Rex v. Backler, ante, p. 118.

#### \*REX v. HUGHES and ANN WORSLEY.

If an indictment for shooting another, with intent to murder, &c., in all the counts are that the pistol was loaded with powder and a leaden bullet, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquittal.

THE indictment charged the prisoner Hughes with shooting at the prisoner Worsley, with intent to murder her, and the prisoner Worsley with being present aiding and assisting him.(a) Another count charged the intent to be, to do her some grievous bodily harm. There were other counts in the indictment, but all of them stated the shooting to be with a pistol, loaded with gunpowder and a leaden bullet.

From the evidence on the part of the prosecution, it appeared that the prisoner Worsley was housekeeper to a person, named Bentley, who had an organ

(a) In Hawkins's Pleas of the Crown, title Felo de se, Book 1, c. 9, s. 6, it is said, "He who kills another, upon his desire or command, is, in the judgment of the law, as much a murderer, as if he had done it merely of his own head; and the person killed is not looked upon as a felo de se, inasmuch as his assent was merely void, as being against the laws of God and man. But where two persons agree to die together, and one of them, at the persons of the other, buys ratabane, and mixes it in a potion, and both drink of it, and he who bought and made the potion survives by using proper remedies, and the other dies; perhaps, it is the better opinion, that he who dies shall be adjudged a felo de se, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner."

See the Para Proper Russ & Rv C. C. R. 523: and Carr. Sup. 230.

See also Rex v. Dyson, Russ. & Ry. C. C. R. 523; and Carr. Sup. 230.

which the prisoner Hughes was in the habit of coming to play; that on Saturday, the 22nd of October, he came about tea-time, and Bentley left him in company with the prisoner Worsley, at ten o'clock at night, when he retired to rest. About eleven, he was awakended from sleep by the report of fire-arms, accompanied by the sound of a fall upon the floor overhead in the room in which he left the prisoners. He immediantely rose, and went into the housekeeper's room \*127] and discovered both prisoners lying on the floor, \*bleeding. On their being asked, what was the matter, and who fired? the male prisoner said, "I fired one pistol at her, and the other at myself." The woman only said, "Lord, have mercy upon me." They were taken to St. Thomas's Hospital, where the man said—"He could feel the ball somewhere in his cheek." woman being asked there, whether she wished Hughes to shoot her? replied-That she did; and had removed her cap for the purpose. The surgeon, who attended them, before they were removed to the hospital, said, that both prisoners were bleeding from the ear, the bones of which were shattered, but no bullet could be found on examination, internally and externally, either in the man or the woman. He added, that he thought the wound was either from a ball or the wadding of a pistol; and that the wadding, if rammed down tight, might have produced the effect, without any ball. It was also proved that search was made in the room, but no ball was found.

C. Phillips, for the prisoners, submitted that the averment in the indictment, that the pistol was loaded with a bullet, had not been proved, and therefore the case was not sustained. He referred to Archbold's Treatise upon Mr. Peel's Acts, Vol. 2, p. 43, where, in a note to the form of an indictment for shooting, which stated the pistol to be loaded with a leaden bullet, it is said,—"The prosecutor must prove the shooting, as stated in the indictment; and either must shew expressly, that the pistol was loaded with gunpowder and a bullet, or prove

circumstances, from which the Jury may fairly infer it."

Bolland, B., who tried the case, consulted with Justice Park, and Mr. Justice James Park, who were present, and then said to the Jury—The offence is charged, in every count of the indictment, as having been committed with a pistol, loaded with a leaden bullet. If the question had arisen with respect to \*128 leave it to you, on his declaration, that he thought he felt a ball in his cheek. But he might have intended to kill himself, being weary of life, though he might not have intended to kill himself, being weary of life, though he consulted with my learned brothers, and it is our opinion, that the indictment is not sufficiently proved, to justify you in a verdict of guilty.(a)

Verdict—Not guilty.

C. Phillips, for the prisoner.

#### REX v. MERTIN. Jan. 11.

A. was indicted for the manslaughter of B., by a blow of a hammer. No proof was given of the striking of any blow, only of a scuffle between the parties. The appearance of the injury was consistent with the supposition, either of a blow with a hammer, or of a push against the lock or key of a door:—Held, that if it was occasioned by a blow with a hammer or any other hard substance held in the hand, it was sufficient to support the indictment; but otherwise, if it was the result of a push against the door.

<sup>(</sup>a) In the case of Rex v. Kitchen, Russ. & Ry. C. C. R. 95, cited Carr. Sup. 239, (which decided, that when a pistol was fired so near, and in such a direction as to be likely to kill, &c., and with intent to do so, it was a shooting within the 43 G. 3, c. 58, though it was loaded with powder and paper only), the indictment contained counts—first, for shooting with a loaded pistol; secondly, for shooting with a pistol loaded with gunpowder only; and thirdly, for shooting with a pistol loaded with gunpowder and other destructive materials. See the case of Rex v. Harris, post.

THE prisoner was indicted for the manslaughter of Ann Evans. ment charged the wound to have been inflicted by a blow with a hammer, which he held in his hand.

It appeared that the prisoner and the deceased lodged in the same house, and that, on the day in the indictment, (frequent disputes having previously taken place on the \*same subject,) a quarrel arose about a staircase window, [\*129] which the prisoner wished to keep shut, and the deceased wished to have open. The prisoner had twice shut it, and a son of the deceased was about to open it a second time, when abusive words passed between them, which the deceased interfered to put an end to, and a scuffle ensued; in the course of which, it was suggested, that the prisoner, who had a small glazier's hammer in his hand, struck the deceased on the back of the neck with it. The surgeon who attended the deceased said, that there was a bruise on the back of the neck, just over the spine; and that it was such an injury as would be likely to be produced by the blow of a small hammer. It appeared that the deceased was not in a good state of health, and that she was desired to remain in the hospital, where she could be best attended to, but would not.

The prisoner in his defence said, that he did not strike the deceased with a hammer, and did not know how she received the injury, unless it was by strik-

ing against the door in the struggle, as it was dark at the time.

The surgeon being called up again said, that, from the appearance of the injury, it might have been occasioned by a fall against the lock or the key of the door, but not against the flat part or the edge; but he repeated, that the appearance was quite consistent with the supposition, that the blow was given by a hammer.

C. Phillips, for the prisoner, submitted, that, with this uncertainty, the indict-

ment could not be sustained.

Mr. Justice J. PARKE. It will be for the Jury to say, whether the injury

was occasioned by a blow of a hammer or by a knock against the door.

His Lordship afterwards (in summing up) said—The indictment charges that the prisoner, wilfully and feloniously, struck the deceased with a hammer. The kind \*of instrument is immaterial. There is no count which describes the injury to have been occasioned by her being struck against the door in the struggle. If, therefore, you are of opinion, that the injury was occasioned by a fall against the door, produced by the act of the prisoner, it will not do; but if you think that the injury was occasioned by a blow given with a hammer, or with any other hard substance held in the hand, then the indictment will be sufficiently proved. It is said, that the deceased was in a bad state of health; but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it. You will give me your opinion, whether you think the injury arose from the blow being given with a hammer, or by a fall; and if you think by the latter, I will put the case in a train for further consideration hereafter.

C. Phillips submitted to his Lordship, that if the Jury thought the injury was occasioned by a fall, the prisoner ought to be acquitted. He referred to Rex v. Kelly,(a) and Rex v. Thompson.( $\check{b}$ )

Mr Justice J. PARKE assented.

(a) R. & M. C. C. R. 113. That case decides, that "in an indictment for murder or manslaughter, when the cause of death is knocking a person down with the fist, upon a stone or other substance, the charge should be accordingly; and a charge that the prisoner with a stone, &c., which he held in his right hand, gave and struck a mortal blow, will not be sufficient, especially if there be no statement, that the person knocked the deceased down upon the ground."

(b) R. & M. C. C. R. 139. The difference between this case and Rex v. Kelly, consisted in the statement of the cause of death in the indictment, which was, that the prisoner assaulted the deceased, and struck and beat him on the head, and thereby, then and there, gave him divers mortal blows and bruises, &c. The facts and the decision were

similar. See these cases, Carr. Supp. 75.

\*131] And the Jury said, they were of opinion, that the injury\* was occasioned by a blow given with a hammer, and therefore, found the prisoner guilty; but they thought that it was given under great excitement, and therefore recommended him to mercy. They added, that they thought he had the hammer in his hand, for the purpose of nailing down the window.

C. Phillips, for the prisoner.

## OXFORD SUMMER CIRCUIT

1831.

BEFORE MR. JUSTICE PARKE AND MR. JUSTICE PATTESON.

## BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE PARK.

\*132] DOD on the Demise of PACKER and Others v. HILLIARD and Others. July 11.

Practice—In cases of ejectment, the certificate of the Judge must, under the stat. 11 Geo. 4, c. 70, s. 38, be for *immediate* possession, or the case must take its ordinary course; but if the Judge should think that some time ought to be allowed to the defendant, he will grant a certificate for *immediate* possession, the lessor of the plaintiff undertaking not to enforce it for a certain time.

EJECTMENT to recover eight houses at Thatcham.

The lessor of the plaintiff was the assignee of an annuity charged on these houses, which was in arrear.

There was a verdict for the plaintiff.

Talfourd, for the lessors of the plaintiff, applied for a certificate, under the stat. 11 Geo. 4, c. 70, s. 38,(a) to entitle the lessors of the plaintiff to immediate possession.

Mr. Justice Park.—Under this act of Parliament, 1 must eigher give you a certificate for immediate possession, or you must wait till Michaelmas Term. The act of Parliament gives me no discretion as to time: however, I will, grant \*133] \*the certificate, if the lessors of the plaintiff will undertake not to put his writ of possession in force, if the arrears of the annuity are paid within a month.

Talfourd, for the lessors of the plaintiff, consented to this undertaking, which was entered by the associate on the back of the Nisi Prius record.

Talfourd and Carrington, for the plaintiff.

Russell, Serjt., for the defendant.

#### [Attorneys-M. Hodding and Holmes & E.]

(a) Set forth ante, Vol. 4, p. 589, n.(a); and see the case of Doe dem. Williamson v. Dawson, Ib.

#### BEFORE MR. JUSTICE PATTESON.

#### REX v. CRUTCHLEY. July 11th.

On an indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 3, for breaking a threshing machine, the Judge allowed a witness to be asked whether the mob by whom the machine was broken did not compel persons to go with them, and then compel each person to give one blow to the machine; and also whether, at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob, the first opportunity.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 4, (set forth ante, Vol. 4, p. 399, n.,) for destroying a threshing machine, the property of a person, named Austin. There were other counts for damaging it with intent to destroy it, and for damaging it with intent to render it useless.

It appeared, that, at about ten o'clock in the night of the 22d of November, 1830, a mob came to the farm of Mr. Austin, and broke his threshing machine to pieces. It was proved, that the prisoner was with this mob, and that he gave

the threshing machine a blow with a sledge hammer.

Mr. Justice Patteson allowed the witnesses for the prosecution to be asked, in cross-examination, whether many persons had not been compelled to join this mob against \*their will, and whether the mob did not compel each person [\*134]

to give one blow to each threshing machine that they broke.

For the defence, William Davis was called. He was the gamekeeper of Mrs. Bainbridge, in whose service the prisoner was as an under-keeper. He stated, that, being on the watch, at Mrs. Bainbridge's preserves, the mob laid hold of himself and the prisoner, and compelled both to go with them, for the purpose of breaking threshing machines.

Mr. Justice Patteson allowed this witness to state, that before the prisoner and himself had gone many yards with the mob, they agreed to run away from

the mob the first opportunity.

The witness stated, that he ran away from the mob in about ten minutes, and that the prisoner joined him in about a quarter of an hour after that time, and that they then returned to their watching at the preserves.

\*Tyrwhit, for the prosecution. Carrington, for the defence.

# Verdict—Not guilty(a). [\*135

## [Attorneys—Blandy & Andrews, and Bartlett.]

(a) In general, what a party says is not evidence in his favour, unless it be part of a conversation, of which some other part has been already given in evidence by the opposite party. However, where a declaration of a party accompanies an act, and is a part of the transaction, it becomes admissible. Thus, the declarations of a bankrupt when he leaves his house are constantly received, to shew the motive of his going; so, what a person says immediately on receiving a hurt, may be given in evidence. And in the case of Aveson v. Kinnaird, 6 East, 193, Lord Ellenborough said, that, in an action for crim. con., he would receive evidence, that the wife had said at the time she left her husband's house, that she did so from the immediate terror of personal violence from him.

The declarations and conduct of a party to explain his acts are often extremely material in cases of mutiny on board ships, as it frequently happens, that when the mutineers have deposed their captain, they find that none of them are able to navigate the ship, and they then force one of the officers to assume the command of her; and he is, in many cases, brought to trial, because he appeared to have been acting with and directing the

mutineers.

#### BEFORE MR. JUSTICE PARK.

### REX v. WEALE. July 15.

On an indictment under the stat. 7 & 8 Geo. 4, c. 29, s. 26, for killing a deer, after a previous summary conviction, a conviction by two Justices of the previous offence was put in:—Held, that such a conviction was good. This conviction, in stating the offence, did not state the place at which it was committed; but the Justices, in awarding the distribution of the penalty, awarded it to the overseers of D., in the said county, "where the said offence was committed:"—Held, sufficient.

THE prisoner was indicted upon the stat. 7 & 8 Geo. 4, c. 29, s. 26, (set forth Carr. Sup. 305,) for having feloniously killed and carried away a deer kept in an uninclosed part of the forest of Wychwood, in the county of Oxford, he having previously been convicted by a Justice of the Peace for an offence relating to deer, for which a pecuniary penalty is, by that act, imposed, namely, the offence of having used a gun in the same county, for the purpose of killing deer in the said forest, within sect. 28 of the same statute, (set forth Id. 363.)

On the part of the prosecution, a conviction of the prisoner for the previous offence was proved, and offered in evidence. The conviction was by two Justices of the Peace. After stating the venue in the margin in the usual form, it set forth, that on a certain day (naming it), in the year 1830, at a certain place (naming it), in the county of Oxford, the prisoner was convicted before us, A. B. and C. D., two of his Majesty's Justices of the Peace for the said county, for that he (the prisoner) did, on a certain day (naming it), unlawfully and wilfully use an engine, called a gun, for the purpose of killing deer in the forest of Wychwood, but omitted to state where or in what county the offence was committed. It then proceeded to inflict a pecuniary penalty upon the prisoner, \*136] and directed such \*penalty to be paid to the overseers of the poor of the parish of D., in the said county, "where the said offence was committed."

Busby, for the prisoner.—I submit that this conviction cannot be received in evidence, on two grounds: first, because the offence charged therein was cognizable only by one justice of the peace, whereas the conviction was by two; and, secondly, because it is not stated that the prisoner had used the gun in the county of Oxford. Upon the first objection I submit that in every case where a justice of the peace exercises a statutable jurisdiction, the provisions of the statute touching the particular matter must be strictly pursued. Now, by s. 28 of this statute, upon which the conviction was founded, jurisdiction is given to "a justice of the peace," not to a justice or justices of the peace; but the conviction in question was by two justices of the peace, and, therefore, did not pursue the provisions of the statute. The conviction must be taken to have been made by the justices jointly or severally; if jointly, it is not within the act; if severally, the Court cannot say by which of the justices it was made in preference to the other; and also, in that view of the question, the prisoner appears to have been convicted twice, i. e. once by each justice. Whether joint or several, the con-With respect to the second objection, I submit that the want of viction is bad. a venue in stating the offence is a fatal defect. The offence charged was the using a gun for the purpose of killing deer; the using the gun, therefore, for the purpose mentioned, and not the killing of the deer, was the real offence, and the offence might have been committed in one county, and the deer have been killed in another. It was, therefore, necessary that the conviction should state expressly that the prisoner had used the gun in the county of Oxford, which it has omitted to do; consequently it does not appear that the convicting justices had any jurisdiction. The venue in the margin does not aid the defect, because

that only aids informal allegations, and not matters of substance; and the statement \*in the adjudicating part, that the forfeiture was to be paid to the overseers of the poor of the parish of D. in the county of Oxford, "where the said offence was committed," is equally unavailing, on the ground that a substantial defect in a conviction, as the want of a venue in the description of the offence, cannot be helped by reference to a subsequent part of the conviction, or by intendment or argument. And, besides this, in the form of conviction set out in s. 71 of the statute, (set forth Carr. Supp. 359,) a direction is given to specify the place where the offence was committed.

Mr. Justice PARK overruled the first objection, holding that a conviction by two justices was good; but called upon Abbott, who appeared for the prosecu-

tion, to answer the second objection.

Abbott contended that it sufficiently appeared upon the face of the conviction, that the offence was committed in the county of Oxford, which gave the justices jurisdiction; for that, assuming that the venue in the margin did not aid the alleged defect, the statement in the adjudicating part, that the forfeiture was w be paid to the overseers of the poor of the parish of D. in the same county, "where the said offence was committed," was a sufficient allegation that the prisoner had used the gun within the county of Oxford, and supplied the omission in the description of the offence.

Mr. Justice PARK expressed himself of this opinion, and received the con-Verdict—Guilty.(a)

viction in evidence.

Abbott, for the prosecution. Busby, for the prisoner.

## WORCESTER CITY ASSIZES.

BEFORE MR. JUSTICE PARK.

## \*REX v. WALTERS. July 20.

L\*138

A bankrupt is not indictable on the stat. 6 Geo. 4, c. 16, s. 112, for concealing his books till after he has concluded his last examination.

Parol evidence of any thing that a bankrupt says at the time of his last examination. cannot be received, although it should appear that no part of what he said was taken down in writing.

Whether, on such an indictment, the petitioning creditor is a competent witness to prove the petitioning creditor's debt-Quære.

INDICTMENT on the stat. 6 Geo. 4, c. 16, s. 112,(b) for concealing two secount books. The first count of the indictment stated, that, on the 17th of November, 1 Will. 4, the prisoner was a trader and shoemaker at Worcester, and that he was indebted to Peter Fish in a sum exceeding 100%, to wit, 131% 10s.; and that he became a bankrupt within, &c. It then stated the petition and the commission at length; and that the commissioners, before they acted, took the oaths; and that the prisoner was duly declared a bankrupt. It then stated, that notice of the commission and adjudication was personally served on the bankrupt, he then being in prison; and that notice was given in the Gasette, and three public meetings held; and that after the commission and adjudication, and after these notices, the prisoner did feloniously &c. conceal divers, to wit, two books of account, to wit, a ledger and cash-book, with intent then and there to defraud his creditors. The second count stated that the prisoner was a trader,

(b) Set forth in Carr. Supp. 171; and see the cases there referred to.

<sup>(</sup>a) For the report of this case we are indebted to the kindness of one of the learned counsel engaged in it.

and was indebted to Peter Fish in a sum exceeding 100%, and had become bankrupt, and that a commission of bankrupt had duly issued under the great seal, directed to certain commissioners therein named, by whom the prisoner was duly declared bankrupt, of which he had notice. It then charged that he feloniously removed the two books. There were two similar counts for removing the books.

\*139] \*Curwood, for the prosecution, opened, that after the prisoner had been declared a bankrupt, it became his duty to deliver up all his books; but that, instead of doing so, he denied the existence of two of them, a ledger and a cash-book, which were afterwards found buried at the house of a person named Allen, who was a relation of the prisoner.

The commission of bankrupt was put in and read. In the setting out in the first count of the indictment, the word 'securities' was inserted instead of the

word 'fees.'

C. Phillips, for the prisoner, objected that this was a fatal variance.

Mr. Justice PARK. Without considering whether it be such a variance as is fatal or not, I shall not stop the case, as the second count appears to me to be \*140] quite sufficient.(a) \*I do not think it essential in a case of this kind to state the commission and proceedings with so great particularity.

To prove the petitioning creditor's debt, the petitioning creditor was called. Mr. Justice PARK suggested a doubt whether he was a competent witness; and, having conferred with Mr. Justice Patteson, said, that he would receive the evidence, subject to further consideration.

(a) The second count was in the following form :--And the Jurors aforesaid, upon their oath aforesaid, do further present, that, heretofore, to wit, on the 17th day of November, in the first year of the reign aforesaid, at the city of Worcester aforesaid, and county of the same city, the said John Walters was a trader, to wit, a shoemaker, then and there seeking his living by buying and selling, and was then and there justly and truly indebted to the said Peter Fish in a certain sum of money, amounting to 100*l.* and upwards, to wit, the sum of 131*l.* 10s., and that the said John Walters, being such trader, seeking his living as aforesaid, and being indebted as aforesaid, then and there became and was a bankrupt within the true intent and meaning of the statute then and now in force concerning bankrupts. And the Jurors aforesaid, upon their oath aforesaid, do further present, that the said John Walters, so being bankrupt as last aforesaid, and the said last-mentioned debt, so due and owing from him to the said Peter Fish as aforesaid, being and remaining wholly unpaid and unsatisfied, afterwards, to wit, on the 13th day of December, in the first year of the reign aforesaid, a certain commission of our said lord the King, sealed with the Great Seal of Great Britain, founded upon the said statute, and bearing date at Westminster, in the county of Middlesex, a certain day and year therein mentioned, to wit, the day and year last aforesaid, was duly awarded and issued out by the then Lord High Chancellor of Great Britain, directed to certain persons therein named, whereby our said lord the King then and there appointed the said last-mentioned persons, four or three of them, his said Majesty's commissioners, to proceed according to the said statute, amongst other things, touching and concerning the said bankruptcy of the said J. Walters, and also touching and concerning his estate and effects; and that afterwards, to wit, on the 20th day of December, in the first year of the reign aforesaid, at the city aforesaid, and county of the same city, the major part of the said last-mentioned commissioners did duly proceed to the execution of the said last-mentioned commission, and did then and there duly declare and adjudge that the said John Walters had become, and then and there was such a bankrupt as last aforesaid. Whereof the said J. Walters afterwards, to wit, on the day and year last aforesaid, at the city aforesaid, and county of the same city, had notice. And the Jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Walters, after he so became bankrupt as last aforesaid, to wit, on the 13th lay of December, in the first year of the reign aforesaid, with force and arms, &c., at the city of Worcester aforesaid, and county of the same city, wilfully, maliciously, fraudulently, and feloniously, did remove divers, to wit, two books of account, to wit, a certain book called a cash-book, and a certain other book called a day-book, then and there respectively relating to his estate, with intent then and there to defraud his the said J. Walter's creditors under the said last-mentioned commission, against the form of the statute in such case made and provided, and against the peace of our said lord the King, his crown and dignity.

Γ140

The petitioning creditor was, however, not called, and the petitioning cred-

itor's debt was proved by other evidence.

The proceedings under the commission were put in, and by them it appeared that the final examination of the \*bankrupt had never been completed, and that it was adjourned sine die. The paper, purporting to be the final [\*141 examination, did not contain any questions or answers; it merely stated that the commissioners, not being satisfied with the answers of the bankrupt, adjourned the examination sine die.

Busby, for the prosecution, proposed to give parol evidence of what the bankrupt had said before the commissioners.

Mr. Justice PARK. I think it cannot be done.

Busby. As it is shewn that what the bankrupt said was not taken down, I submit that I may give parol evidence of what the bankrupt said; and besides, by the 36th sect. of the bankrupt act, (a) the commissioners are empowered to examine by parol.

\*C. Phillips and Carrington, contra, relied on those words of the 36th section of the bankrupt act, which require the examination to be reduced

into writing.

Mr. Justice PARK. I can receive no evidence of the examination but the writing. The examination is required to be in writing by the act of Parliament: and that part which relates to the examining by parol, applies only to the questions which may be either put by parol or by written interrogatories. But even if the prisoner had concealed these books, I am of opinion that he is not indictable till after he has concluded his last examination; till then he has a locus penitentice. How do we know that when he goes to complete his last examination he will not deliver up all his books correctly? The prisoner must Verdict—Not guilty. be acquitted.

Curwood and Busby, for the prosecution. C. Phillips and Carrington, for the prisoner.

#### [Attorneys-Gilham and Hughes.]

(a) By which it is enacted, "That it shall be lawful for the commissioners, by writing under their hands, to summon any bankrupt before them, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time by them appointed (having no lawful impediment made known to them at such time, and allowed by them), it shall be lawful for the said commissioners, by warrant under their hands and seals, to authorize and direct any person or persons they shall think fit, to apprehend and arrest such bankrupt, and bring him before them; and upon the appearance of such bankrupt, or if such bankrupt be present at any meeting of the said commissioners, it shall be lawful for them to examine such bankrupt upon oath, either by word of mouth. or on interrogatories in writing, touching all matters relating either to his trade, dealings or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing: which examination, so reduced into writing, the said bankrupt shall sign and subscribe: and if such bankrupt shall refuse to be sworn, or shall refuse to answer any questions put to him by the said commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the said commissioners any such questions, or shall refuse to sign and subscribe his examination so reduced into writing as aforesaid (not having any lawful objection allowed by the said commissioners), it shall be lawful for the said commissioners, by warrant under their hands and seals, to commit him to such prison as they shall think fit, there to remain without bail until he shall submit himself to the said commissioners to be sworn, and full answers make to their satisfaction to such questions as shall be put to him, and sign and subscribe such examination."

## \*STAFFORD ASSIZES.

BEFORE MR. JUSTICE PATTESON.

## REX v. ANN SAVAGE.(a) July 26.

If, in a case of felony, a witness for the prosecution is too ill to attend the assizes, this is a good ground for postponing the trial, but will not authorize the reading the deposition

of the witness taken before the magistrate.

A. went to the shop of B., and asked for shawls for Mrs. D. to look at; B. gave her five, she pawned two, and three were found at her lodgings. Mrs. D. was not called as a witness :- Held, that A., on this evidence, could not be convicted of a larceny in stealing the goods of B.

THE prisoner was indicted for stealing five shawls the property of Peter Cotterell. It was proved that she went to the shop of the prosecutor, with "Mrs. Downing's compliments"—and said, that Mrs. Downing wanted some shawls to look at; the prosecutor selected five shawls, and gave them to the prisoner; who pawned two of them the same evening, and the remainder were found in her lodgings. Mrs. Downing was so near her confinement, as not to be able to attend at the assizes, or before the committing magistrate; and it was proved, that the prisoner was taken to Mrs. Downing by the magistrate; and a witness stated, that what Mrs. Downing said in the presence and hearing of the prisoner was taken down in writing.

Greaves, for the prosecution, proposed to call the magistrate, to prove what was stated by Mrs. Downing in the hearing of the prisoner.

Lee, for the prisoner. The illness of Mrs. Downing might be a good ground for putting off the trial, but can be no reason for receiving the examination.

If the witness be unable to travel through illness, the depositions are admissible. 1 Hale, 586; Kel. 55.(b)

\*Mr. Justice Patteson. That has been doubted by Mr. Starkie; (c)

\*144] and I think the evidence not admissible.

My objection is not, that the deposition is not admissible although I might contend that point, but that the statement made by Mrs. Downing in the magistrate's presence cannot be received from the magistrate's recollection of what occurred, when the facts had been reduced into writing, which writing is not in Court. And I would submit, that the indictment ought to have been for false pretences, inasmuch as it was by false representation that the goods were procured; and it is clear, the property was parted with by the prosecutor, when the shawls were delivered to the prisoner, because he has said, he considered the goods as sold to Mrs. Downing. This is like the case of Rex v. Davenport, Arch. Peel's Acts, 4, for there the delivery in the first instance, was legal: and and we must assume, until Mrs. Downing proves the contrary, that she sent for all the goods.

Greaves, contrà. That case is precisely in point in support of this indictment; the only difference between the cases is, that there the prosecutor sent two articles for the supposed orderer to make his selection; here, the prisoner asked for some shawls for Mrs. Downing to look at. And, as in that case the property would continue in the prosecutor till the selection was made, so it

witness.

<sup>(</sup>a) For the report of this case we are indebted to the kindness of the learned counsel engaged in it.

<sup>(</sup>b) See the case of Doe dem. Evans v. Lloyd, ante, Vol. 3, p. 219. (c) 2 Law of Evid. 487. In practice, motions are frequently made on the part of the prosecutors of criminal cases, to postpone the trial, on account of the illness of a material

would in this case. The true distinction between false pretences and larceny is this; if the property, as well as the possession of the goods, passed from the prosecutor, at the time of the delivery of the goods, to the prisoner, the indictment ought to be for false pretences; \*but if the possession alone be parted with the property remaining in the prosecutor, there the indictment ought to be for larceny. Here the property did so remain in the prosecutor therefore the indictment is right.

Mr. Justice Patteson. That would be so, if it had been proved that Mrs. Downing had not sent the prisoner for the shawls; but we must assume that

Mrs. Downing did send her.

Greaves. Assuming that the property passed to Mrs. Downing on the delivery to the prisoner, she might have been indicted for stealing the goods of Mrs. Downing. Now, although the property did not pass to Mrs. Downing, yet she was a special bailee; and it is impossible to draw any distinction between the case of a special bailee, and that of an absolute owner of property. Any possession, even that of a mere finder, is sufficient as against a wrong doer; and no distinction can be made between the different degrees of absolute or limited rights of possession.

Mr. Justice Patteson. At common law, no indictment could have been maintained for larceny by Mrs. Downing, against the prisoner, if she had been her servant.(a) It must be assumed, that she received the \*goods properly, and that it afterwards entered into her mind to convert them to her own use. At that time, in whom was the possession of the goods?

(a) If the prisoner had been really sent by Mrs. Downing for the shawls, and had converted them to her own use, before they had got to the hands of Mrs. Downing—it seems that the proper indictment would have been for embezzlement. On the subject of embezzlement the following case has been decided by the twelve Judges.

# OLD BAILEY MAY SESSION, 1830.—Coram T. DENMAN, Esq., COMMON SERJEANT.

#### REX v. MURRAY. May 28.

The prisoner was indicted for embezzling, amongst other moneys, the sum of 1l. 0s. 6d. under the following circumstances—It appeared that the prisoner was a clerk, employed in the office of Messrs. Adlington & Co., Solicitors; and that, upon the 22nd of March be received the sum of 5l. from William Rothwell Jackson, one of their managing clerks with directions to pay out of it a charge for inserting an advertisement in the London Clazette, for Messrs. Adlington & Co. The prisoner charged in his account the sum of 2d. 0s. 6d., for such advertisement, when, in truth, he only paid the sum of 1l. The prisoner was found guilty.

F. V. Lee, amicus curiæ, suggested that the money, if received by the prisoner himself from the master, for the purpose of paying it to a third person, would not be an emberalement within the 7 & 8 Geo. 4, c. 29, s. 47, which contemplated a receipt or taking into possession of moneys received by servants from third persons, for and on account of their masters. He cited Rex v. Peck, 2 Russ. C. & M. 213; and suggested that the receipt from Jackson was, in fact, a receipt from the master, and that the master's right of property

never was devested.

Clarkson, for the prosecution, contended that this was a receipt of moneys by the prisoner for and on account of his master, within the act; but, at all events, it was clearly a larceny; and there being a count of that description in the indictment, that was sufficient.

On looking at the larceny count, it was ascertained that the stealing was stated to be

"in manner and form aforesaid."

F. V. Lee then suggested, that that count was an imperfect count for an embezzlement and not a count for larceny; and that "in manner and form aforesaid," was a material averment, and could not be rejected as surplusage; and he contended, that if the first objection was good, the indictment was altogether defective.

The Common Serjeant respited the judgment, to take the opinion of the twelve Judges—who held the objections fatal to the indictment, and ordered the prisoner to be discharged.

Greaves. It must be admitted, that it was in the prisoner, although the pro-

perty was in the prosecutor.

Mr. Justice Patteson directed the Jury to acquit, on this defect in the evidence.

Verdict—Not guilty.

\*147] \*Greaves, for the prosecution. F. V. Lee, for the prisoner.

[Attorneys-Foster and Watson.]

## CHARLTON, Esq. v. HILL. July 17.

The clark of the course at a race cannot set off a claim of an unpaid stake due from the plaintiff on one race against a stake of another race won by the plaintiff's horse.

The clerk of the course at a race cannot bring actions for unpaid states.

Money had and received. Plea—General issue, with a notice of set off.(a) The defendant was clerk of the course at the Lichfied races of 1830; and it appeared that the horse of the plaintiff had "walked over" for the Produce-stakes, whereby the plaintiff was entitled to a sum of 25%, which sum was in the hands of the defendant as clerk of the course. On the part of the defendant it was contended, that he had a right to detain this sum of 251., because the plaintiff had called at the office of Mr. Wetherby, (who publishes the Racing Calender, and is authorized to enter horses), and had desired his name to be entered for the Two-year-old-stake at the same races. The amount of the subscription to that stake was 25l. It was proved, that before the time of the races, the plaintiff went to Mr. Wetherby, and said, he would withdraw his name from the Twoyear-old-stake, because a list of the horses entered had not been sent; but Mr. Wetherby's clerk stated in his evidence, that, when a gentleman entered for a stake, they did not allow him to withdraw his name. It was therefore, contended, that the defendant had a right to detain the sum of 251. won by the plaintiff from the Produce-stake, to satisfy the 251. for the plaintiff's subscription to the Two-year-old-stake.

\*148] Mr. Justice Patteson.—There is nothing like a set off \*proved. The defendant could not have brought an action against the plantiff for this Two-year-old-stake. The clerk of the course has no right to stakes, till he gets the money into his hands; he is never more than a mere stake-holder. Indeed if he could bring actions for unpaid stakes, he would be liable to have actions brought against him for every stake that was won, whether he had received it or not; and his situation would not be a very enviable one. The plaintiff is entitled to a verdict.

Campbell and F. V. Lee, for the plaintiff.

C. Phillips, for the defendant.

#### [Attorneys-Rosser and S., and Simpson.]

(s) Where there is any chance of the defendant's proving his set off by the cross-examination of the plaintiff's witnesses he should plead the set off, and not give notice of it, because, by having to prove his notice of set off, he loses the reply.

## STAFFORD ASSIZES.

#### BEFORE MR. JUSTICE PARK.

### REX v. STOKES. July 26.

A warrant of a justice of the peace to apprehend a party, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such party, is good.

Indictment for rescuing a person named Spilsbury out of the custody of John Tooth, a constable, in whose custody he was by virtue of a warrant of Mr.

Fowke, a magistrate.

The magistrate's warrant was put in; it recited that it appeared to the magistrate, by the certificate of the clerk of the peace, that a bill of indictment had been found against Spilsbury for an assault, and commanded the constable wapprehend him.

Greaves, for the defendant. I submit that this warrant is bad. The magistrate had no right to grant a warrant, except on evidence upon oath. If a bill of indictment was found at the Sessions, the Sessions might have granted their \*own process to bring in the offender. The indictment was in that Court and that Court might have acted on it, a single magistrate had no right to do so.

Ferrard, for the prosecution.—I believe that the granting of a warrant in this way is in the ordinary course of business; and besides, as the constable was commanded by the magistrate's warrant to take the party, and it being a case over the subject-matter of which the magistrate had jurisdiction, namely an as-

sault, the constable had nothing to do but to execute the warrant.

Mr. Justice Park. I have signed warrants over and over again on the certificate of the clerk of assize; and I should expect some authority to be cited to shew me that the practice is illegal. A Judge's warrant is not the warrant of the Court, but of the Judge personally. Where a thing is the act of court, the Judge's personal name never appears to it at all. There are some particular affidavits that must be sworn before a Judge, and there the Judge's own name must be signed to them. Even at the Assizes, where I sign warrants continually, I alone am not the Court without the clerk of assize or some other commissioner being joined with me; and if an indictment came in from the Grand Jury now, while I am sitting in Court, I should not grant a warrant upon it without a certificate being first given by the clerk of assize. I will however, confer with my learned brother on the point, as there is much business of this kind in the Court of King's Bench.

His Lordship, having conferred with Mr. Justice Patteson, said—"My learned brother has no doubt; he says it is done every day." Verdict—Guilty.

Ferrard, for the prosecution. Greaves, for the defendant.

As to the practice respecting the granting of Judge's warrants on indictments found in the Court of King's Bench, see 1 Gude's Cr. Off. Prac. 85; and the forms of certificates are given Id. Vol. 2, p. 175, et seq.

## SHREWSBURY ASSIZES.

#### BEFORE MR. JUSTICE PATTESON.

\*HUGHES v. MARSHALL and Others. July 80.

The treating act 7 & 8 W. 3, c. 4, only applies to candidates and their agents.

Assumpsit for goods sold. Plea—General issue.

This action was brought for the price of ale and other refreshments, supplied to the voters of Mr. Slaney, M. P. for Shrewsbury, during the election there in the year 1830. The defendants were not members of Mr. Slaney's committee; and it was proved, that they had ordered the refreshments in question, and had signed a paper stating that fact and the amount of the account.

The defence was, that the plaintiff had given credit to Mr. Slaney's committee, and that this account had been included in another account, which he had been

paid by that committee; and

Campbell, for the defendant, also contended, that the plaintiff could not recover, as this account came within the treating act 7 & 8 W. 3, c. 4,(a) since

which no bill for treating at an election could be recovered.

Mr. Justice Patteson. That act only applies to candidates and their agents If I was to go and run up a bill during an election, there is no doubt that I must pay it. By this act of Parliament, candidates and their agents are prohibited from treating voters; but still, as many of the voters come from a distance, they must have accommodation and refreshment, and for that they must either themselves be liable, or any one else may be liable who gives the order, provided he be neither a candidate nor an agent.

\*151] \*His Lordship left the case to the Jury on the first ground of defence.

Verdict for the plaintiff.

Curwood and Watson, for the plaintiff. Campbell and Godson, for the defendants.

[Attorneys-Yates and Moore.]

In the ensuing term Godson obtained a rule nisi for a new trial, which was subsequently discharged.

(Oroson Side.)

BEFORE MR. JUSTICE PARKE.

REX v. HICKMAN. July 29.

An indictment for manslaughter charged, that the deceased was on horseback, and that the prisoner struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened, and threw him, giving him a mortal fracture. The evidence was, that the prisoner struck the deceased with a small stick, and that the latter rode away, and the former rode after him; whereupon the deceased spurred his horse, which then winced, and threw him, whereby he was killed:—Held, that this evidence sufficiently supported the indictment.

(a) Cited ante, Vol. 3, p. 401, n. See the case of Ward v. Nanney, Id. p. 399.

MANSLAUGHTER. The first count of the indictment stated the death of the deceased to have been by blows. The second count stated, in substance, that the deceased, John Randell, was riding on horseback, and that the prisoner made an assault upon him, and struck him with a stick; and that the deceased, from a well-grounded apprehension of a further attack upon him, which would have endangered his life, spurred on his horse, whereby it became frightened, and threw the deceased off, giving him a mortal fracture, &c.

There was no evidence to support the first count; and it appeared, that the prisoner and the deceased, being both on horseback, had a quarrel; and that the prisoner struck \*the deceased with a small stick, and that he rode away along the Holyhead road, the prisoner riding after him; and that, on the deceased spurring his horse, which was a young one, the horse winced, and threw

him.

Bather and C. Phillips, for the prisoner, objected—First, that the fall ought to have been laid as the cause of the death; whereas, the cause stated was the blow of the stick and the frightening of the horse; and, secondly, that the blow and the frightening of the horse were stated jointly to have been the cause of the death, whereas the blow, it was evident, could not have eaused it, ever so remotely; and, besides that, it was stated, that the deceased was apprehensive of a further attack upon him, which would endanger his life, of which there was

not the slightest evidence.

Mr. Justice Park. I think the second count is sufficiently proved. The death of the individual was clearly caused by the frightening of his horse. In indictments for robbery, terror and force are always both stated, but it is insufficient to prove one of them. However, in this count, it is not stated that the deceased died of any blow. In the case of Rex v. Evans,(a) it was held, that if the death of the deceased, who was the wife of the prisoner, was partly occasioned by blows, and partly by a fall out of a window, the wife jumping out at the window from a well-grounded apprehension of further violence that would have endangered her life, the prisoner was as much answerable for the consequences of the fall, as if he had thrown her out at the window himself.

Verdict-Guilty.

Whateley, for the prosecution.

Bather and C. Phillips, for the defence.

## \*GLOUCESTER ASSIZES.

**[\*153** 

BEFORE MR. JUSTICE PATTESON.

## REX v. WARREN JAMES. Aug. 13.

An indictment on the riot act, 1 Geo. 1, st. 2, c. 5, s. 1, for remaining assembled one hour after proclamation made, need not charge the original riot to have been in terrorem populi.

Indictment on the riot act, 1 Geo. 1, st. 2, c. 5, s. 1, (set forth ante, Vol. 4, p. 442. The indictment stated, that, on the 8th of June, 1 Will. 4, the prisoner and certain evil-disposed persons, to the number of one hundred and more, did unlawfully, riotously, and routously assemble; and that, while so assembled, Edward Machin, one of his Majesty's Justices of the Peace for the county of Gloucester, did go, as near as he safely could, to proclaim silence; and

<sup>(</sup>a) 1 Russ. C. & M. 425. See the case of Rex. v. Culkin, ante, p. 121.

afterwards did, as near as he safely could, make proclamation (setting out the proclamation;)(a) and that the prisoner, and the other persons, to the number of twelve and more, afterwards, and notwithstanding the proclamation, did remain together for the space of an hour and more, against the form of the statute.

C. Phillips, for the prisoner. I submit that this indictment is bad. In an indictment for a riot, it is necessary that the indictment should state it to have been in terrorum populi. That was decided in the case of Rex v. Hughes; (b) and it is so laid down by the text writers. This indictment begins with charging a riot, as, without that, the magistrate had no right to make proclamation; \*154] and it being necessary to charge that a riot was committed, \*that riot must be charged in the indictment with legal technicality; and not being so here, I submit, that, by reason of the omission of the terrorem populi, this indictment cannot be supported.

Mr. Justice Patteson. This indictment pursues the words of the act on which it is framed. The charge here is, for keeping together after being riotously assembled. There is a distinction between an indictment for a riot, and an indictment framed on this act. I think the indictment is sufficient.

Verdict—Guilty.

Jervis, Campbell, W. J. Alexander, and Talbot, for the prosecution. C. Phillips and Phillipotts, for the defence.

[Attorneys-Green, Pemberton, & Co., and Chadborn.]

## REX v. BIRT and Others. Aug. 13.

If parties assemble together for a purpose, which, if executed, would make them rioters; but, having assembled, they do nothing, and separate without carrying their purpose into effect, this is an unlawful assembly.

INDICTMENT for a riot, with a second count for an unlawful assembly. Each

count concluded in terrorem populi.

It appeared that the prisoners, and a large number of persons, assembled to cut down the fences of the inclosures of the forest of Dean; and that the surveyor-general of the forest, and his woodmen, did not think themselves strong enough to resist them; and that inclosure fences to the extent of a mile and more were destroyed.

Mr. Justice PATTESON.—The difference between a riot and an unlawful assembly is this: If the parties assemble \*in a tumultuous manner, and actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose, which, if executed, would make them rioters, and, having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly.

Verdict—Guilty.

Jervis, Campbell, W. J. Alexander and Talbot, for the prosecution.

C. Phillips and Phillpotts for the defence.

[Attorneys-Green, Pemberton & Co., and Chadborn.]

See the case of Rex v. Cox, ante, Vol. 4, p. 538.

(a) Care ought to be taken to set out the proclamation exactly as the Justice made it. Several of the printed precedents, in setting out the proclamation, vary from the proclamation as given in the act, and as given in Chetw. Burn, Vol. 5, p. 22, and Chit. Burn, Vol. 5, p. 283, from which magistrates are very likely to read it.

(b) Ante, Vol. 4, p. 373. See also the case of Rex v. Cox, Id. 538.

### REX v. SALISBURY. Aug. 15.

S. was employed by a post-mistress to carry letters from Duraley to Berkeley, at a weekly salary paid him by the post-mistress, but which was repaid to her by the post-office:—Held, that S. was a person employed by the post-office, within the stat. 52 Geo. 3, c. 143. s. 2.

But a letter sent from Cardiff to Dudley, but which, it was alleged, was missent to Dursley, if stolen by S., would not be a letter which came to his hands "in consequence of

his employment."

Semble—That the words, "whilst employed," in sect. 2 of the stat. 52 Geo. 3, c. 143, relative to stealing letters, merely mean that the party should be then in the employ of the post-office; and not that the letter, when stolen, was in the party's hands in the course of his duty.

On an indictment for felony, a matter, which was the subject of another indictment for felony, was material to be given in evidence; as it formed a part of the facts of the case. The Judge received the evidence, and did not direct the second prosecution to

be abandoned.

INDICTMENT for stealing a letter from the post-office, containing bank-notes. The first eight counts of the indictment were framed on sect. 2 of the stat. 52 Geo. 8, c. 143, (set forth ante, Vol. 4, p. 572, n. (a)). The first count charged, that the prisoner was employed in the post-office at Dursley, in the opening of the mail bag, and sorting of letters; that a letter directed to Messrs. Joseph Cox & Sons, came by the post, containing certain bank-notes of 101. each, and that the prisoner stole the notes. The next seven counts varied this, by its being stated in some of them, that the notes were in a packet, and in others, that the prisoner secreted the letter; and the property was also laid to be in different persons. The 9th, 10th, 11th, 12th, and 13th counts were framed \*on sect. 3 of the act (set forth ante, Vol. 4, p. 573, n.). The ninth (\*156 count charged, that the prisoner stole a letter from the post-office at Dursley, containing the bank-notes; and the other counts varied the charge, by laying the property differently, and by stating the letter to be a packet. The last count charged the prisoner with stealing the notes in the dwelling-house of Mrs. Baldwin, the post-mistress of Dursley.

Jervis, for the prosecution, opened. That the prisoner was a letter-carrier from Dursley to Berkeley, and that his wife was the sister of Mrs. Baldwin, who was the post-mistress of Dursley, where he sometimes opened the mail-bags and sorted the letters. That a letter, sent by Mr. Joseph Cox from Cardiff, and directed to Dudley, containing the notes in question, had been mis-sent to Dursley, from which place the letter and its contents had been stolen. He also stated, that a person named Baller had sent a letter, containing other banknotes, from Lostwithiel to Uley, which would have to pass through the Dursley post-office; and that the notes sent in Mr. Baller's letter were taken out, and Mr. Cox's notes, to an equal amount, put into Mr. Baller's letter in their stead. He was proceeding to show how Mr. Baller's notes would be traced to the posses-

sion of the prisoner.

Curvood, for the prisoner, objected to this being stated, as there was another indictment against the prisoner for stealing the notes out of Mr. Baller's letter. And he cited the cases of Rex v. Smith, Ante, Vol. 2, p. 633, and Rex v. Westwood, Ante, Vol. 4, p. 547, and a case in which the same point was decided by Mr. Baron Bolland.

Mr. Justice Patteson.—On the part of the prosecution, they put it in this way:—they propose to show, that the prisoner stole Mr. Cox's notes, because they were put into \*Mr. Baller's letter in exchange for his notes, which must have been taken out by some one, and are to be traced to the prisoner's possession. In the case of Rex v. Ellis, 9 D. & R. 174, it was held, that evidence of other felonies was receivable, where they were all parts of one transaction. I see, that in that case there was only one indictment; but still, I

think that the evidence respecting Mr. Baller's notes is essential to the chain of facts necessary to make out the case.

Currocod.—I hope that your Lordship will direct the other prosecution to be

abandoned.

Mr. Justice PATTESON .--- I will see about that.

It appeared from the evidence of Mrs. Baldwin, the post-mistress of Dursley, that she employed the prisoner, at a salary of 14s. a-week, to carry the letter-bag from Dursley to Berkeley; and that she was allowed by the post-office, in her quarterly account, the sums she paid him; but she stated, that the prisoner never sorted the letters, or opened any mail-bag. There was no very distinct evidence to show that Mr. Cox's letter ever was in the Dursley post-office; but the notes contained in it were distinctly shown to have been put into Mr. Baller's letter, notes to an equal amount having been taken out; and evidence was adduced, with a view of tracing some of these notes to the prisoner; but the statements of some of the witnesses was by no means positive.

Mr. Justice Patteson, (in summing up).—I think that the prisoner was a person in the employ of the post-office, as his sister-in-law paid him 14s. a-week, which the post-office allowed her again. The evidence is, that he was not em-\*158] ployed as a sorter, but as a letter-carrier from \*Dursley to Berkeley. I think also, that this letter cannot be said to have come to his hands "in consequence of his employment;" because he, as a letter-carrier from Dursley to Berkeley, would not have a letter addressed from Cardiff to Dudley come to his hands in the course of his duty. However, the 2d section of the act of Parliament goes on "whilst so employed." The question, then, is, whether those words relate to time only, or whether they make it essential that the letter should come to his hands in the course of his duty. I am inclined to think that they relate merely to time; because the words "by virtue of his employment" are used in another part of the section. However, this is less material, as there is a count for stealing the letter out of the post-office at Dursley; and also a count for stealing in a dwelling-house, to the value of more than 5l.; and if the letter was stolen out of the post-office, the prisoner may be convicted on either of those counts; and if he merely stole the notes, he may be convicted of larceny. the prisoner took the letter containing these notes from the post-office at Dursley, he will come within one of the capital charges; and, as they are all capital, it will not be very material to determine which. Verdict—Not guilty(a).

Jervis, Campbell, Ludlow, Serjt., and Maule, for the prosecution.

Curwood and Justice, for the defence.

[Attorneys-Peacock and Blozsome & Co.]

\*159] \*REX v. HARRIS. Aug. 17.

If a pistol be loaded with gunpowder and balls, but its touch-hole be plugged, so that it cannot by possibility be fired, this is not "loaded arms," within the stat. 9 Geo 4, c. 31, ss. 11, 12.

INDICTMENT on the statute 9 Geo. 4, c. 31, ss. 11, 12, (set forth Carr. Supp. pp. 236, 237,) charging the prisoner with attempting to discharge a loaded pistol at William Watkins, by drawing the trigger. In the different counts, the in-

<sup>(</sup>a) See the case of Rex v. Pearson, ante, Vol. 4, p. 572.

The prisoner was afterwards tried on the indictment charging him with stealing the notes from Mr. Baller's letter, and acquitted.

tent was laid to be, to murder, disable, do grievous bodily harm, and to resist

lawful apprehension.

The prosecutor had been appointed a special constable to execute a warrant of Mr. Ducaral, a magistrate, to take the prisoner on a charge of riot. The warrant was both shewn and read to the prisoner, and he drew a pistol, which was loaded to within half an inch of its mussle, with gunpowder, paper, and two ill-shaped balls. This the prisoner pointed at the head of the prosecutor, within four inches of his ear, and pulled the trigger. The lock went down, and the prosecutor saw a single spark proceed from it. No mischief was done, and the pistol was taken from the prisoner. There was no priming found in the pan, but it was proved that that might have dropped out in the struggle to take the pistol from the prisoner.

The prisoner said, in his defence, that the pistol was kept loaded for the protection of his house, which had been robbed, but that, to prevent his children from doing themselves mischief with it, he always kept a piece of paper in the pan, and another piece of paper twisted tightly, and run into the touch-hole,

so as to prevent its being fired.

The prisoner's son was called to prove that the pistol had been in this state

the day before.

Mr. Justice Patteson, (in summing up) If you think that the pistol had its touch-hole plugged, so that it could not by possibility do mischief, I think that the prisoner ought to be acquitted, because I do not think that a pistol so circumstanced ought to be considered as loaded arms, within the meaning of this act of Parliament.

Verdict—Guilty.(a)

Justice, for the prosecution. Watson, for the defence.

[Attorneys-Lucas and Hulls.]

## REX v. ROBERT COLLIER, Gent., One &c. Aug. 17.

The practice of issuing county court processes in blank, for the attorneys to fill up after they have been issued by the county clerk, is highly irregular. And semble—that the filling up of a county court summons, or altering a distringas into a summons, after it has been so issued in blank, is a forgery at common law.

INDIGIMENT for forging a county court summons. The first count of the indictment charged the defendant with forging "a certain paper-writing, in the words and figures following;" (it then set out the summons verbatim), with intent to defraud John Collier. The third count stated the instrument to be "a certain summons, purporting to be a summons sued out from the county court of David Ricardo, Esq., Sheriff of Gloucestershire." The fifth count stated the instrument to be "a certain summons, purporting to be a summons under the seal of the office of David Ricardo, Esq., the said D. R. then being Sheriff of Gloucestershire." The second, fourth, and sixth counts, were for uttering the summons, knowing it to be forged; and the seventh and eighth were for obtaining the sum of 7s. 6d. by falsely pretending that the instrument was a genuine summons.

The paper in question was a printed form of a distringus, which had had the words respecting the distraining struck through with a pen, and the word "summon" inserted instead. The whole of the filling up of the instrument was in the defendant's handwriting, and his name was to it, as the attorney who had sued it out. It purported to be a summons at the suit of a person named Allen.

<sup>(</sup>a) See the case of Rex v. Hughes, ante, p. 126.

There was a seal to it, but whether this was the genuine seal of the county court \*161] or not, the witnesses could not state, as the \*impression was so defective.(a) No entry of the issuing of this summons appeared in the books of the county court. This paper had been served on the prosecutor, and he had paid the defendant the costs, as if it had been a genuine summons, and also the debt which Allen claimed of him. It appeared, from the evidence of the county court clerk, that, when he was absent, the clerks in the office, if they were busy, sometimes gave out blank summonses to the attorneys, who filled them up for themselves.

Mr. Justice Patteson. I do not see that there is any evidence of an intent to defraud the prosecutor. He would have had just the same costs to pay if

this summons had been sued out in the most regular manner.

Curvood. In cases of forgery at common law, there need be no intent to

defraud any particular person.(b)

Mr. Justice Patteson. It is highly irregular; but I know that the summonses are sometimes given out in blank. I am not prepared to say, that after the notice that this trial will give parties as to the impropriety of the practice, I should not hold, that this mode of filling up a summons, or of altering a distring into a summons was not forgery.

Verdict. Not guilty.

Curvood and Carrington, for the prosecution.

Justice and Busby, for the defence.

[Attorneys-Ward and Collier.]

## HOME SUMMER CIRCUIT.

1831.

BEFORE LORD TENTERDEN, C. J., AND MR. JUSTICE GASELEE.

## MAIDSTONE ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE GASELEE.

\*162]

REX v. BELL. July 29.

On the trial of a prisoner who has made before a magistrate a voluntary confession of his guilt, previous to the conclusion of the evidence against him, which confession is taken down in writing, and signed by the prisoner, and attested by the magistrate's clerk; the proper course is for the clerk to give evidence of the prisoner's statements, refreshing his memory by the written paper.

(b) For the law respecting forgery at common law, see 1 Curw. Hawk. 263.

<sup>(</sup>a) Seals are affixed to many public documents in a very slovenly manner. The Great Seal affixed to a commission of bankrupt, which was given in evidence in a case of felony tried before Mr. Justice Patteson, at the Hereford Sum. Ass. 1831, was a mere lump of wax, which had no impression upon it; and the prisoner's counsel objected, that this was not a commission of bankrupt under the Great Seal. The prisoner was acquitted on the merits, and this objection was therefore not further considered.

THE prisoner was indicted for the murder of Richard Taylor.

It appeared, that, on the 21st May, the prisoner and his younger brother were brought up to be examined before the magistrates at Rochester. They had both been in custody since the 17th, and various depositions had been takes between that day and the 21st. On the 21st, several depositions were taken in the presence of the prisoner, and the younger brother was about to state a confession made to him by the prisoner on the previous evening, when the prisoner interrupted him and made a full confession of his guilt. The confession the magistrate's clerk immediately reduced into writing, and it was read over to the prisoner and he put his mark to it. It was attested by the magistrate's clerk thus:—"Taken and signed by the said John Heneker Bell, in the presence of —." On the 23rd and two following days, other depositions were takes in the presence of the prisoner; and, on the 25th he was fully committed for trial. Some additional depositions were subsequently taken in the absence of the prisoner; some of them as late as the 6th of July. All these latter depositions were duly returned to the Court, including the prisoner's confession but not the earlier depositions of the 21st of May and previously. It was proposed, on the part of the prosecution, to read the confession in evidence

Clarkson, for the prisoner, objected to its admissibility, on the following grounds—First, that it was made by the prisoner before the evidence against him had been gone through. On this point he referred to Rex v. Fagg, (vol. 4 of these Reports, p. 566,) in which Garrow, B., expressed his opinion, that nothing which a prisoner stated before he knew what the evidence against him was, ought to be used to criminate him. Secondly, that some of the depositions were taken in the absence of the prisoner. Thirdly, that there were interlineations and erasures. And, fourthly, that there was a false attestation.

GASELEE, J., after consulting Lord Tenterden, C. J., upon the objections, said—My Lord Tenterden agrees with me that the opinion of Mr. Baron Garrow in Rex v. Fagg is much too general, as it would go to exclude any acknowledgment of guilt made by a prisoner to a constable. He also agrees with me that the interlineations and erasures are cured by the attestation, which cannot be called a false attestation, though it would have been more regular to have said, that the prisoner put his mark, as is customary in affidavits in the superior Courts. We are both of opinion, that it is no objection that some of the depositions were taken in the absence of the prisoner. We are also both of opinion, that the confession may be repeated by the magistrate's \*clerk who [\*164 heard it, and that he may refresh his memory by aid of the written paper.

Clarkson then further objected, that, as the rules of law required that the best evidence should be given, the parol statement of the clerk was not receivable. The paper ought to be used as a confession, or the evidence should not

be received at all.

GASELEE, J.—After again consulting with Lord Tenderden, C. J., said, we are still of opinion that the clerk may give the whole in evidence, refreshing his memory with the written paper.

The confession was then read by the magistrate's clerk in the third person,

and the prisoner was convicted and executed.

Walsh and Brett, for the prosecution.

Clarkson, for the prisoner.

In a case which occurred on the Norfolk Circuit, where a statement made by a prisoner, which was proved to have been taken under similar circumstances, as far as regarded the completion of the evidence against him, was offered in evidence.—Nydref Taylor, for the prisoner, objected, and cited Rex v. Fagg. The depositions were produced, and it appeared that they had been drawn up as if the whole evidence had been taken before the confession was made. Lord Lyndhurst, C. B., rejected the evidence, on the ground that the document was false; but intimated, that he did not consider the objection as tenable, upon the ground mentioned in the authority referred to.

## NORFOLK SUMMER CIRCUIT.

1831.

BEFORE LORD LYNDHURST, C. B., AND MB. BARON GARROW.

## BEDFORD ASSIZES.

BEFORE MR. BARON GARROW.

## \*REX v. JAMES DEERING and JOHN ATKINSON. July 15.

A counsel for the prosecution, on opening a case of felony, has in strictness a right to state in his own way a conversation supposed to have passed between the prisoner and a witness whom he intends to call; but, in correct practice, the statement ought to be confined to the general effect of the conversation.

A person indicted with others for an offence, but against whom the bill has been thrown out, may, if he be in custody at the time of the trial of the others, be placed at the bar

to be identified as one who was in their company.

THE prisoners were indicted for burglary in the dwelling-house of John Bull,

and stealing a quantity of watches, &c.

Austin, for the prosecution, stated that he should call a person named Westwood, who had been lately discharged from Cambridge gaol, and who would depose to a conversation between himself and the prisoner Atkinson, relating to the robbery in question. He was proceeding to state the conversation to the Jury, when-

Smith, for the prisoners, objected, on the ground that various circumstances might arise in the progress of the cause, rendering the conversation inadmissible in evidence; and he submitted that it was better that the jury should not hear that in statement, which they could not afterwards act upon as evidence. \*GARROW, B.—If the counsel for the prosecution thinks fit to open

\*166] the evidence, I cannot control him.(a) A person named Ward had been indicted with the two prisoners for the offence in question, but the Grand Jury had thrown out the bill against him; but he was present in Court in the custody of the gaoler of Cambridge, having been brought by him to answer this charge, and, being detained in such custody, to be taken back to Cambridge, to answer another charge there. It was proposed on the part of the prosecution to place him in the dock beside the prisoners who were on trial, in order that he might be identified as a person who was in their company.

Smith, for the defence, objected, that as the Grand Jury had thrown out the bill, he was as free from the present charge as if it had never been preferred against him, and therefore ought not to be treated as if the bill had been found

and he was actually on his trial.

GARROW, B., said, that there was no doubt as to the right to have the party produced in order that he might be identified; and Ward was, in consequence,

<sup>(</sup>s) In a case tried on the same Circuit, in March, 1831, a similar objection was made, and a similar decision given by Alderson, J.; but in the case of Rex v. Swatkins and Others, Vol. 4 of these Reports, p. 548, Bosanquet and Patteson, Js., were of opinion that the correct practice was only to state the general effect of the conversation.

placed at the bar. His Lordship afterwards observed, that the same course had been adopted on the trial of Thistlewood and others at the Old Bailey.

Verdict—Guilty.

Austin, for the prosecution. Smith, for the prisoners.

[Attorneys-Swain & Co., and Isaacs.]

## BURY ASSIZES.

BEFORE LORD LYNDHURST, C. B.

## \*REX v. TUFFS. July 22.

**[\*167** 

A prisoner, indicted for stealing two heifers, said: "I drove away two heifers from "the World's End Dolver," (i. s. Fen). The prosecutor's farm was called by that name, but he could not swear that there was not any other of the same name in the neighbourhood:—Held, insufficient to warrant a conviction.

THE prisoner was indicted for stealing two heifers, the property of James Suker of Mildenhall. The heifers were not missed by the prosecutor or any person in his service, and the only evidence against the prisoner was his own statement, when questioned on the subject, that he had driven away two heifers from his uncle's premises, "the World's End Dolver," (Dolver meaning, in that part of the country, a fen.) The prosecutor and another person proved that the prosecutor's farm was called by that name, but they could not undertake to say that there was not any other of that name.

Lord LYNDHURST, C. B., upon this, told the Jury, that, under the circumstances, there was not any evidence of a stealing as to the heifers of the procedutor; though, if it had been proved that his farm was the only "World's End Dolver," it would have been sufficient.

Verdict—Not guilty.

## \*REX v. OFFORD. July 23.

r\*168

To justify the acquittal of a prisoner indicted for murder, on the ground of insanity, the Jury must be satisfied that he was incapable of judging between right and wrong, and at the time of committing the act did not consider that it was an offence against the laws of God and nature.

The prisoner was indicted for the murder of a person named Chisnall, by shooting him with a gun. The defence was insanity. It appeared that the prisoner laboured under a notion that the inhabitants of Hadleigh, and particularly Chisnall, the deceased, were continually issuing warrants against him with intent to deprive him of his liberty and life; that he would frequently, under the same notion, abuse persons whom he met in the street, and with whom he never had any dealings or acquaintance of any kind. In his waistcoat pocket a paper was found, headed, "List of Hadleigh conspirators against my life." It contained forty or fifty names, and among them "Chisnall and his family." There was also found, among his papers, an old summons about a rate, at the foot of which he had written, "This is the beginning of an attempt against my life." Several medical witnesses deposed to their belief, that, from the evidence they had heard, (See Rex v. Haswell, Russ. & Ry. C. C. R. 458, cited

Carr. Sup. p. 72,) the prisoner laboured under that species of insanity which is alled monomania; and that he committed the act while under the influence of that disorder, and might not be aware that, in firing the gun, his act involved the crime of murder.

Lord LYNDHURST, C. B. (in summing up.) told the Jury that they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of God and nature?

\*169] \*By Sir James Mansfield, and expressed his complete accordance in the observations of that learned Judge.

The Jury acquitted the prisoner, on the ground of insanity.

Austin and Palmer, for the prosecution.

Smith, for the prisoner.

[Attorneys-Last and Leeck.

## HOME WINTER CIRCUIT.

1831.

## MAIDSTONE ASSIZES.

BEFORE MR. JUSTICE PATTESON.

## \*170] \*REX v. JAMES HARGRAVE. Dec. 8.

An indictment for manslaughter charged, that A. gave to the deceased divers mortal blows at P., in the county of M., and that the deceased languished and died at D., in the county of K.; and that the prisoner was then and there aiding in the commission of the felony:—Held, that the indictment was good, and that the word there referred to P., in the county of M.

Although all persons present at and sanctioning a prize fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree; yet they are not such accomplices as require their evidence to be confirmed, if they are

called as witnesses against other parties charged with the manslaughter.

(a) The prisoner was indicted for the murder of the Right Hon. Spencer Perceval, and the defence was insanity. According to the statement of the case in Russell on Crimes and Misdemeanors, Vol. 1, p. 10, extracted from Collinson on Lunacy, Addenda 630, the learned Judge in charging the Jury, told them, "that in order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that, in fact, it must be proved beyond all doubt, that, at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder or any other crime. That, in the species of madness called "Lunacy," where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady, would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from vil, they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks au opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement."

INDICTMENT against the prisoner, as a principal in the second degree in the manslaughter of Richard Dodd.

The deceased and another person named Cox, (who had afterwards died, met, on the day laid in the indictment, at Islington, and there commenced a puglistic contest. Having been interrupted by the interferance of the police, they proceeded to the Isle of Dogs, where they recommenced the fight; and the deceased, Dodd, in consequence of the injuries which he received, died shortly after his removal from the place of combat, on board the Hospital ship Grampus, which was then stationed in the Thames, and within the parish of St. Nicolas, Deptford. The indictment stated, that James Cox made an assault on the deceased in the parish of All Saints, Poplar, in the County of Middleser, and beat the deceased, giving him divers mortal bruises and contusions, &c.: "of which said bruises and contusions the said Richard Dodd, from &c., until &c., at the parish of St. Paul's, Deptford, in the county of Kent, did languish &c.: and that he there died; and that the said James Hargrave, together with &c., were then and there present, aiding, abetting, &c., the said James Cox is the commission of the said felony.

\*Clarkson, for the prisoner, objected that the indictment was bad, as [\*171 it did not with certainty charge the prisoner with the commission of the offence in any particular place; for the word there referred to the two parishes

mentioned in the indictment, viz. All Saints, Poplar, and St. Paul's Deptford.

Mr. Justice Patteson. The giving of the blows which caused the death The languishing alone, which is not part of the offence, constitutes the felony. is laid in Kent; the indictment states, that the prisoners were then and there present, aiding and abetting in the commission of the said felony; that must, of course, apply to the parish of All Saints, Poplar, where the blows which constitute the felony, were given; and the words then and there refer with sufficient certainty to that parish.

The facts of the case, as to the fight, and the presence of the prisoner at it, together with his conduct upon the occasion, were proved by persons who were present at the boxing match. The surgeon who attended the deceased having also been called to prove the injuries which he had received, the case was closed

for the prosecution.

Clarkson submitted, that, as all persons who were present at the fight were, in the eye of the law, principals in the second degree to the offence, their evidence, as in case of accomplices required confirmation.

Mr. Justice Patteson held, that they were not such accomplices as to require

any further evidence to confirm them.

The prisoner was found guilty, and sentenced to fourteen years' transportstion.

Bodkin, for the prosecution. Clarkson, for the prisoner.

[Attorneys-Carttar & Son and Chell.]

## \*COURT OF COMMON PLEAS.

First Sitting at Westminster, in Michaelmas Term, 1831.

BEFORE MR. JUSTICE PARK.

(Who sat for the Lord Chief Justice.)

JARMAIN v. EGELSTONE and Another. Nov. 10.

A purchaser at an auction cannot recover from the vendor the expenses of preparing the deeds of conveyance of the property, after he has refused to complete the purchase on account of the non-production of certain title deeds, though his attorney prepared the conveyances on the faith of a note written in the margin of the abstract by the vendor's solicitors, stating that all the title deeds were examined by them on the original purchase, and that, if it should be required, they would apply to the solicitor for the original seller, in whose custody they were.

THE first two counts in the declaration stated the sale by auction to the plaintiff of certain freehold property; the undertaking of the defendants to make out a good title, &c; and their failure to do so; and claimed the expenses which the plaintiff had been put to in the investigation of the title, which had become unproductive in consequence; and certain costs he had incurred in an action

against the auctioneer to recover the deposit, &c.

The third count stated in substance, that certain objections to the title had been made, which were under discussion; and that, in consideration that the plaintiff would, at the request of the defendants, cause the deeds of conveyance of the property to be prepared, they, the defendants, undertook that those objections should be cleared up; and that the plaintiffs did, in consequence, cause the deeds to be prepared; but the defendants did not procure the objections to be cleared up; whereby the deeds became useless, and the plaintiff was put to expense, &c.

There were also the ordinary money counts. Plea—The general issue.

The defendants, who were trustees of certain freehold property, put it up to auction on the 6th of November, 1827; the plaintiff became the purchaser of \*173 Lot 1, and \*paid 2311. deposit, and 16 guiness for a moiety of the auction duty. The property in question came to the trustees from a person When the abstract was sent by the defendants' solicitors to the named Bates. solicitor of the plaintiff, various objections were raised on the part of the latter, many of which were obviated by explanations, &c.; and the difference between the parties was at last reduced to a question as to the production of certain title-deeds, which were not in the possession of the trustees. On the subject of these deeds, the following memorandum was written by their solicitors in the margin of the abstract:—" If it should be required, Messrs. Seeker & Son will apply to Mr. Eade, of Hitchin, on the subject. At the time Bates made this purchase, Secker, sen., examined all the original deeds, then in the hands of Mr. Eade's agent. After this, the plaintiff's solicitor proceeded to draw the conveyance, the draft of which he sent to the defendants' solicitors in January, 1829, and received it back approved, in April. In May, he sent the engrossment, and was, shortly after, informed that it had been executed by the defendants. The title-deeds in question were not produced, and, on that account, the purchase was completed. The plaintiff brought an action against the auctioneer, in which he recovered back the amount of the deposit and auction-duty which he had paid; and the present action was brought to recover a sum of 1701., being partly for the expense of investigating the title, partly for costs incurred in the action against the auctioneer, and partly for the costs of preparing and engrossing the conveyances. 112% was paid into Court on the first two counts

and the money counts.

Wilde, Serjt., for the defendants. The expenses of preparing the conveyance are not recoverable. If the plaintiff meant to insist on the production of the title-deeds, he should have done so before the conveyance was prepared and sent for execution. There has been an excess \*of haste on the part of the plaintiff, and the defendants are not to suffer by it. The attorney thought proper to act upon the note in the margin of the abstract, and he must be bound by it. A purchaser has no right to prepare his conveyance, until he has made up his mind to take the estate. It is hard enough upon trustees to be obliged to pay the necessary expenses, and it would be very unreasonable to fix them with such a demand as this.

Talfourd, in reply. I allow, that, in ordinary cases, the duty of a solicitor is as has been stated. But the third count in this case contains a statement of the special circumstances; and I submit, that the plaintiff may recover, as the se-

licitors were acting in perfect confidence with each other.

Mr. Justice PARK. The third count states, that the defendants requested the plaintiff to prepare the deeds. There is no evidence of that. It seems to me, that that count is not proved. His Lordship, in summing up, said-"Nothing can be more honest than the intentions of the parties; but the question is, whether the conveyance should have been prepared so early. It seems to me, in point of law, that the requisition for the production of the deeds should have been made before; and if that were not the law, trustees would be in a very inconvenient situation. Supposing in this case the money had been paid, and the trustees had distributed it to the different parties interested, they would have to get it all back again. It seems to me, therefore, that the verdict must be for the defendants." Verdict for the defendants.

Talfourd and C. R. Turner, for the plaintiff. Wilde, Serjt., and Secker, for the defendants.

[Attorneys-G. Smith and Few & Co.]

\*Last Sitting in London, in Michaelmas Term, 1831. [\*175

BEFORE MR. JUSTICE PARK.

#### DOVER v. MILLS. Nov. 23.

A booking-office keeper, who also keeps a wine vaults, is guilty of negligence, if he allows goods to remain in front of the bar, exposed to persons coming in for liquor. even though they are of too large a size to be conveniently taken into the bar, behind the counter.

THIS was an action to recover from the defendant, who kept a wine vault in Skinner Street, Snow Hill, which he also used as a booking-office for goods to be sent by carriers to various places, and, among them, to Hampstead, the value of two trunks of clothes. It appeared from the evidence on the part of the plaintiff, that, about one o'clock on Saturday, the 2nd of April, the trunks, corded together, and covered with matting, were delivered at the defendant's place, and 2d. was paid for the booking to a person in the bar; that there was a direction on a piece of strong paper, folded at the edges, and fastened to the cord of the box with a string. It was, "Mrs. Dover, - Longman's, Eq., Hampstead, by Gray." The person who took the boxes told the person in the bar, that they were servants' boxes, and would be wanted, and must be sure to go that day. The entry of the parcel in the defendant's book was-"Mrs.

Dover, Hampstead, Gray." The boxes were placed in the wine vaults, in front of the bar, and remained there till half-past five, when the carrier's man took them. He said, that when he put them in his cart, the direction was—"Mrs. Dover, to be left at the Load of Hay, Hampstead." The carrier's man left the boxes at the Load of Hay, and a person called for them very soon after, and took them away, and they had not been heard of since. It was supposed that, while they were in the defendant's custody, some of the persons who came in for liquor, of whom there were many, must have altered the direction, for the \*176] purpose of stealing them afterwards. \*On the part of the defendant, witnesses were called to shew, that the boxes were not lost sight of during the whole of the time, and that the alteration could not have taken place in the wine vaults. They also said, that the boxes were too large to be conveniently placed elsewhere than in the front of the bar, and that it was usual to put such packages in that part of the premises; but they admitted, that there was but one seat in the room, and that persons who came in frequently sat down upon the goods which happened to be there.

Andrews, Serjt., for the defendant, contended, that, considering the smallness of the remuneration, and the circumstance of the boxes being put in the usual place in which articles of their bulk were deposited, and as they could not conveniently be put elsewhere, there was was no evidence that reasonable care and diligence had not been used with reference to the subject-matter, and, therefore,

the plaintiff was not entitled to the verdict.

Mr. Justice Park left it to the Jury to say, whether there was negligence on the part of the defendant. His Lordship said, that, in his opinion, goods ought not to be laid down in a common gin-shop, where there was but one seat, and persons were in the habit of coming in, and sitting down upon the goods which happened to be there. It was the duty of the defendant to take the things into a safe place behind the counter. It could not be supposed that improper persons did not come into places of that description; and a booking-office keeper, who received money, was bound to take care of the things given into his custody, by putting them into a safe place. He then told the Jury, that if they were of opinion that a sufficient degree of diligence, or care, or caution, had not been used, then they should find their verdict for the plaintiff.

Verdict for the plaintiff—Damages 401:

\*177] \*Bompas, Serjt., and ——, for the plaintiff.

Andrews, Serjt. for the defendant.

[Attorneys-Flower and Harmer.]

See the cases of Newborn v. Just, ante, Vol. 2, p. 76; and Butler v. Basing, Id. p. 613.

Adjourned Sittings in London, after Michaelmas Term, 1831.

BEFORE LORD CHIEF JUSTICE TINDAL.

BOWMAN and Another, Assignees of SMITH & HALL, Bankrupts, v. NORTON and Others. Dec. 5.

A conversation between a client, who afterwards becomes bankrupt, and his attorney's clerk, on the subject of his affairs, is a privileged communication, and cannot be given in evidence in an action by his assignees, for the purpose of shewing his motives.

TROVER for certain bills of exchange. Vol. XXIV.—38

[\*179

It was proposed, on the part of the plaintiffs, to ask an attorney's  $\operatorname{clerk}(a)$ , what one of the bankrupts had said to him, when he came to consult about the state of his affairs.

This was objected to on the part of the defendants, on the ground that it was

a privileged communication.

Taddy, Serjt., for the plaintiffs. The reason of the privilege only applies to cases where the party himself retains the right of suit; but, where it is transferred to assignees under a commission, the creditors have a right to the cridence, as showing the bankrupt's motives.

\*J. Williams, for the defendants. It is no matter whether the bankrupt has the right of suit or not. That is a perfectly new distinction.

The change of parties makes no difference in the case.

TINDAL, C. J. I cannot tell whether the commission may not be set aside; and, suppose it is, are this man's secrets, told to his solicitor, to be let out?

Taddy, Serjt. My friend does not represent Smith & Hall. I represent them as counsel for the assignees. A. may waive his privilege if he pleases; and the bankrupt being represented by his assignees, they have the same right to waive the privilege as he would have had, if he had brought the action.

TINDAL, C. J., was still of opinion that the evidence was not admissible: and put it to Taddy, Serjt., whether he had ever known the evidence offered

before.

Taddy, Serjt., replied that he had not. And the evidence was not received: but a note was taken by his lordship of its having been tendered. (b)

The case proceeded, and there was a-Verdict for the defendants.

Taddy, Serjt., and Hill for the plaintiffs.

J. Williams, Bompas, Serjt., and W. Wilde for the defendants.

[Attorneys-W. G. Bolton and Rodgers.]

## \*NICHOLS v. HART and Another. Dec. 5.

A. sold to B. a butt of wine, which was not delivered. B. compounded with his creditors. and the amount of the wine was, by A.'s consent, included in the composition. The composition money was secured by bills, and A. had a claim against B. beyond the price of the wine. Before the whole of the composition was paid, B. demanded the wine of A., who refused to deliver it:—Held, that he was bound to deliver it, as he had undertaken to do so; and that the doctrine with respect to stoppage in transitu did not apply under the circumstances.

TROVER for a butt of sherry wine. It appeared that the plaintiff purchased a butt of cherry from the defendants, but it was allowed to remain in the docks undelivered. Afterwards he was compelled to make an arrangement with his creditors, and agreed to pay them by instalments, 12s. 6d. in the pound on the amount of his debts; 10s. of it to be secured by bills, and the remaining 2 6d. by his own note, at the end of a year. In a conversation which he had with one of the defendants, previous to this arrangement being carried into effect, he requested that the defendants would take the Sherry back; but this was declined. the defendant saying that he never took back any thing he had sold, and would rather take a composition than make any alteration in his books; and he added. that the plaintiff might have the wine at any time, on paying the duty. The price of the butt of sherry was, therefore, included in the composition, and the bills were given. An agreement was signed by the creditors, the defendants among the number, to take the bills, and give a release to the plaintiff. The

<sup>(</sup>a) See the case of Taylor v. Forster, ante, Vol. 2, p. 195, and the cases referred to. (b) No motion was made.

sum against the defendants' names was 339l. Before the bill for the last instalment became due, the plaintiff met the defendant who had made the agreement, and demanded the butt of sherry; but he refused to let him have it, and said, that it had been sold. The defendants were also applied to to sign the release agreed upon, but refused, on account of the dispute about the sherry. They admitted that it had been included in the composition, but said it must have been by mistake, as it would be absurd for them to give the plaintiff a butt of sherry for 12s. 6d. in the pound, when they had never parted with the possession of it.

Hoggins, for the defendants. There was not any consideration for the promise to let the butt of sherry go at \*12s. 6d. in the pound, the defendants having the right of stoppage in transitu at the time. The case of Hodgson v. Loy, 7 T. R. 440, is in point. Lord Kenyon there said, that part payment did not take the case out of the general rule with regard to stoppage in transitu; and that he should be sorry to let in such an exception, because it would destroy the rule itself; since every payment, however made, even the payment of a farthing by way of earnest, would, if such an exception were introduced, prevent the operation of the general rule of stoppage in transitu. This is a case of a promise, raised on part payment, to deliver a butt of sherry. Peise v. Wray, 3 East, 93, is also an authority to the same effect as Hodgson v. Loy.

TINDAL, C. J. It appears to me, that there is a very good consideration. If there had been no debt exceeding the amount of the sherry, then the observation might be of some importance. But they get security for the whole debt, which is much better for them. The cases cited are only cases in which the

right of stoppage in transitu was insisted upon; here it is given up.

Hoggins. The plaintiff has not shown that the other creditors came in on the faith of the defendant's signing as to this butt of sherry.

TINDAL, C. J. That cannot make any difference as to this plaintiff.

Verdict for the plaintiff.

Taddy, Serjt., and Dundas, for the plaintiff. Hoggins, for the defendant.

[Attorneys-Norton & C., and Michael.]

A MOTION was afterwards made to set aside the verdict, but the Court refused a rule.

#### \*181] \*ROLFE and Others v. WYATT. Dec. 9.

Semble, that an indorsee for value, who receives part payment from the drawer of an accommodation bill, and takes a new bill to give time for the payment of the remainder, does not thereby discharge the acceptor, unless he was aware that the acceptance had been given for the drawer's accommodation.

Whether, if he knew that fact, it would make any difference—Quære.

Assumpsit on a bill of exchange by the indorsee against the acceptor. It appeared that the acceptance was given as an accommodation to the drawer, but it did not appear that this fact was known to the plaintiffs. When the bill became due, the drawer applied to the plaintiffs, the holders, and paid them 10% on account, and got them to take another bill for the remainder. There was some contradictory evidence, as to whether the plaintiffs agreed to discharge the acceptor of the first bill from his liability.

Jones, Serjt., for the defendant, contended, that they had so agreed; but also

contended, that, whether they had or not, they could not maintain the action, as their taking the second bill amounted, under the circumstances, to a discharge

in point of law.

Wilde, Serjt., for the plaintiffs, answered—That, by the custom of merchants, the acceptor was always liable, and was not discharged by giving time to the drawer, (Dingwall v. Dunster, Doug. 247. But see Laxton v. Peat, n. infra.) He also contended, that, on the evidence, any express agreement to discharge the defendant was negatived.

TINDAL. C. J., in summing up, said—The question for your consideration is. Whether, when the second bill was taken, there was an express agreement that the bill with the defendant's name to it should be given up; for, if so, then the plaintiffs cannot recover. This is the question that I shall leave to you; and, if the learned counsel for the defendant thinks that I ought to leave any other question to you, he shall have liberty to move the Court upon the subject.

Verdict for the plaintiffs.

\* Wilde, Serjt., and Dawson, for the plaintiffs. Jones, Scrjt., for the defendant.

F\*182

### [Attorneys-G. Vincent and Hodgson & Co.]

In the case of Laxton v. Peat, 2 Camp. N. P. C. 185, and Bayley on Bills, p. 271, which was an action by indorsee against acceptor, it appeared that the bill had been accepted for the accommodation of the drawer, which circumstance was known to the plaintif, who gave value for the bill. When the bill became due, the plaintif received part-payment from the drawer, and gave him time to pay the remainder, without the concurrence of the defendant. Lord Ellenborough said, that, as it was an accommodation bill, within the knowledge of all parties, the acceptor could only be considered as a surety for the drawer; and, in the case of simple contracts, the surety is discharged by time being given, without his concurrence, to the principal. The plaintiff was nonsuited. See, also, the case of Rees v. Berrington, 2 Ves. Jun. 540, and the cases collected in the notes to Laxton v. Peat, cited supra.

#### DE MEDEIROS v. HILL. Dec. 21.

When a ship owner, knowing that a port is blockaded, enters into a contract with a merchant for the delivery of a cargo there, if he afterwards refuses to go, he is liable to an action for the breach of the contract; but, whether the damages are to be nominal or otherwise, must depend upon the opinion of the Jury as to whether, if the vessel had gone to the place, she would have been able to get in.

THE defendant was the owner of a ship called the Catherine, and this action was brought to recover damages for the breach of an agreement entered into by the captain on behalf of the owner, that the ship Catherine should, with all convenient speed, after delivering her cargo at Plymouth, proceed to Liverpool, and take in a cargo of salt for Terceira, and, after delivering it at Terceira, should

go to St. Michael's, and bring back a cargo of fruit to Europe.

The charter-party was prepared by a broker at Liverpool, and signed by the captain of the vessel on the 27th September, 1830; it was sent up to London on the 28th, and signed by the plaintiff on the 29th. On the 28th, the captain told the broker that he objected to going to Terceira., as it was in a state of blockade; and it appeared that, at this time, vessels were not allowed at Liverpool to clear out for Terceira; and that those who were going there \*were [\*183 obliged to use false papers. The vessel sailed from Liverpool for Plymouth on the 2nd of October, and returned again on the 23d of November; but it appeared that, instead of going only to Plymouth, she went on to Exeter.

The breach in the declaration was, that the vessel did not, with all convenient

speed, return to Liverpool after delivering her cargo at Plymonth.

R appeared in the evidence for the plaintiff, that it was known in London gen-

erally, that Terceira had been declared in a state of blockade. It was also proved, that salt sold at Terceira at 12. a-ton, by wholesale; but, if sold by retail, would have produced, after deducting duty and commission, about 2l. a-ton. The salt

was to be taken freight free.

TINDAL, C. J., to the plaintiff's counsel. I want to know whether a ship owner is bound to risk his ship to deliver a single cargo of salt at a place blockaded. It seems to me a case for 1s. damages. It is not an answer to the action, but it is not a case for more than nominal damages.

Jones, Serjt., for the plaintiff. The defendant should shew that this sort of

blockade prevented a trading vessel from going to the place.

A witness, who carried on business at Terceira, proved that many ships entered, and many were taken in the latter end of 1829, and the beginning of 1830. This witness said, that, when he left Terceira, in March, 1830, it was blocksded; but when he returned in December, 1830, it was not. He also said

that salt was not a prohibited article there.

Taddy, Serjt., for the defendant. As the salt was to \*go out freight free, the defendant would not have got any thing if he could not have discharged his cargo of salt. He would have been taken if he had gone, as there was a blockade; and, if there had not been a blockade, he would have been in time to bring back fruit, provided he had sailed in November, when he was at liberty to go. At all events, no more than nominal damages can be recovered; but I submit that the action is not maintainable. I shall shew that a letter was received at Lloyd's, on the 18th of March, 1829, from the Foreign Office, stating that intelligence had been received of an effective blockade of the port of Terceira by the existing government. We have nothing to do with the disputes of Don Miguel and Don Pedro; if our government considers the government blockading as an existing government, and the blockade is effective. that is enough, and every contract to elude it is illegal. The ship must either have been taken or returned. It would have been no advantage to the plaintiff to have brought his salt back.

The letter was then put in and read.

Jones, Serjt., in reply. The notification of the blockade was in March, 1829, and the contract was in September, 1830. There is no evidence that there was any blockade; and, in point of law, the contract is not illegal.

TINDAL, C. J. I do not say it is illegal. I shall tell the Jury that it is

legal; but it is a question of damages.

Jones, Serjt. Then, as to the damages; salt was not a prohibited article, and therefore the vessel would not have been in danger of being taken. As the delay in returning from Plymouth was the cause of the injury, the plaintiff is entitled to damages to the amount of the profit on the salt, and also on the fruit, which was to be brought back. It is evident that the objection, on the

ground of the blockade, was merely an after-thought.

\*TINDAL, C. J. (in summing up) said—It seems that the captain did not merely go to Plymouth, but went on to Exeter, and stopped on his return at Fowey. There is, therefore, undoubtedly a breach of the charterparty in that respect. But, when he returned to Liverpool, on the 23d of November, he objected to the voyage, on the ground that Terceira was blockaded. The defendant's counsel contends, that the blockade made the contract illegal, just as if there had been war between our country and the blockading government. But it does not appear to me, that the mere circumstance of there being a blockade prevented the parties from speculating if they pleased, knowing the fact at the time; yet it may materially affect the question of damages. If the captain had gone, and waited at Terceira for a time, and found the blockade still continuing, the voyage would have been unproductive; yet, if the parties, knowing the fact, chose to enter into a contract like this, the party breaking it is liable to an action. The question is, whether the ship, when she arrived off Terceira, would have been prevented from entering, by an effective blockade; if she had gone there; for, if that were the case, then the verdict should be for nominal damages only. The only evidence as to the nature of the blockade is from a witness who left in March, 1830, at which time there was a blockade, and returned on the 12th December, 1830, at which time there was no blockade. If you think, that, though there was a blockade at an earlier period, it did not continue till the time in question, you will regulate the damages accordingly. If you think that the ship would not have found an effective blockade when she arrived, or that, by waiting a reasonable time, she could have got in, then you will not confine yourselves to giving nominal damages. And, with respect to the amount, I think it was rather incumbent on the plaintiff to shew, if he seeks to recover the larger sum for the sale of the salt in the retail way, that he had some person at Terceira, to \*whom it was to be delivered, and who would have sold it for him; as the duty of the captain would only be to leave it at the place.

Jones, Serjt., and Shee, for the plaintiff.

Taddy, Serjt., and Tomlinson, for the defendant.

[Attorneys-Lane, P. & L., and Harris.]

In the ensuing term, an application for a new trial was made; but the Court were of opinion that the case had been properly decided at Nisi Prius, and refused a rule.

## BREMRIDGE and ROBERTS v. CAMPBELL, Knt. Dec. 21.

Two of the electors of a borough went to a bankrupt there, and said, they wished to draw checks upon the bank. The banker promised to honour any checks they might draw. The checks drawn were signed by one only, but the account in the banker's books was opened in the joint names:—Held, that they might maintain a joint action against the candidate, in whose interest they were, if he adopted the payments made.

Semble, that, where the same sum is given to every voter coming from the same plan to an election, for his travelling expenses, it is bribery; and it is not the less so, though all the candidates agree in the payment of the same amount. But it is for the Jury to say, in an action by an agent of the candidate, to recover the amount from his principal, whether the money was bona fide paid for expenses, and expenses only.

Assumpsit for money paid, &c.

The plaintiffs were two of the electors of Barnstaple, and the defendant a candidate to represent that borough in Parliament. It appeared that, a short time before the election, the plaintiffs went to a banker's in Barnstaple, and said they wished to draw checks upon the bank; and the bankers promised to honour their checks. There was no evidence of any joint payment of money into the bank; and all the checks on the bank were signed by one of the plaintiffs only. There was much contradictory evidence \*as to whether the payments sought to be recovered were or were not adopted by the defendant, as having been made by the plaintiffs for the advancement of his interest in the borough. It appeared clearly that it was not distinctly known at the time when several of the payments were made, whether the defendant would stand for the borough or not, though a requisition had been sent to him. A considerable portion of the money was spent in payments of 201., 151., 101., and 61., to various voters, who came from London, Bristol, and other places, as for their expenses. There were three candidates; and it was agreed among them, that a voter from London, giving a plumper, should receive 201. from the candidate for whom he voted; and that one who voted for two should receive 10%. from each. The expenses of voters from other places were also agreed upon, at

a certain sum. It appeared also, that the defendant's solicitor and agent had deposited 1000l. at another bank in the place, for the purposes of the election.

Tuddy, Serjt., at the close of the plaintiffs' case, applied for a nonsuit, on the ground that there was no evidence of a joint right of action in these plaintiffs. There was no proof of joint liability, or joint payments by them to the bankers; and all the checks drawn appeared to be in the name of one only.

Spankie, Serjt. According to the evidence, there was a joint fund of credit;

and that would have the same effect as a joint fund of money.

TINDAL, C. J. If there was bona fide a joint fund of credit, it is the same as if there was a joint fund of money. I do not think that I can withdraw the case from the Jury; it must go to them, with my observations.

\*188] In the course of the cause, it was objected, that the \*sums paid for travelling expenses could not be recovered, being evidently given as bribes; being of the same amount to each person coming from the same place.

TINDAL, C. J. I shall leave it to the Jury to say, whether they believe that the money was given bona fide for expenses or not. Each voter from the same place receives the same sum. Now, their expenses could not be the same sum exactly; one might come by steam, and another by coach.

Spankie, Serjt., stated, that the Committee of the House of Commons, on a former election for Barnstaple, had allowed 10% for the expenses of out-voters

from London.

Merewether, Serjt., stated, that the Evesham election had been declared void, on this very ground, that the expenses were all the same sum.

Taddy, Serjt., addressed the Jury for the defendant.

Spankie, Serjt., in reply, (as to the expenses). It is not bribery; because bribery is to give one candidate an advantage over another; and, where all par-

ties agree in the same course of proceeding, it is not bribery.

TINDAL, C. J., in summing up, said—There are three questions for your consideration—first, Whether the defendant ever authorized the outlay on his account—and, secondly, Whether the money was advanced out of any fund in which the plaintiffs were jointly interested. These two questions go to the maintenance of the action; and, if you find them both in the affirmative, then will come the third question, viz.—How much the plaintiffs are entitled to recover; and that will depend upon the nature of the payments. If any of them were made to bribe the voters to vote for Sir Colin Campbell; or, if any part \*189] comes within \*the provisions of the treating act, those sums cannot be recovered. I dissent from the opinion given by the counsel for the plaintiffs, that it is not bribery if all the parties agree in giving a certain sum for expenses. The question on the first point is, whether Sir Colin Campbell, or his agent, with a knowledge of the payments of the plaintiffs, adopted their If it was merely, that the plaintiffs were holding in embryo a certain number of votes, ready for any third candidate, not caring who it might be, that will not fix Sir Colin Campbell. On the second point, as to the joint claim, it seems that both the plaintiffs came to the bankers, and desired to open an account there; though it is a little singular that we do not find any check with both names to it. On the third point, to what extent the payments made are recoverable, it will be for you to say, as to the sums paid to the several voters, whether they were paid really and bons fide for travelling expenses, and travelling expenses only, or were paid to induce them to give their votes. The question is, whether any part was paid as a bonus, over and above the actual expenses of the party. If the payments were made for travelling expenses only, it seems somewhat singular that all the voters should be paid alike. It seems that 64. was given to a man who lived only a few miles from Barnstaple, who certainly, in the first instance, would not require travelling expenses at all. it is said, that this is no matter, because the other parties agreed, and therefore it is not bribery. But it seems to me, that that only shows that all parties agreed in setting the statute at defiance. You will say, whether the money was

honestly paid, merely for travelling expenses; and if you think it was not, then you will strike off such sums as you think exceeded a reasonable sum for the expenses.

Verdict for the defendant.

Spankie, Serjt., and Manning, for the plaintiffs.

Taddy and Merewether, Serjts., and Platt, for the defendant.

[Attorneys-Davison and Pyne.]

#### \*ILLIDGE v. GOODWIN. Dec. 22.

F\*190

If a horse and cart are left standing in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer by, in striking the horse.

THE declaration stated, that the plaintiff was possessed of certain goods and porcelain, in a certain shop window; and that the defendant was possessed of a cart and horse, which, through the negligence of his servant, was backed against the window, and broke the china; whereby the plaintiff was put to

expense, &c.

It appeared, from the evidence of the plaintiff's shopman, that the plaintiff was a china-man in St. Paul's Church Yard, and that, between eight and nine in the morning of a day in June, a scavenger's cart, with the name of Joseph Goodwin upon it, backed against the window of the plaintiff's shop, and broke a quantity of china; and that the carman was not there at the time, but came up very soon after.

It was then proposed to give in evidence certain statements made by Joseph

Goodwin, sen.

Spankie, Serjt., objected to the evidence, and stated that he was in a situation to shew, that Goodwin, sen. was not the person against whom the action

was brought, but his son, Joseph Goodwin the younger.

TINDAL, C. J. Somebody has appeared under the name of Goodwin. It is only evidence against that person. They must take out execution against that person; and, if they take it out against a wrong person, he may bring an action of trespass. If you shew that the person making the admission is not the owner of the cart, that will be important.

Spankie, Serjt., replied, that he was the owner of the cart, but was not the

defendant.

\*TINDAL, C. J., admitted the evidence; and the witness proved that Goodwin, sen. had said that the horse was given to backing, and it was

very wrong of the man to leave it in the street.

Spankie, Serjt. This action has been brought against Joseph Goodwin, the son. He was the person served with process, and he notified to the attorney on the other side, that his father was the owner of the cart. I apprehend that, when, with full knowledge, they have brought the action against the son, they cannot recover.

TINDAL, C. J., again intimated his opinion, that all this was matter for an

application to set aside the execution.

Spankie, Serjt. Suppose a man is indicted for felony by the name of Joseph Goodwin, is he to be convicted because his name is Joseph Goodwin, though it appears that he was not the person who committed the offence; and it is the same thing in an action as on an indictment. The question is, whether young Goodwin was the person who committed this delictum. If he was not, a verdict cannot be given against him. But, supposing the right person to have been sued, yet the plaintiff is not entitled to recover. I shall shew that the horse was a very quiet one, and that a person passing by whipped him and

made him move. This person is responsible, and not the owner of the horse. It is similar to the case of a thing thrown. (See Scott v. Shepherd, 3 Wilson, 403.) This will make it a question, whether it was such an accident as they are entitled to recover for, on the ground of negligence. Leaving a spirited horse is negligence; but leaving a steady one, which would not move if left to himself and not struck, is not negligence.

The attorney who conducted the defence was then called, and proved that he \*192] was retained by Goodwin the \*younger, and that he told the clerk of the plaintiff's attorney, at the time of pleading, that the action was

brought against the wrong person.

To make out the defence opened by Spankie, Serjt., two witnesses were called, who swore to the striking of the horse by a person passing by; and one added, that the horse backed against the window in consequence of the bad management of the plaintiff's shopman, who came out and laid hold of his head. During the cross-examination of the second of these witnesses, the Jury interposed, and said they did not believe the evidence of either of them.

TINDAL, C. J. After all, supposing them to be speaking the truth, it does not amount to a defence. If a man chooses to leave a cart standing in the

street, he must take the risk of any mischief that may be done.

A witness was then called, who proved that he served the writ, which was directed to "Joseph Goodwin," on Joseph Goodwin, the son; that he went, for the purpose of serving it, to the residence of Goodwin, the father, and saw young Goodwin in the yard, and asked him if Mr. Joseph Goodwin was in. He said—'My name is Goodwin;" upon which the witness served him, and told him it was in consequence of his cart having backed against Mr. Illidge's window; adding, that a letter had been sent, offering to wait a week, but no answer had been returned, and therefore they had proceeded. He said—"Yes, I know we have had a letter; it is a hard case; we have been at the expense of putting in a window; it was no fault of our men; some of Mr. Illidge's men must have laid hold of the horse." The witness further proved, that, when the declaration was served, young Goodwin said-"I'll give it him in the morning-he is not in now."

TINDAL, C. J.—No one can doubt that the father knew very well all that

had been done.

\*Spankie, Serjt., proposed to call the father to prove that the cart was \*193] his, and not his son's.

TINDAL, C. J.—I think, upon the evidence before me, I must take him to be the defendant. There is evidence enough. He offered to pay money. On the facts there is evidence of practice between the father and the son.

R. V. Richards, for the plaintiff.—It would be good service even on motion. Rhodes v. Innes, 5 M. & P. 153; and see Godfrey v. Jay, ante, vol. 3, p. 192.

The Jury then, under his Lordship's direction found a

Verdict for the plaintiff—181. 14s.

Bompas, Serjt., and R. V. Richards, for the plaintiff. Spankie, Serjt., for the defendant.

[Attorneys-Gale and Butler.]

#### IMASON v. COPE. Dec. 23.

One of the marshals of the city of London, whose duty it was, on the day of a public meeting in the Guildhall, to see that a passage was kept for the transit to their carriages of the members of the corporation and others, directed a person in the front of a crowd at the entrance to stand back, and, on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him:—Held, that in so doing the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity for removing the party in a more peaceable way.

Assault and battery. Plea—Not guilty.(b.)

The plaintiff was a tradesman, and also a freeman and liveryman of London, and, on the 9th of July, went \*to the Guildhall for the purpose of seeing [\*194 the freedom of the city presented to Lord John Russell. After the ceremony was over, the plaintiff was coming out, and, in consequence of a cry of "make way," accompanied by clapping of hands, as if some persons of consequence was coming, when he had got just outside the entrance, he stood up in front of a crowd which had there assembled, when the defendant, who was one of the City Marshals, and whose duty it was to see that a passage was kept clear for the nobility and members of the corporation to pass to their carriages, came up to him and told him to stand back. The plaintiff replied, that he could not, on account of the persons behind. Upon which the defendant immediately struck him a blow on the face, saying that he would make him stand back. This was the assault complained of.

Wilde, Serjt., for the defendant, submitted, that is was essential for an officer whose duty it was to contend with a crowd, to act with great vigour and promptness; particularly as bad characters take advantage of a mob to create confusion for the purposes of plunder. And if he did, under the difficulties arising at the moment, use a little more violence than persons looking on merely might think was necessary, he ought to be protected if he was acting in a way which he thought necessary to discharge his duty and accomplish the object he

had in view.

TINDAL, C. J. (in summing up) said—"This is an action for assault and The plaintiff contends that he has received bodily injury from a blow given by the defendant, which the defendant is not in a condition to justify. He therefore seeks at your hands a fair compensation in damages. The circumstances out of which the assault arose took place on the occasion of Lord John Russell's coming to the city, when a considerable crowd had collected, and when there was a considerable pressure on getting out of the Guildhall. If the defendant was, at the \*time, acting in the performance of his duty, undoubtedly any act he did in the fair execution of that duty might have been justified by him on the present occasion. The question you have to consider is, whether the course he took with respect to this plaintiff was not an excess of the duty he had to perform, and of the authority he then bore with him? Because, if it was, you are then bound to give the plaintiff a fair compensation in damages for any injury occasioned in that manner. Undoubtedly, the defendant would be justified in using a moderate degree of pressure to remove a person opposing those for whom he was bound in the discharge of his duty to make a passage. Or, if any resistance occurred, then a more violent degree of pressure might be used. But it does not appear that any resistance was offered to the authority of the defendant beyond that which the necessity of the case, that is the pressure of the crowd behind the plaintiff, rendered on his part absolutely necessary. Therefore, you have to say whether a blow, which appears to have been struck instantly, without any attempt to remove the plaintiff by other means, was or was not an excess of the authority which the defendant exercised at the moment. His Lordship stated the evidence, and then said—As it stands at present, it appears to me, it is a blow struck where no blow ought to have been struck; that a more moderate degree of pressure ought to have been exercised, and some little time given to remove the party in a more peaceable way. It appears to me not in this particular instance to have been an act done in keeping the peace, but, by too violent an exertion on the part of the defendant at the moment,

<sup>(</sup>a) By statute 21 Jac. 1, c. 12, s. 5, constables, &c., may plead the general issue and give special matter in evidence.

rather the breaking of the peace than the keeping of it. At the same time, taking the whole of the circumstances into consideration, there appears to have been a great pressure, and a great degree of what we might almost call irritation \*196] going on at the time. Therefore, you will give that fair and \*moderate compensation in damages which you think the case requires.

Verdict for the plaintiff—Damages 51.

Andrews, Serjt., and Payne, for the plaintiff. Wilde and Stephen, Serjts., for the defendant.

[Attorneys-Greenfield and W. L. Newman.]

# First Sitting at London, in Hilary Term, 1832.

BEFORE MR. JUSTICE PARK.

(Who sat for the Lord Chief Justice.)

## SMITH v. SAINSBURY. Jan. 19.

A witness formed his opinion of the hand-writing of a party from having observed it signed to an affidavit used in the cause (on a motion to postpone) by the counsel for the party against whom it was proposed to be proved:—Held, sufficient.

Assumpsir. It became necessary, on the part of the defendant, to prove the hand-writing of Mary Smith, whose name was written as the attesting witness

to an agreement, purporting to be signed by the plaintiff.

For this purpose, the defendant's attorney was called. He stated, that he believed he was acquainted with Mary Smith's hand-writing; that he never saw her write, but that he had observed the name of Mary Smith signed to an affidavit which had been used by the plaintiff's counsel, in answer to an application to postpone the cause, and which was filed. In the affidavit it was sworn, that Mary Smith was the plaintiff's wife.

Jones, Serjt., objected, that this was not evidence.

Mr. Justice PARK .-- I think as you, the plaintiff's counsel, \*used the affidavit, the Jury are bound to believe at least that your client did not think it was a fraud. If it was a mere comparison of hand-writing, it would not do. But it is not so, the witness says he took notice of the signature, and, in his mind, formed an opinion which enables him to swear to his belief. I have no doubt that it is evidence.

Jones, Serjt., and Kelly, for the plaintiff. Wilde, Serjt., for the defendant.

[Attorneys-Lofty and Boydell.]

## Third Sitting in London, in Hilary Term, 1832.

BEFORE MR. JUSTICE GASELEE.

(Who sat for the Lord Chief Justice.)

### PERRYMAM v. STEGGALL and Another. Jan. 26.

Questions may be put on the voire dire to a witness by the party who calls him, in order to shew his competency, though no question has been asked by the opposite counsel to shew a disqualification; the objection being founded on the opening speech.

Assumpsir on two promissory notes given by the defendants, as sureties for one Tucker. The fact of the notes having been signed for Tucker's accommodation was opened by *Andrews*, Serjt., who, in stating the defendants' case, said, that he should call him as a witness.

Bompas, Serj., for the plaintiff, on Tucker being put into the box, objected

to him as incompetent without a release.

Hoggins, (who was with Andrews, Serjt.), proposed to \*ask him, on the voire dire, whether he had been discharged under the Insolvent Debtors' Act.

Bompas, Serjt., objected, that no question could be asked by the defendants on the voire dire, as none had been asked on the part of the plaintiff; and that, at all events, under such circumstances, the witness could not be allowed to give evidence of a discharge which could only properly be proved by the written discharge itself. It was only where a witness was shown to be disqualified by examination on the voire dire, that he could set himself up again without the production of documents.

GASELEE, J., was of opinion that the question might be asked.

The question was then put, and the witness replied that he had been discharged after the date of the notes, and that they were inserted in his schedule.

Bompas, Serjt., then objected that this was not sufficient, as his future effects were liable, though his person was discharged.

GASELEE, J., was of opinion, that, if a release of the costs of the action was

given, the witness might be examined.

This release was given, the cause proceeded, and there was eventually a— Verdict for the defendants.

Bompas, Serjt., and Justice, for the plaintiff.

Andrews, Serjt., and Hoggins, for the defendants.

[Attorneys-Sylvester & W., and Darke.]

## \*COURT OF KING'S BENCH.

**[\*199** 

Sitting in London in Hilary Term, 1832.

BEFORE MR. JUSTICE JAMES PARKE.

SEDGWICK v. JAGER. Jan. 30.

Where a bill is by the acceptor made payable at a particular place, which is not his residence, proof of presentment at that place is not sufficient evidence of dishonour in an action against the drawer, without proof of the acceptor's handwriting.

Assumpsir on a bill of exchange, drawn by the defendant on one Isaac Malden, and made by him, in the written acceptance, payable at the house of a person named Taylor.

It was proved that the bill was presented at Taylor's house, which was not the acceptor's residence, and notice of dishonour was given to the defendant,

the drawer; but there was no proof of the handwriting of the acceptor.

Mr. Justice J. PARKE was of opinion, that, without such proof, there was not evidence of dishonour; as, to make out dishonour, there must be presentment at the acceptor's residence, or at such other place as he by his acceptance appointed instead; and it did not appear, without proof of his handwriting, that he did appoint any other place.

Nonsuit.

Steer, for the plaintiff.

[Attorneys-Allen and Jager.]

\*2007

\*REED v. MOORE. Jan. 30.

To make a husband liable for his wife's board and lodging at the house of a third person, when the wife leaves in consequence of a dispute, it must be shewn, either that his conduct rendered it improper for her to live with him, or that he knew where she was residing, and did not make any offer to take her back, except upon conditions which he had no right to make.

Assumpsit for board and lodging, furnished to the defendant's wife, and her

servant, and a lap-dog.

The claim for the lap-dog was disallowed, as not being for necessaries. With respect to the other part of the case, it appeared that the defendant and his wife had quarrelled, and she took out a warrant against him for an assault; but the charge was abandoned, on a negotiation being entered into. After this, they quarrelled again; and, upon the wife's attempting to leave the room, for the purpose of calling for the landlord to interfere, the defendant laid hold of her, to prevent her; and, according to his own admission, he was very much annoyed, and used more violence towards her than he should otherwise have done. In consequence of this, she left his house, and went to reside at the house of the plaintiff. It appeared, that the defendant was aware that his wife was living at the plaintiff's house, but made no offer to take her back, and was not willing to receive her, unless she would consent to give up a certain portion of the property which was settled upon her.

Mr. Justice J. Parke, (in summing up), said—If it had depended on the question of violence, one should have wished for some more evidence, as a wife is bound to live with her husband, unless he makes it improper for her to do so. The defendant might be only keeping his wife from doing something which she had no right to do. But it seems he made no offer to take her back, except upon a condition, that she should give up some of her property. Now, this he had no right to do. A husband is bound to maintain his wife, whether she has money or not. I think, therefore, on these facts, that you may find your verdict for the plaintiff.

Cary, for the plaintiff.

[Attorney—Begbie.]

## CASES

# NIST PRIUS.

## COURT OF KING'S BENCH.

Sittings at Westminster after Hilary Term, 1832.

BEFORE LORD TENTERDEN, C. J.

\*REX v. ELIZA SMYTH and Three Others. Feb. 1. r\*201

An indictment for a forcible entry cannot be supported by evidence of a mere trespass. but there must be proof of such force, or at least such shew of force, as is calculated to

prevent any resistance.

If a wife, separated from her husband, take a house of which the husband, with the land-lord's consent, obtains possession:—Semble, that if the wife come with others and make a forcible entry into this house, she may be convicted on an indictment for a forcible entry, stating it to be the house of the husband.

If a married woman take a house, in which a burglary is committed, the house must be

laid as the house of the husband, although she be living separate from him.

Where a constable entered a house with a warrant in his hand, and searched it, and for such entering and searching was indicted for a forcible entry:—Held, that his counsel might ask the witnesses for the prosecution what the constable said at the time as to whom he was searching for.

Where an indictment is tried at Nisi Prius, the nisi prius record does not shew what

names were on the back of the indictment.

Where an indictment is founded on a written instrument, and where the instrument itself is the crime, it is receivable in evidence, although not stamped; but where the indictment is for an offence distinct from the instrument, and the instrument be only introduced collaterally, it cannot be received unless it be properly stamped.

INDICTMENT for a forcible entry into the house of William Henry Carmichael

Smyth. Plea-General issue.

It appeared that the defendant Mrs. Smyth was the wife of the prosecutor Mr. Carmichael Smyth, and that she, under the description of Mrs. Anne Smyth Carmichael, had, on the 12th of November, 1829, taken the house in question for her own residence; and that Mr. Smyth and \*his servant, on the 17th November, had gone to the house with the consent of the landlord, and obtained possession of it, a man named Teresias being by them put into posses-It was also proved, that, on the 18th of November, Mrs. Smyth came to the house with two or three men, and knocked at the door; and that, on being refused admittance, Mrs. Smyth and one of the men got over the railings in front of the house; and the man, having broken a pane of glass, pushed down the upper sash of the window and got into the house, and he having opened a

door, Mrs. Smyth went in and told Teresias that he had better go out peaceably, or they would put him out. Teresias then went out, leaving Mrs. Smyth and her party in possession.

C. Phillips, for the defendants Goddard and Schofield, who were constables, applied to have Mr. Smyth called as a witness, as his name was on the back of

the indictment.

Lord TENTERDEN, C. J. The original indictment is not here, and the nisi prius record does not shew what names were on the back of the bill.

Mr. Smyth was not called.(a)

Cockburn, for the defendant Mrs. Smyth. I submit that my client must be sequitted. She is indicted as the wife of the person whose house she is charged with having entered. It is clear, that no man could be indicted for a forcible entry into his own house, neither, as I submit, can a wife be indicted for a forcible entry into the house of her husband. Mr. Serjeant Hawkins says(b)-"It seems \*clear that no one can come within the intention thereof (i. e. of the statutes relating to forcible entry,) by any force whatsoever done by him in entering into a tenement whereof he himself had the sole and lawful possession both at and before the time of such entry, as by breaking open the door of his own dwelling-house, or of a castle which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, or by forcibly entering into the land in the possession of his own lessee at will." That being so, I submit that the possession of the wife and the husband is identical. as the common law takes no notice of any separate possession of the husband and wife. Indeed, the possession of one is not only the possession of the other, but it is the duty of the wife to be in the house of her husband, and as she cannot be a trespasser in entering the house of her husband, she cannnot be guilty of this offence, as it includes a trespass. Great inconvenience would be sustained if such indictments as the present could be preferred, as the wife could have no remedy against her husband for malicious prosecution.

Lord TENTERDEN, C. J. If a married woman takes a house, and a burglary be committed in it, it must be laid as the house of the husband, although she be living separate from him; therefore, this house is properly laid as the house of Mr. Smyth. It was a mere trespass, I quite agree with you, that the wife could not be a trespasser; but if she comes with a number of persons, and with the strong hand, I have great doubts, because it tends to a breach of the peace. However, you can have the advantage of this point hereafter, if it should become

necessary.

A witness for the defendant stated, that the defendant Goddard searched the house, having a warrant in his hand, Schofield being with him.

\*C. Phillips wished to ask the witness, whether, at the time of the

searching, Goddard said for whom he searched?

Archbold, for the prosecution. What Goddard said is not evidence in his own favour.

Lord TENTERDEN, C. J. We may hear what he said at the time, as to who he was searching for. (See the case of Rex v. Crutchley, ante, p. 133.)

The witness said, that he stated that he was searching for Mr. Smyth.

The agreement under which Mrs. Smyth had entered the house was offered

in evidence. It was not stamped.

Lord TENTERDEN, C. J. Where the indictment is founded on the instrument, the want of a stamp does not signify. That is, where the instrument itself is the crime; but here the indictment is for a forcible entry, and this instrument is introduced collaterally. I therefore cannot receive it without a

(b) 1 Curw. Hawk. B. 1, c. 28, s. 32, citing Moore, 786; Cro. Jac. 18; 2 Keb. 495.

<sup>(</sup>a) On the trial of an indictment for a forcible entry under the statute 8 Hen. 6, c. 9, and 21 Jac. 1, c. 15, the party dispossessed is not a competent witness for the prosecution. Rex v. Williams, 4 M. & R. 471, and 9 B. & C. 549.

The agreement was not read.

Lord TENTERDEN, C. J., (in summing up.) An indictment for a forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force, or at least such a shew of force, as is calculated to prevent any resistance. In point of Law, although Mrs. Smyth had taken the house separately from her husband, it must be taken to be his house; but still she would have a right to enter the house of her husband. However, if you should think that she came with violence and the strong hand, or at least such shew of force as to prevent any resistance, I think, as at present advised, that she would be guilty of this offence, notwithstanding her being the wife of the \*party whose house this is alleged to be. Whether the two officers went for the purpose of increasing the shew of force, is for you to consider; but if you think that they went either to prevent a breach of the peace, or to take Mr. Smyth on a warrant, they must be acquitted. If you acquit them, there only remain Mrs. Smyth and one man. There is no doubt, that a great number of persons being present does increase the shew of force; but, if you think that Mrs. Smith and the third man were all that were concerned in getting possession of this house, you will say whether their presence, and the breaking of a window, is such a shew of force as will satisfy the present charge. (See the case of Milner v. Maclean, ante, Vol. 2, p. 17.)

The jury found all the defendants—Not Guilty.

Archbold, for the prosecution.

Platt and C. Phillips, for the defendants Goddard and Schofield.

Cockburn, for the defendant Mrs. Smyth.

## \*REX v. BIRNIE, Knt., HALLS, Esq., and Others.

L+206

Magistrates have no authority to detain a person known to them till some other person makes a charge against him. Before they detain a known person, they should have a charge actually made.

INDICTMENT for the false imprisonment of, and for assaulting William Henry

Carmichael Smyth.

Mr. Smyth, being called as a witness, said—"On the 15th of December, 1830, I was at the Bow Street Police Office; I went to complain against Goddard the officer; I went in consequence of a rule of the Court of King's Bench; Sir Richard Birnie and Mr. Halls were sitting; Sir Richard Birnie refused to hear the case, and referred me to Mr. Halls. I refused to submit to Mr. Halls, as the rule was addressed to Sir Richard Birnie. Mr. Halls dismissed the complaint; I bowed, and was about to retire, when Sir Richard Birnie exclaimed, Stop him, shut the door, don't let that man escape. Where is the person that has got the information to lay against Mr. Smyth, for tampering with the due course of justice?' I insisted on being let go. A person, named Wotton, was keeping the door. I was repeatedly repulsed by him. He said, 'Why do you attempt to escape, when you know you cannot?' I said, because they would say I acquiesced, and was not a prisoner. There was a long consultation between the magistrates and ten or a dozen officers. Sir Richard said "This man is a prisoner, we must see and get his pension stopped, a pretty man to be a pensioner, tampering with the due course of justice. I was kept a quarter of an hour or twenty minutes. Sir Richard Birnie went out at the back door. I was sitting down at the end of the office. Mr. Halls called out Mr. Smyth, repeatedly. I said, I have nothing to say to Mr. Halls; I demand my liberty. The defendant, Birchell, then said, 'If you will not come by fair means, I must take you by force.' He dragged me by the collar across the office, and Mr. Halls said, 'Mr. Smyth, I understood there was an information against you for

obstructing the due course of justice, and, as you were present, I considered it \*207] my duty to detain you. Now that \*I have read the charge, I don't think I should be justified in detaining you any longer; you are discharged.' I said, you may depend on it, Mr. Halls, if there is any law in the country, to which I can have recourse for redress of this outrage, I will have recourse to it.

Mr. Halls said 'I might do as I thought proper.'"

Adolphus, for the defendants, opened, that the magistrates were informed that Goddard, the officer, had a complaint to make against Mr. Smyth, for having tampered with the due course of justice; and that, Goddard not then being at the office, they detained Mr. Smyth till Goddard was sent for. And he contended, that, if the magistrate has a person before him, charged with either felony or misdemeanor, he may either go into the case immediately, or detain the party to await his leisure. And he cited the case of Broughton v. Mulshoe.(a)

Lord TENTERDEN, C. J. I am opinion, that the Justices could not detain a person known to them till some other person should make a charge. I think, before they detain a known person, they should have a charge made; therefore, unless you can shew that Goddard's charge was made by him, and received by the magistrates before Mr. Smyth was stopped, you cannot vary the case; and it is plain that you cannot, as they evidently detain Mr. Smyth till Goddard makes his charge, then it is found to be not sufficient. However, I will hear

any evidence you have to offer.

Adolphus declined calling witnesses.

Lord TENTERDEN, C. J., (in summing up.) The only question of fact is, whether Mr. Smyth was detained against his will; for I think that a magistrate is not justified in detaining a known person till a charge is made. The magistrate should have the charge actually made before he detains the Verdict-Guilty. party.

Archbold for the prosecution. Adolphus, for the defendants.

[Attorneys-A. H. Smyth, and Roche & P.]

#### REX v. POPE and Others. Feb. 3.

Where the bankruptcy of a party is stated in an allegation, in an indictment for a conspiracy, the assignment cannot be received as evidence in support of such allegation unless it be proved by the subscribing witness.

INDICTMENT for a conspiracy to defraud the Sheriff of Middlesex. first count of the indictment, the bankruptcy of the defendant Pope was stated in a prefaratory allegation.

To prove this allegation, the proceedings under the bankruptcy were put in. Lord TENTERDEN, C. J. You cannot put in the assignment, without calling the subscribing witness to prove the execution of it.

Verdict—Guilty.

This was done. Denman, A. G., and Bodkin, for the prosecution.

Curvood, for the defendant Pope.

#### [Attorneys-Willoughby and Pope.]

(a) Moore, 408. This was an action for false imprisonment, in which the defendant justified, "for that the plaintiff being in the presence of a Justice of Peace, and the justice not having opportunity to examine him, commanded the defendant, being a constable, to take him into his custody till the next day, which he did." This was held a good justification, without alleging the cause that the justice had for imprisoning the plaintiff, and, without shewing a warrant in writing, because it occurred in the presence of the justice.

Vol XXIV.-34

#### \*BEFORE MR. JUSTICE LITTLEDALE.

(Who sat for the Lord Chief Justice.)

### WHIPPY and Another v. HILLARY.

A letter, stating that an appointment of funds to pay a debt, due from the defendant to the plaintiff had been made, and that Mr. Y. was one of the trustees; but some time must elapse before the trustees would be in cash; will not take the case out of the statute of limitations, as it is at most only a promise to pay as soon as the trustees are in cash. But, semble, that the creditor's remedy would be by a bill in equity against the trustees.

Pleas-General issue and the statute of limitations. Goods sold.

The delivery of the goods was admitted; and to take the case out of the statute of limitations the following letter was put in :-

10th October, 1825.

"Gentlemen-I have hitherto deferred writing to you regarding your demand upon me, in consequence of some family arrangements, through which I should be enabled to discharge your account, and which were in progress, not having

been completed.

"I have now the satisfaction to inform you, that an appointment of sufficient funds for this purpose has been signed, of which Henry Young Esq., 12, Essexstreet, Strand, is one of the trustees, to whom I have given in a statement of your account, amounting to 981. 8s. 6d. It will, however, be unavoidable that some time must elapse before the trustees can be in cash to make these payments; but I have Mr. Young's authority to refer you to him for any further information you may deem requisite on this subject. I remain, Gentlemen, A. W. Hillary." your obedient servant,

Curwood, for the defendant. This letter is not an absolute, but a conditional promise, and will not support the declaration. This is merely a promise that the money shall be paid out of a particular fund, and not a general promise to

Mr. Justice Littledale. I think this is not sufficient \*to take the case out of the statute of limitations; and I think that the plaintiffs

ought to have gone to Mr. Young for the money.

For the defence, Mr. Young was called. He stated, that he was not in fundtill about three months after the bringing of the present action; and that. as soon as he was so, he sent to the plaintiffs to offer them the sum mentioned in the letter.

Coltman, for the plaintiffs. I submit that this acknowledgment is sufficient. under the statute 9 Geo. 4, c. 14. It is not necessary that there should be: new promise; an acknowledgment of the debt is sufficient. Here we have an absolute acknowledgment, and the law raises the promise. This is not like the case of a bankrupt's certificate, because there the debt is extinguished.

Comyn, on the same side. An acknowledgment in writing would be sufficient.

although there was not a promise of any kind.

Curwood.—The act of Parliament only requires that to be in writing which before might be by parol. If there be an acknowledgment alone, that will be enough; but if the acknowledgment be coupled with a condition, you cannot take the acknowledgment without the condition; you must take the whole together.

Mr. Justice Littledale. I am of opinion, that this letter is not sufficient to take the case out of the statute. If the acknowledgment be accompanied by a condition, you must take the whole together. In this letter, the defendant refers to Mr. Young. At most it is only a promise to pay when Mr. Young is in funds; but I have great doubts as to whether the plaintiffs' only remedy \*9117 is not by a bill in equity against Mr. Young. I shall nonsuit the \*211] \*plaintiffs, giving leave to enter a verdict for the plaintiffs.

Nonsuit, with leave to move.

Campbell, Coltman, and Comyn, for the plaintiffs. Curwood and Capron, for the defendant.

[Attorneys-J. Miller, and Fladgate, Young, & Jackson.]

In the ensuing term, Campbell moved to set aside the nonsuit; but the Court Refused a rule.

See the statute 9 Geo. 4, c. 14, set forth ante, Vol. 3, p. 298.

In the case of Tanner v. Smart, 6 B. & C. 603, it was held that a promise to pay as soon as the party was able to do so, would not take a case out of the statute of limita-

tions, without proof of his ability.

In the case of Haydon v. Williams, 4 M. & P. 811, it was held, that where a written promise to pay a debt, barred by the statute of limitations, has been lost, parol evidence

way be given of its contents; but it seems, both from this case and from that of Tanner v. Smart, that, if the promise be conditional, the plaintiff ought to declare specially.

See also the cases of Robarts v. Robarts, ante, Vol. 3, p. 296; Ansell v. Ansell, Id. p. 563; Chippendale v. Thurston, ante, Vol. 4, p. 98; Smith v. Forty, Id. p. 126; Fearne v. Lewis, Id. p. 173; Cory v. Bretton, Id. p. 462; Lang v. Mackenzie, Id. p.4 63; and Dickinson v. Hatfield, ante, p. 46.

As the following case is on the same subject, we have inserted it here.

Sittings in London, after Hilary Term, 1832.

COR. MR. JUSTICE J. PARKE.

#### GIBSON v. BAGHOTT, Esq. Feb. 18.

A defendant had written a letter to T., to make a proposition to the plaintiff respecting a debt he owed him; and in this letter he desired T. to arrange with the whole of his creditors. T. wrote a letter to the plaintiff, offering an acceptance for 7s. 6d in the pound on the debt:-Held, not sufficient to take the case out of the statute of limitations.

Assumpsir for goods sold, and work and labour. Pleas-First, general issus; ascend, \*212] infancy; third, the statute of limitations. Replication \*denying the infancy, and alleging that the cause of action was within six years.

To take the case out of the statute of limitations, a letter from the defendant, dated June 6th, 1829, to a person named Turner, was put in. By this letter, the defendant desired Mr. Turner to make a proposition to Messrs. Stultz respecting a debt from the defendant to them, and then went on as follows:—"Do what you can to arrange with the whole of my creditors, and you will much oblige, dear sir, your's truly, T. Baghott."

Mr. Turner stated, that the defendant mentioned to him the names of all his creditors, and stated that he owed the plaintiff about 271. for saddles and bridles he had had when in the army. It also appeared that on the 27th of June, 1829, Mr. Turner wrote to the

plaintiff a letter, in the following terms:-

"5, Wynch-street, Drury-lane, June 27th, 1829.

"Gentlemen,—I am directed by Mr. Thos. Baghott, to offer you 7s. 6d. in the pound for the amount of your debt due from him to you. Should you be inclined to accept that sum, Mr. T. Baghott will give you his acceptance at three months for the amount. debt he states to be about 27*l*. I will join him in the bill, as further security for you, should you be inclined to take it. I shall do myself the pleasure of calling upon you tomorrow, when I trust you will favour me with an answer. I am, Gentlemen, your obedient humble servant, Addressed—"Messrs. Gibson." "Edw. E. Turner."

F. Pollock, for the defendant, submitted that this was not enough to take the case out of the statute.

Barstow, for the plaintiff.—Here are two letters, the one from the defendant, making Mr. Turner his agent to arrange with his creditors; and the other is a letter from the agent to the plaintiff, acknowledging the debt.

Mr. Justice J. Parks. There is nothing signed by the defendant, which acknowleges any debt due to the plaintiff.

Barstow .- Must not the two letters be taken together?

Mr. Justice J. Parke. I doubt whether the second letter, even if signed by the defendant, would be enough to take the case out of the statute; but, as it is not, I think I must non-suit the plaintiff.

Nonsuit.

\*Baretow, for the plaintiff.
F. Pollock, for the defendant.

[#213

### [Attorneys-J. B. Sinedley and C. Bell.]

In the case of Heys v. Heseltine, 2 Camp. 604, it was held, that an averment in a declaration, that the defendants accepted a bill of exchange according to the custom of merchant, was supported by evidence, that the bill was accepted by John Wilson, their authorized agent, the acceptance being as follows:—"For H. Heseltine and Co. John Wilson." See also the cases of Hubert v. Moreau, ante, Vol. 2, p. 528, and Booth v. Grover, ante, Vol. 3, p. 335, and the cases there cited.

## REX v. SLANEY, Gent., One, &c. Feb. 8.

A witness is not only not bound to answer a question, the answer to which would criminate him, but he is not bound to answer any question, the answer to which would tend to criminate him. A witness is, therefore, not bound to answer whether he wrote an advertisement referring to libellous letters which the prosecutor had received; and though he is bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself.

A clerk who has seen numerous letters addressed by a party to his employer, and has

acted on those letters, may prove the handwriting of such party.

An information for a libel stated that the prosecutor had received certain anonymous letters, and that of and concerning those letters the defendant published a libellow placard. The defendant was proved to have caused the placard to be published. In the placard it was asked if the prosecutor had not received certain warning. The prosecutor stated that he understood that to refer to the letters, and that he should not have understood the meaning of the placard if he had not received the letters:—Held, that the letters might be read in evidence as explanatory of the placard, without proof of the handwriting of them.

INFORMATION for several libels, imputing that a daughter of Mr. Fane, (who was dead at the time of the libels), had committed adultery with a gentleman named Joddrell.

The first count of the information, after setting forth the state of Mr. Fane's family, charged that the defendant wrote and published five anonymous letters to Mr. Fane, and a letter to Mr. Lowndes, and also a printed placard. The second count, charged him with printing and publishing the letter to Mr. Lowndes only. The third count stated the five anonymous letters, and also certain advertisements in newspapers, without charging any of them to have been either written or published by \*the defendant; and then charged that the placard was written, printed, and published by the defendant, of and concerning those letters. The fourth count was on the placard alone; but stated the intent to be to vilify Mr. Fane. All the other counts stated the intent to be to vilify Mr. Fane and the memory of his daughter, and to excite discord among the different members of his family. Plea—Not guilty.

It was proved, that the placard was printed by the direction of the defendant;

and Mr. Fane proved that he had received the letters addressed to him.

A clerk of the defendant, named Evans, was called, and he was asked if he had written one of the advertisements. He objected to answer, because it might criminate him.

Lord Tenterden, C. J. He is not bound to answer.

Sir J. Scarlett, (to the witness). Do you knew who wrote it? Lord TENTERDEN, C. J. He must answer that.

The witness. I do.

Sir J. Scarlett. Name the person.

Lord TENTERDEN, C. J. He is not bound to do that, because it may be himself. You can not only not compel a witness to answer that which will criminate him, but that which tends to criminate him; and the reason is this, that the party would go from one question to another, and though no question might be asked, the answer of which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him.

The placard was read. It was signed "An Oxfordshire freeholder." It contained the following passage:—"Were \*you not warned that your own character was at stake, by your continuing to associate and connect yourself with a person regarding whom such statements had been long openly talked of? Were you not informed, that it was commonly said, that you knew of and sanctioned his conduct? Did you never have any specific information given you, which would enable you, without inflicting the slightest injury upon any one, to ascertain the truth of such reports? And were you not urged, over and over again, in justice to yourself, not to credit the plausible professions of others, but to inquire and judge for yourself? Were not dates, names, and every particular furnished you for that purpose?"

It was proposed to read the letters, no evidence had been given of the handwriting; but it was stated by Mr. Fane, that he should not have understood the

meaning of the placard if he had not also seen the letters.

Denman, A. G. I am quite satisfied that your lordship will not hold that the fact, that the defendant is the author of a placard in which some letters are mentioned, will let in those letters as evidence against him. The other side in effect say thus:—Let us read the letters, and we will show how they are evidence. It is quite new, that a thing should be received to show whether it is evidence or not.

I will take the simplest case. Suppose an indictment against Sir J. Scarlett. a publisher for publishing a book of which he is not the author, and that book referred to another book, without which it was not intelligible. Could it be contended, that the book referred to could not be read in evidence? Whatever is necessary to make a libel intelligible, the prosecutor is entitled to read; and the publisher would not be allowed to say that he did not know it alluded to the former publication. I will assume that the present defendant knew nothing of these \*letters, yet, as the libel published by him refers and alludes to these letters, and is unintelligible without them, he cannot be allowed to say that a part of the entire malignity of the libel shall be kept back from the jury, because he did not understand it. Such an objection as that can never shut out the evidence against the publisher. It should be observed too, that the placard distinctly refers to these letters. It says, "Were you not warned? Did you never have specific information?" And Mr. Fane tells us that he received these letters, and that he himself should not have understood the meaning of the insinuations in the placard, if they had not. Whoever was the author of this placard was clearly the author of the anonymous letters; but even admitting that the defendant did not know of the letters, yet, as they are alluded to in the placard, he cannot prevent their being read.

Campbell. It has been frequently decided, that whatever shows the quality or probable consequences of a libel, ought to be set out, and ought to be proved. In indictments for seditious libels, where the libels refer to public events, which give a quality to them, those events are stated in the indictments, and proved;

but if they are not set out, they cannot be proved.

Manning. If this were an action, the question would be how the public would understand this placard? but being a criminal proceeding, the question is, how Mr. Fane, the party libelled, would understand it. If in this libel it had been said, that the contents of a certain document were true, and that document contained a certain charge, it would be no defence, that the publisher

of the libel did not know the contents of that document; and, in the present

case, there is an express allusion to the letters in the placard.

Lord TENTERDEN, C. J. The correct way is to ask Mr. Fane, whether he considered that the placard referred to \*the letters; and I will do so now. Mr. Fane, what did you understand by the expressions—"Were you not warned?" and, "Did you never have any specific information given you?"

Mr. Fane. I understood those passages to allude to these letters.

Denman, A. G. It has been said on the other side, that if a bookseller be charged with a libel, he is to have every thing read in evidence against him which is alluded to in the book that he has published. Now, it seems to be a most dangerous doctrine, that a bookseller, publishing a work in the most innocent language, is to be answerable for other papers of the contents of which be knows nothing. If a book, published by the defendant, says that A. B. is guilty of all that is stated in another book, for this the defendant would be answerable But, suppose a bookseller to publish a statement that A. B. walked up St. James's street, could it be said that another paper could be adduced in evidence, in which, walking up St. James's street was coupled with some dreadful offence. Actio non facit reum sed mens. Mr. Campbell has instanced the case of public events having been given in evidence: those are admissible because they are known; but this is the case of letters known only to the writer and the receiver; and although there may be some words in this placard which may refer to these letters, or to something else, still that ought not to let the prosecutor into giving evidence of other things said against him at other times, and not by the present defendant.

Lord TENTERDEN, C. J. My opinion will be confined to the particular facts of this case, and the evidence already given. Mr. Fane says, that the placed refers to the letters, and would not be intelligible without them; and I think, that a defendant, who refers to other papers in \*his publication, must submit to have them read, as explanatory of such publication; but it does not at all follow, that the Jury will be satisfied, that the defendant was either the author or publisher of those papers.

The letters were read.

To shew that the letters were of Mr. Slaney's hand-writing, a witness, named Richards, was called. He had never seen Mr. Slaney write; but he had seen number of letters, which purported to have come from him, on the subject of a cause in which he was engaged on one side, and the witness on the other side; and the witness further stated, that he had acted upon those letters in the course of the cause.

Denman, A. G. Objected to this witness being asked as to the hand-writing

of the defendant.

Lord Tenterden, C. J. How do you prove the hand-writing of a person abroad, except by the evidence of those who have corresponded with him?

Denman, A. G. But there the letters of the party, whose hand-writing is to be proved, have been addressed to the person who has been called to prove it.

Lord TENTERDEN, C. J. A clerk comes from a merchant's counting house, and proves the hand-writing of a party by his knowledge of it, acquired by his seeing the letters of the party, which have been received at his master's counting-house. It is frequently done.

The witness was examined as to the hand-writing of the defendant. He said, that they were written in a very disguised hand; but that he believed it to be

that of the defendant.

The Jury found the defendant guilty on all the counts of the information. \*Sir J. Scarlett, Campbell, and Manning, for the prosecution. r \*219 Denman, A. G., F. Pollock, and Follett, for the defendant.

In the ensuing term, an application was made for a new trial, on affidavita. The affidavits went to shew that the defendant was not the writer of the letters; and, at the suggestion of the Court, the prosecutor consented that the verdict of guilty should be entered on that count only, in which the defendant was charged with having published the placard.

## ARCHBOLD, Esq., v. SWEET. Feb. 9.

If A., being the author of a law book, sell the copyright to B., and B. publish a third edition of the work edited by another, but not stated to be so, and which purchasers were likely to suppose was edited by A., such edition having errors and mistakes in it, calculated to injure the reputation of A. as an author:—Held, at Nisi Prius, that, for this, an action lies by A. against B. The question, whether an edition purports to have been edited by A., is a question for the Jury; but the question, whether the alleged errors and mistakes be so or not, and whether they are such as are calculated to injure the reputation of A. as an author, are questions for the Court.

The first count of the declaration stated, in substance, that, at the time of the committing of the grievances in this and the next count mentioned, the plaintiff was a barrister, and was the author of divers works and treatises, and, amongst others, had written and prepared for publication, and was the author of a certain book or work, then published in his own name, being a Summary of the Law relative to Pleading and Evidence in Criminal Cases, with Precedents of Indictments, &c., which said book was greatly esteemed and approved of, by which the plaintiff had deservedly acquired great gains in his profession, and as such author. That the plaintiff had prepared a second edition of the lastmentioned book or work, and sold the same, and also the copyright, to the defendant and one R. Pheney, in his lifetime, now deceased; that the second \*edition was published; and that the defendant, contriving, &c., "wrongfully and unjustly, and without the leave or license, and against the will of the said plaintiff, printed and published, and caused and procured to be printed and published, a certain edition, being the third edition, as and for, and purporting to be a third edition, prepared for publication by the said plaintiff, of the said book or work, being a 'Summary of the Law relative to Pleading and Evidence in Criminal Cases, with Precedents of Indictments, and the Evidence necessary to support them;' in which said third edition, so printed and published by the said defendant as aforesaid, there were and are divers and very many gross errors, and blunders, and mistakes, and bad, incorrect, and informal precedents, and which were not contained in the previous editions of the book or work;" and, that the plaintiff did not prepare the said third edition of the last-mentioned book or work for publication. The second count was similar to the first, except that it did not mention the second edition. The third count stated, that the defendant, wrongfully, and without the license of the plaintiff, published a certain edition of the work, (stating the title of it,) in the plaintiff's name; and in which edition there were many gross errors, blunders, and mistakes, and bad, incorrect, and informal precedents, and such as are not warranted by law. The fourth count stated, that the defendant caused the third edition to be edited and prepared for publication "by some person who was grossly ignorant of criminal law;" and that the defendant "well knew that such person had introduced into the said third edition, so edited and prepared for publication as last aforesaid, divers and very many gross errors, blunders, and mistakes, and bad and informal precedents, and such as are not warranted by law;" yet, that the defendant, further contriving &c., "wrongfully and unjustly published, and caused and procured the same to be published, in the name of the said plaintiff, and as if he, the said plaintiff, had edited and prepared the same for publication; \*whereas the said plaintiff did not edite the said last-mentioned third \*221] \*whereas the same planning did not called the fifth count stated, that the defendant caused a book, purporting to be the third edition of the work, (stating the title,) to be edited and prepared for publication by some person who was grossly ignorant of criminal law; and that the defendant published it as a work written and edited by the plaintiff; "and although the said defendant, shortly after the said last-mentioned book or work had been so published as aforesaid, to wit, on the day and year aforesaid, at Westminster aforesaid, in the county aforesaid, well knew that the said person had introduced into the said last-mentioned book or work divers and very many gross errors, blunders, and mistakes, and bad and informal precedents, and such as are not warranted by law; yet the said defendant, further contriving &c., wrongfully and unjustly continued to publish the last-mentioned book or work, and to sell and dispose of the same, as and for a book or work written and prepared for publication by the said plaintiff, and as having been prepared for publication and edited by the said plaintiff; whereas, he, the said plaintiff, did not edite the said last-mentioned book or work, or prepare the same for publication, to wit, at Westminster aforesaid, in the county aforesaid:" By means whereof several members of the legal profession, and other worthy subjects of this realm, not knowing the contrary, believed the plaintiff to have been the author of this edition, and to have prepared it for publication, "and to have made and committed the several gross errors, blunders, and mistakes hereinbefore mentioned, and to have written and drawn the several bad and informal precedents hereinbefore mentioned;" and that the plaintiff had been, by means of the premises, greatly injured in his reputation, as such barrister and such author as aforesaid. Plea-Not guilty.

Campbell, for the plaintiff, opened, that the plaintiff was \*the author of several works; and that, after having edited two editions of the work in question, the plaintiff had sold the copyright of it to the defendant and Mr. Pheney; and that it was then understood, that the future editions of this work should be prepared by the plaintiff. However, Mr. Pheney having died, the defendant had published a third edition not edited by the plaintiff, with the following title page:-"A Summary of the Law relative to Pleading and Evidence in Criminal Cases, with Precedents of Indictments, &c., and the Evidence necessary to support them. By J. F. Archbold, Esq., Barrister at Law. Third Edition, with very considerable Additions, including Lord Lansdowne's Act. &c." The title page of the Second Edition, which was edited by Mr. Archbold. was as follows: "A Summary of the Law relative to Pleading and Evidence in Criminal Cases, with Precedents of Indictments, &c., and the Evidence necessary to support them. Second Edition, with considerable Additions and Alterations. By John Frederick Archbold, Esq." &c. If a person (not being the author) edite a work, he ought to put his name to it, that the public might know who was responsible. Indeed, editors sometimes put their alterations within brackets, to shew what part was theirs and what part was the work of the original author; but here there was not the slightest intimation that this edition was not prepared by Mr. Archbold. The address to the reader contained in the second edition was signed J. F. A., and dated Symond's Inc. which was not the case with the address of the third; but still no purchaser would look to that: and what the plaintiff had to complain of was, that this edition was prepared in a slovenly, ignorant, manner. For example, at page 288 of the third edition, in treating of carnally knowing and abusing a female above ten and under twelve, it was stated, that it is immaterial whether the act was done with or without the consent of the female. This was a blunderwith consent, it is a misdemeanor; against consent, it is a rape. So, at page 156, in stating the evidence necessary to support an indictment for breaking into a church, it is stated that the prosecutor must prove either a breaking in or a breaking out, thus stating that evidence of breaking out would support an indictment for breaking in. There were a great many more errors; however, the great question would be, whether this edition purported to have been edited by the plaintiff.

Mr. M'Dowall proved that he had been employed by the defendant to print the third edition, and that it was not edited by the plaintiff.

Mr. Heaton, the barrister, was called to point out the errors in the third

edition.

Lord TENTERDEN, C. J.—If Mr. Heaton will point out the passages alleged to be erroneous, I will tell the Jury whether they are so or not.

Mr. Heaton pointed out five different passages.

Sir J. Scarlett, for the defendant.—I submit that the plaintiff must be nonsuited. The defendant and another have purchased the copyright, and have
published a third edition of the work, as they were perfectly at liberty to do. I
submit, that this action cannot be maintained without evidence of express
malice. If the bookseller employs an editor who does as well as he can, can
any action lie? Every count in the declaration states this to have been done
wrongfully and injuriously; and I submit, that, to support this action, there

must be positive evidence of express malice.

Campbell, for the plaintiff. It has been held, that any untrue assertion to the injury of another is actionable. A person without fraud assumed to have anthority to accept a bill, he really having no authority; and as he accepted per proc. a remote indorsee took the bill on the credit of the supposed acceptor.

This indorsee sued the acceptor \*and was nonsuited; but after that he sued the supposed procurator, the declaration alleging malice and fraud; and he recovered, although the Jury negatived both the malice and the fraud; and the Court laid down, that where there is an untrue assertion and a damage, an action lies. It will be for the Jury to say here whether the defendant has not published this as an edition prepared by the plaintiff.

Follett, on the same side.—The defendant publishes a book as the plaintiff's, which is not so, to the plaintiff's damage. Surely, for that an action lies.

Sir J. Scarlett.—The proprietors of the copyright have the greatest possible interest to make the best of the work. I do not say, that if there was express malice, an action might not be maintainable. But the question is, whether the non-insertion of the name of the editor after the words "Third Edition," which words follow the name of Mr. Archbold, will make the defendants liable in this action.

Lord TENTERDEN, C. J. You shall have leave to move. The class of cases most like the present are those of the perfumers and fish-sauce makers, where one has sold an article made by himself, professing that it was of the manufacture of the plaintiff. The first case of the kind was that of a perfumer. There, the injury was the deteriorating the credit of the plaintiff's commodity; and here, it is the injury to the reputation of an author. I am not prepared to say that an action will not lie.

Sir J. Scarlett. Without evidence, does your Lordship think that the third

edition does not shew sufficiently that it was not by Mr. Archbold.

Lord TENDERDEN, C. J. I have no doubt about that. Taking up this title page and reading it, I should certainly \*feel satisfied that the

third edition was by Mr. Archbold.

Mr. Heaton pointed out fourteen more errors; and in his cross-examination he said, that, at page 163 of the second edition, it was stated, that, in Story's case, assuming the name of another to whom money was required to be paid by a genuine instrument was not within the statutes then in force relating to false pretences. He also stated that the Jury Act, 6 Geo. 4, c. 50, was not mentioned in that edition; and that the indictment for riot and assault, at page 332 of that edition, did not conclude in terrorem populi; but he stated, in re-examination, that those particulars in the third edition were left exactly the same as they had been in the second.

On the part of the defendant, the gentleman who edited the third edition was called, he stated, that the defendant applied to him to have his name put in the title page as editor, but that he refused. He also stated, that he was of nearly

fourteen years' standing at the bar, and had previously edited another work for the defendant.

Mr. Pheney, junr. (the son of Mr. Pheney who had joined the defendant in the purchase of the copyright) stated, that he had applied to the plaintiff to edite the third edition, and that the plaintiff said he would not edite it again as long as the defendant had anything to do with it. He also stated that the plaintiff had published a work founded on Mr. Peel's Acts six months before the third edition appeared, but that the Lord Chancellor would not grant an injunction to restrain that publication.

Evidence was given by several law-booksellers that they, from seeing the address and the title page of the third edition, should have considered that the edition was not prepared by the plaintiff; and it was stated by the son of the defendant, that he informed all the persons who bought it of him, that it was

not edited by Mr. Archbold.

\*Lord Tenterden, C. J. (in summing up).—The question for your consideration is, whether a person buying this book would suppose that it was edited by the plaintiff. The treatises prepared by the plaintiff had obtained a good reputation, but, as the defendant had bought the copyright of this work, he had a right to publish a third edition; however, this third edition has many errors and mistakes, probably occasioned by negligence and haste. On the part of the defendant, it is contended, that this edition does not profess to be edited by the plaintiff. In point of law, I have told you that there are many errors and mistakes in it; and the plaintiff says that his credit as an author will be injured by these mistakes. The defendant, to shew that it does not profess to be of the plaintiff's editing, has called several law-booksellers, who say, that, looking at the title page and address, they should know that it was not prepared by him. However, it is not quite consistent with that, that one of the witnesses should have informed the purchasers that it was not edited by the plaintiff. I must say, that, looking at the title page alone, I should not have been struck by the change in the placing of the name; perhaps, looking at the addresses also, I should have come to the same conclusion that the booksellers do. It appears that the plaintiff had sold the copyright to the defendant, and a copyright is worth nothing unless future editions are to be published with the alterations made in the law by Acts of Parliament, and also with the more recent decisions, if the work be a law book, and with the recent discoveries, if the work be on any other science. I think that the defendant had a fair right to expect that the plaintiff would have edited the future editions; but, for what reason we know not, he has refused to do so; which clearly authorized the defendant to have another edition prepared by some one else; indeed, another complaint against the plaintiff has been, that he himself has published the new acts with comments; however, that could be no infringement of this copyright, as it related \*to matter which took place subsequently to the sale of the copyright. The question of fact is this, whether the third edition would be understood by those who bought it to be the work of the plaintiff; for, if so, I think the errors are such as would be injurious to the plaintiff's reputation. If you are of opinion that the third edition would be understood by those who bought it to have been prepared by the plaintiff, the plaintiff is entitled to a verdict; but if you are of opinion that persons using reasonable care would think that this third edition was not prepared by the plaintiff, your verdict should Verdict for the plaintiff.—Damages 51., with be for the defendant.

leave to move to enter a nonsuit. (a)

J. Williams. There is no evidence that any person was actually misled.

Campbell and Follett, for the plaintiff.

Sir J. Scarlett, J. Williams, and Lee, for the defendant.

[Attorneys—Leigh and J. Allen.]

\*2297

### \*WEATHERBY and Another v. BANHAM. Feb. 10.

A., a publisher, had for some years supplied a periodical work to W. as fast as the numbers came ent. W. died, and A., not knowing of his death, continued sending the numbers of the work by the stage coach, addressed to W. These numbers were received by B., who had succeeded to the property of W., and there was no evidence that B. had ever offered to return them:—Held, that A. might maintain an action for goods sold and delivered against B., though at the time of the deliveries A. was not aware of the death of W.

Assumpsit for goods sold and delivered. Pleas—First, general issue. Second, the statute of limitations. Replication, a writ sued out in the year 1830.

Rejoinder, no cause of action within six years of that time.

It appeared that the plaintiffs were the publishers of the Racing Calendar; and that they had for some years supplied a copy of that work, as fast as the numbers came out, to Mr. Westbrook, who had resided at Maidenhead. Mr. Westbrook died in the year 1820, when the defendant, who had kept an inn at Maidenhead, succeeded to the property of Mr. Westbrook, and went to live in his house. The plaintiffs, not knowing of Mr. Westbrook's death, continued to send the Racing Calendar, by the stage coach, directed to him; and a servant of the defendant proved them to have been received by the defendant; and no evidence was given that the defendant had ever offered to return them. This action was brought to recover the price of the Racing Calendars of 1825 and 1826.

Talfourd, for the defendant. I submit, that there was never any contract between these plaintiffs and the present defendant; indeed, it appears, that they did not know him. This form of action, therefore, cannot be supported.

Lord TENTERDEN, C. J. If the defendant receive the books, and use them, I think that the action is maintainable. These books come addressed to the deceased gentleman, whose estate has come to the defendant, and he keeps the books. I think that the defendant is clearly liable in this form of action.

Verdict for the plaintiff.

F. Pollock and B. Andrews, for the plaintiffs. Falfourd and Jeffreys Williams, for the defendant.

[Attorneys-Raimondi and J. Williams.]

Adjourned Sittings at Guildhall, after Hilary Term, 1832.

BEFORE MR. JUSTICE J. PARKE.

(Who sat for the Lord Chief Justice.)

\*WARD v. BIRD. Feb. 18.

A., being a creditor of B., had executed a composition deed, in which it was stipulated that the debt should be paid at 6s. in the pound, by promissory notes. After executing this deed, A. obtained payment from B. in full:—Held, that B. could not recover back the difference between the full-amount and 6s. in the pound, without proving that the composition notes had been paid, or giving some evidence that would be equivalent to such proof.

Money had and received. Plea-General issue.

It was opened by Comyn, for the plaintiff, that, in the year 1826, the plaintiff had compounded with his creditors, and that the defendant had refused to

sign the composition deed, unless he was paid in full; and that he was paid 184. being the full amount of his debt, instead of 6s. in the pound, the amount of

composition specified in the deed: and he cited Turner v. Hoole.(a)

The composition deed, executed by the defendant, as a creditor for 18t., and by other creditors for other sums, was put in. By it, the plaintiff stipulated to pay a composition of 6s. in the pound, for which he was to give promissory notes. It was also proved, that 181., had been subsequently paid to the defen-

Mr. Justice J. PARKE. You do not prove that the notes were given under

the composition deed.

\*Comyn. This defendant did not stand on his legal rights; but he signs the deed, and holds out to the other creditors that he is taking the same rate as they do.

Mr. Justice J. PARKE. You have not proved that you have performed your

part of the agreement respecting the composition.

Comyn. I submit, that, as it is proved that the defendant received 20s. in

the pound, it is unnecessary to prove the composition notes.

Mr. Justice J. Parke. I think, that you ought to prove that the composition notes were paid, or give some evidence that is equivalent.

Nonsuit.

Comyn, for the plaintiff. Campbell, for the defendant.

[Attorneys—Lloyd and Hodgson & H.]

### BEFORE LORD TENTERDEN, C. J.

JETTARY and Another, Assignees of PENNINGTON, an Insolvent, v. ROBINSON. Feb. 20.

In an action by the assignee of an insolvent, it is necessary to prove the provisional assignment, although, by the Insolvent Debtors' Act, 7 Geo. 4, c. 57, it must be executed at the time of signing the petition, on which the adjudication of the Insolvent Debtors' Court (which is a court of record) is founded.

CASE. The declaration stated, that the insolvent had delivered a mare to the defendant to be sold for the best price that could be gotten; but that the defendant not regarding his duty, sold the mare for much less than the best price that could be gotten. There were also two \*counts in trover. In one of [\*231 them the conversion was alleged to have accrued before the insolvency, and in the other to have accrued after the insolvency. Plea-General issue.

To prove the title of the plaintiffs as assignees, the adjudication in the Insolvent Debtors' Court, and the order for the insolvent's discharge, were proved, and also the assignment from the provisional assignee to the plaintiffs; but no evidence was given of the provisional assignment from the insolvent to the provisional assignee.

Sir J. Scarlett and Nichols, for the defendant, contended, that the provisional

assignment ought to be proved.

(a) D. & R. N. P. C. 27. There the defendant, after he had signed a composition deed in favour of his debtor, the plaintiff, induced the latter to give him bills of exchange for the full amount of the debt, dated on the day before the composition deed bore date; and after receiving one instalment, sued the plaintiff on the bills, and recovered the amount, minus the instalment paid; and it was held, that the plaintiff might maintain an action for money had and received against the defendant, to recover the difference between the amount of the composition and the full amount of the debt.

Tancred and Cooke, for the plaintiffs. The Insolvent Debtors' Court is a court of record, and the due execution of the provisional assignment is a necessary step before the adjudication, as, by the Insolvent Act, the provisional assignment is to be executed at the time of subscribing the petition; (a) it is, \*232] therefore, no more necessary to prove \*that than it would be to prove the issuing of a writ to support the proof of a judgment. Your Lordship will, as this is a Court of record, presume that the preliminary proceedings have been duly had.

\*233] Lord Tenterden, C. J. That would be a receipt \*for curing every thing. I think the plaintiff must be called. Nonsuit.

Tancred and Cooke, for the plaintiff. Sir J. Scarlett and Nichols, for the defendant.

[Attorneys-O. Price and L. Norton.]

#### TIDMAS v. LEES. Feb. 20.

On a trial at Nisi Prius, evidence that the cause was originally commenced in the Palace

(a) By the 11th sect. of the 7 G. 4, c. 57, it is enacted, "That such prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said Court, in such form as is to this act annexed, of all the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessaries of such person, and his or her family, and the working tools and implements of such prisoner, not exceeding in the whole the value of 201., and of all future estate, right, title, interest, and trust of such prisoner, in or to any real and personal estate and effects within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him or her, before he or she shall become entitled to his or her final discharge in pursuance of this act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his or her discharge from custody without adjudication being made in the matter of his or her petition, then before such prisoner shall be at large and out of custody, and of all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid; which conveyance and assignment, so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignec; and the same shall be made subject to a proviso, that, in case the petition of any such prisoner shall be dismissed by the said Court, such conveyance and assignment shall, from and after such dismission, be null and void to all intents and purposes; and the said Court is hereby empowered to dismiss any such petition in the matter whereof a final adjudication shall not have been made in pursuance of this act, at any time when it shall seem fit to the said Court to dismiss the same: provided always, that where in any case, by leave of the said Court, any amendment shall be made in any such petition, or an amended petition shall be filed as of the date of the original petition, which the said Court is hereby empowered to do and authorize without dismissing such original petition, the assignment and conveyance executed in such case shall not thereby be affected, but shall stand good to all intents and purposes, notwithstanding such amendment or amended petition so filed as aforesaid.

With respect to the execution of assignments by assignees, it is enacted, by the 2d section of the statute 2 Will. 4, c. 44, "That from and after the passing of this act, the said assignees shall not be required to execute such counterpart as aforesaid, but that in lieu thereof the said provisional assignee shall execute every such conveyance and assignment as aforesaid in duplicate, and that one part of such conveyance and assignment so executed by such provisional assignee shall be filed of record in the said Court; and that a copy of any such record so made and so purporting to be certified and sealed as by the said first-recited act is directed for evidence of the records therein mentioned in that behalf, shall be recognised and received as sufficient evidence of such conveyance and assignment so to be executed as aforesaid, and of title under the same, as fully and effectually in every respect as the said records are required to be recognised and received by

the provisions of the said first-recited act, to all intents and purposes."

Court, and that the defendant let judgment go by default in that Court, and afterwards removed the cause by habeas corpus, is admissible.

Work and labour. Plea-General issue.

On the part of the plaintiff, it was proposed to show by the proceedings in the Palace Court, which were produced by the Prothonotary of that Court, that the action had been originally brought there, and that the defendant had in that Court suffered judgment to go by default.

Sir J. Scarlett objected that this evidence was not receivable.

Lord TENTERDEN, C. J. I must receive evidence that the defendant let judgment go by default in the inferior Court, and then removed the cause by habeas corpus into the Court above.

The evidence was received.

For the defence, several witnesses proved that the plaintiff, who was a milliner's workwoman, came into the service of the defendant to improve herself. agreeing not to receive any salary or wages.

Nonsuit.

Erle, for the plaintiff.

\*Sir J. Scarlett, for the defendant.

**[ \*234** 

### [Attorneys-D. Willoughby and Mayhew & Co.]

In the case of Bottings v. Firby, 4 M. & R. 567, it was held, that the letting judgment go by default in the Palace Court, where the defendant had afterwards removed the cause by habeas corpus, is not prima facie evidence of the plaintiff's cause of action, so as to call on the defendant to answer it.

## First Sitting at Westminster in Easter Term, 1832.

BEFORE MR. JUSTICE TAUNTON.

(Who sat for the Lord Chief Justice.)

LOWRY, Gent., v. GUILFORD. April 19.

An attorney in a cause is not answerable for the absence, neglect, or want of attention in the counsel engaged in it.

Assumpsit for an attorney's bill. Plea—a tender as to part, and non-as-

sumpsit as to the residue. Replication—denving the tender.

The only part of the plaintiff's demand which was in dispute, was for business done in a suit in equity, in which the present defendant was the plaintiff, the present plaintiff being his solicitor. It was proved that the cause in equity was in the paper for hearing in the Vice-Chancellor's Court on the 26th of February, 1830, and that a brief in that cause had been delivered to an eminent counsel at the equity bar on the 11th of that month; and a clerk of the plaintiff's town agent gave evidence as follows:—"I attended the Vice-Chancellor's Court on the 26th February, 1830. I did not see our counsel. The cause was five off, and I went to search for him at the Rolls' Court. The Vice-Chancellor was sitting in Lincoln's Inn, and the Master of the Rolls at the Rolls' Court, in Chancery Lane. I could not find our counsel at the Rolls' Court, \*and I went back to the Vice-Chancellor's Court. I was away less than ten minutes; and on my return I found that the cause had been struck out of the paper with others that stood before it. In about five minutes after I heard our

counsel address the Court to restore the cause, but he did not succeed in his ap-

plication."

Sir J. Scarlett, for the defendant.—The fault here was in the clerk's going away; if he had stayed and said what counsel was in the cause, the counsel would have been sent for. In the King's Bench if the attorney and counsel are both absent the case is lost, and no new trial will be granted; but if the attorney stays, and says that his counsel is at the Rolls', or any other Court near, he would be sent for, instead of the cause being struck out. There has been a tender of all but this part of the bill; and it has been held that if there is no beneficial service, nothing is to be paid. Here there was no service by reason of the negligence of the attorney.

The tender of the remainder of the demand was proved.

Alexander, in reply.—If the attorney's clerk had sat still instead of going to look for his counsel, it would have been said that he ought to have gone to fetch his counsel. I submit that the clerk did what a prudent man would do, for he went for his counsel when the cause was five off.

Mr. Justice Taunton (in summing up).—The question here is, whether you are satisfied that the plaintiff did not use due diligence; and that, instead of using due diligence, he was guilty of gross negligence; and that, in consequence of such negligence, the cause miscarried. It appears that the plaintiff delivered a brief in the equity cause on the 11th February, which was fifteen days before the cause came on. This was certainly no want of diligence. I do not know \$2361 the practice of the Court of Chancery, but briefs at \*law are generally

\*236] the practice of the Court of Chancery, but the practice of the Court of Chancery, but the practice of the Court of Change of the Rolls' Court: was five off, the attorney's clerk went to look for his counsel at the Rolls' Court; and that, being unable to find him, he returned in less than ten minutes. Here I must ask you if this was gross negligence either in the attorney or his clerk. The counsel who practice in equity are in the habit of going from one Court to the other, and neither the clerk nor the attorney could go and say to a gentle-man of the bar there—" You must not go to the Rolls' Court, as my cause in the Vice-Chancellor's Court is only five off;" he could not do that, and as other causes were struck out which stood before this, the probability is, that, if those causes had been heard, this cause would not have met with the fate it did. It is further proved that the counsel asked to have the cause restored, but was unsuc-You are therefore to say whether this misfortune which befel the present defendant, as a party in the equity suit, was not the result of an accident over which the attorney had no control. The attorney is not answerable for the neglect or want of attention in the counsel. He acted for the best in going for his counsel to the Rolls' Court, and it was from an anxiety on his part that he He is not, I repeat, answerable for the absence of his counsel, and his own absence was only caused by his trying to find the counsel. You, will, therefore, say whether the attorney was guilty of gross negligence.

Verdict for the defendant. R. Alexander and R. C. Nicholl, for the plaintiff.

Sir J. Scarlett and Cresswell, for the defendant.

## [Attorneys-Lowry & W. and Francis.]

Alexander, on a subsequent day in the term, applied for a rule nisi for a new trial, on the grounds, that the verdict was against evidence and against the \*237] opinion of the \*learned Judge. The court granted a rule, which was afterwards made absolute.(a)

<sup>(</sup>a) For this information respecting the result of the motion, we are indebted to the kindness of one of the learned counsel engaged in it.

# Sittings at Westminster, after Easter Term, 1832.

BEFORE MR. JUSTICE PATTESON,

(Who sat for the Lord Chief Justice.)

### PAUL v. WHITE. May 14.

If a letter be shewn to a witness for the defendant, on the voire dire, to make out that he has an interest, and the witness be released and examined, the Judge will not prevent the plaintiff's counsel from observing on this letter in his reply.

Assumpsit by an indorsee against the acceptor of a bill of exchange.

A witness, named White, was called for the defendant. He was asked by Sir J. Scarlett, on the voire dire, whether he had not given a guarantie to the defendant for the payment of this bill; and a letter written by him, containing the guarantie, was put into his hand. It was admitted that this made him interested, and the witness was released by the defendant, and was examined.

Sir J. Scarlett, in his reply, commented on the terms of this letter.

F. Pollock, for the defendant. I submit that the other side have no right to make any comment on this letter. It was not evidence in the cause. If it had been, it should have been read, and I should have been at liberty to have observed on it. The letter was merely put in to satisfy your Lordship, that the witness had an interest, and was incompetent. It was not read as evidence to be considered by the jury.

\*Mr. Justice Patteson. I am of opinion, that, as the document was put in, I cannot prevent the plaintiff's counsel from observing on it.

Verdict for the plaintiff.

Sir J. Scarlett and Moody, for the plaintiff. F. Pollock, for the defendant.

[Attorneys-V. S. Reynolds, and Pasmore & T.]

#### BEFORE MR. JUSTICE TAUNTON,

(Who sat for the Lord Chief Justice.)

DAGLEISH, Assignee of BURKE, an Insolvent, v. DODD. April 17.

In an action by the assignee of an insolvent, a letter written by the defendant was given in evidence; on the back of it something had been written by the insolvent:—Held, that the defendant's counsel were entitled to have that read.

Work and labour by the insolvent as a builder. Plea—General issue.

On the part of the plaintiff, a letter, written by the defendant, was put in and read. On the back of it was something which had been written by the insolvent.

F. Pollock, for the defendant, wished to have that read also.

Thesiger, for the plaintiff. I submit that what the insolvent writes is not evidence; and even if it were, the defendant must give it as his evidence.

F. Pollock. If the paper is put in, I am entitled to have the whole of it read.

Mr. Justice TAUNTON. I think so: you produce the paper, and if you put it in, the other side have a right to have the whole of it read.

\*2397 \*The memorandum on the back of the letter was read.

Therian and Channell for the plaintiff

Verdict for the plaintiff.

Thesiger and Channell, for the plaintiff. Pollock and Steer, for the defendant.

[Attorneys—Brooks & Co., and Arnott & E.]

## AUWORTH v. JOHNSON and Another. May 14.

A tenant from year to year of a house is only bound to keep it wind and water tight. A tenant, who covenants to repair, is to sustain and uphold the premises; but that is not so with a tenant from year to year.

Assumpsit. The first and second counts of the declaration were on a special agreement to occupy a house, on the terms contained in a certain lease of same house, which had been determined. The third count stated, that, on, &c., at, &c., "in consideration that the said plaintiff, at the special instance and request of the said defendants, would permit and suffer the said defendants to occupy certain messuages and premises, as tenants to the said plaintiff, for a certain term, then and there agreed upon by the said plaintiff and the said defendants, at and for a certain yearly rent, the said defendants then and there undertook, and faithfully promised the said plaintiff, that they would perform all necessary and needful repairs on the said last-mentioned premises, and that they would keep and continue the same so repaired, in good and tenantable order and condition; and the said plaintiff in fact saith, that he, confiding in the said lastmentioned promise and undertaking of the said defendants, did permit and suffer them to occupy the said last-mentioned messuages and premises as such tenants as last aforesaid; yet the said defendants, not regarding, &c., did not perform all necessary and needful repairs, but on the contrary thereof, utterly neglected the same, and allowed the same \*to become ruinous, fallen down, prostrate, and decayed, for want of necessary and needful repairs; and permitted and suffered the same so to remain for a long space of time, to wit, from thence hitherto." The declaration also contained the money counts. Plea-General issue.

No evidence was given to support the first and second counts, but evidence was given that the defendants were let into possession of the house by the plaintiff; that the stairs of the house were worn out; that new sashes were wanted; that the doors were rotten and falling to pieces from decay; that the sash lines, latches, catches, keys, and locks were broken and damaged; and that a panel of one of the doors was broken.

Hutchinson, for the defendant. There is no evidence of the terms of any

Lord Tenterden, C. J. No. The case is, that, in consideration of the plaintiff letting the defendants into possession, they agreed to keep the place in tenantable repair. A tenant from year to year is to keep the premises in a little order, and they say that you have done nothing.

Hutchinson. They charge for doors and sashes which are worn out; that

they hardly ought to do.

Lord TENTERDEN, C. J. Certainly not.

For the defendants, evidence was given, that the house was situate on Piestrect, and that when the defendants took it, the condition of it was very bad. It was also proved that, in the year 1829, the defendants had employed a brick-

Vol. XXIV.—35

layer and carpenter to repair it, and that they put it into as good a state of

repair as it was capable of.

Campbell, in reply. I admit that the defendants are not liable for the substantial repairs; but still they have \*not done that which a tenant from year to year ought to do. The sash lines, the broken panel of the door, the latches, catches, locks, and keys, are all, clearly, things which a tenant from year to year ought to make good.

Lord TENTERDEN, C. J. (in summing up.) It appears that this was a very dilapidated house, when the defendants took it, and that they have had a very considerable quantity of work done upon it. However, the first question is what are the things which an occupier of a house from year to year is bound to do. I am of opinion, that he is only bound to keep the house wind and water tight, and that that is all he is bound to do. A tenant who covenants to repair, is to sustain and uphold the premises, but that is not the case with a tenant from year to year. A great part of what was claimed by the plaintiff consists of new materials where the old were actually worn out; for that the defendants are clearly not liable: and if you think the defendants have done all that tenants from year to year ought to do, considering the state of the premises when they took them, the defendants are entitled to your verdict.

Verdict for the defendants.

Campbell and Kelly, for the plaintiff. Hutchinson and Channell, for the defendants.

### [Attorneys-Garry, and Lowten & N.]

In the case of Ferguson v. ---, 2 Esp. N. P. C. 590,-Lord Kenyon said, "A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs. such as putting in windows or doors which have been broken by him, so as to prevent waste and decay of the premises."

In the case of Gibson v. Wells, 1 N. R. 290, which was an action on the case against a

tenant at will for permissive waste, the Court held, that the action would not lie for per-

missive waste, although it would have lain for wilful waste.

In the case of Baker v. Holtpzaffell, 4 Taunt. 45, it was held that the landlord of premises demised under a written agreement might recover, in an action \*for use and occupation against the tenant, the rent accruing after the premises were burnt [\*242] down, and no longer inhabited by the tenant. But it appears by the case of Horsefall r. Mather, Holt, N. P. C. 9, that the tenant would not be bound to rebuild or repair after 2

In the case of Powley v. Walker, 5 T. R. 373, it was held that the mere relation of landlord and tenant of a farm, is a sufficient consideration for the tenant's promise to manage the farm in a husbandlike manner. In the case of Legh v. Hewitt, 4 East, 160, the plaintiff succeeded in an implied assumpsit in the tenant to manage the farm according to the custom of the country. And in the case of Horsefall v. Mather, Gibbs, C. J., said, that a tenant from year to year "is bound to use the premises in a husbandlike manner, but is not liable to general repairs."

With respect to clerical dilapidations, in the case of Wise v. Metcalf, 10 B. & C. 229. the Court held that the incumbent of a rectory "was bound to maintain the parsonage. and also the chancel, and to keep them in good and substantial repair; restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain any thing in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay).

and white-washing, and papering belong."

See also the case of Percival v. Blake, ante, Vol. 2, p. 514.

# Adjourned Sittings at Westminster, after Trinity Term, 1832.

be taken as a nomen collectivum, including all that is commonly so called, and not the

city merely.

In an action against a carrier for the loss of a painting, it appeared that the stage wagon in which it was sent had seven horses, but that there was only one wagoner: the L. C. J. left it to the Jury to say, whether the sending but one wagoner was gross negligence; and they found that it was so.

Assumpsit against defendant, as a common carrier from London to Bath, for not safely carrying and delivering a painting, of the value of 80%, sent by his

wagon from London to Bath.

The plaintiff proved the delivery of the case containing the painting, at the Old White Horse Cellar, in Piccadilly, in the County of Middlesex; and that \*243] twopence was paid for the booking, the book-keeper being told that \*it was a painting, no extra carriage or insurance being paid.

Campbell and Wyborn, for the defendant, objected, that, upon this evidence, the plaintiff should be nonsuited, as the termini of the journey were not properly described, the Old White Horse Cellar not being in London, but in another county; and they cited Tucker v. Cracklin,(a) where, on a count stating a contract to carry from the Blue Boar in Whitechapel, in the county of Middlesex, it being proved that the Blue Boar was actually in the city of London and not in the county of Middlesex, although the whole neighbourhood commonly went by the name of Whitechapel, the plaintiff was nonsuited.

LORD TENTERDEN, C. J. The word London is nomen collectivum for this purpose, although some convictions against stage coach proprietors have errone-

ously proceeded upon this supposed distinction.

The defendants proved an express notice that they would not be liable for parcels above 5l. value, unless entered as such, and paid for accordingly.(b) But

(a) 2 Stark. 385. In the case of Ditchman v. Chivis, 1 M. & P. 735, which was an action on the case against a stage coach proprietor for an injury sustained by a passenger, the declaration alleged, that the defendant was the owner of a stage coach, for the conveyance of passengers from London to Blackheath, and that the plaintiff had agreed to become a passenger, and that the defendant had agreed to receive her as such passenger, to be carried from London to Blackheath; and the evidence was, that the words London and Blackheath were painted on the coach door; that the coach was licensed to run from Charing Cross only; and that the plaintiff was taken up at the Elephant and Castle, in St. George's Fields: It was held, that, as Charing Cross and St. George's Fields are both

in common parlance stiled London, the allegation was sufficiently proved.

(b) There has been a great alteration made in the law on this subject, by the statute 11 Geo. 4 & 1 Will. 4, c. 68, by sect. 1 of which it is enacted, "That from and after the passing of this act, no mail contractor, stage coach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following; (that is to say,) gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or packages which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as herein-after mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." And also, by sect. 2, "That when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for

it was proved, upon cross-examination of the defendant's witnesses, \*211\*255 \*that the practice with their wagon was to proceed out of \*London for one stage with two men, and after that with one wagoner only, changing the wagoner every twenty-five miles. It was also proved, that no stage wagons ever employed more than one wagoner beyond the first \*stage, and very few employed (as the defendant did) two wagoners for the first stage.

Sir J. Scarlett, for the plaintiff, argued, that, admitting the notice, still that would not justify gross negligence; and he contended, that, if the carriers entrusted a large wagon with seven horses, and all its contents, to the care of one wagoner only, who could not attend to the horses and the goods at one and the same time, it was but natural to suppose this painting would be stolen, as in fact

it had been

LORD TENTERDEN, C. J., left it to the Jury to say—first, whether the notice was sufficiently proved or not—and secondly, whether, if so, the leaving the wagon and seven horses to the care of only one wagoner was taking such reasonable care as the common law imposed upon carriers, and from which even the notice could not protect them; and his Lordship asked the Jury to state upon which point they found.

The Jury returned a verdict for the plaintiff, stating that their verdict was

founded on the gross negligence of employing only one wagoner.

Sir J. Scarlett and Platt, for the plaintiff. Campbell and Wyborn, for the defendant.

[Attorneys-Founes & W., and Froud]

such mail contractors, stage coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance. stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge." And also by sect. 4, "That from and after the first day of September now next ensuing, no public notice or declaration heretofore made or hereafter to be made shall be deemed or coustrued to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage coach proprietors, and other common carriers as aforesaid shall from and after the said first day of September be liable, as at the common law. to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding." And by stat. 5, "That for the purposes of this act every office, warehouse, or receiving house which shall be used or appointed by any mail contractor or stage coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage coach proprietors, or common carrier shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach or other public conveyance by land for hire as aforesaid." And also, by sect. 6, "That nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, or any other parties, for the conveyance of goods and merchandizes." And also. by sect. 8, "That nothing in this act shall be deemed to protect any mail contractor. stage coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct." But, by sect. 9, carriers, although the value of the goods is declared, are not to be liable for more than the value proved at the trial; and by sect. 10, they may pay money into Court.

## \*MONTGOMERY v. RICHARDSON, Esq., and Others. June 22.

The statements in a special plea, which has been holden bad on demurrer, are not evidence for the plaintiff on the general issue, although the Jury are to assess damages as well as to try the case on the general issue.

FALSE imprisonment. Pleas—the general issue, and several special pleas, which were holden bad on demurrer.

Wyborn, for the plaintiff, proposed to read one of the special pleas, which stated the fact of the suing out of the writ by one of the defendants. He contended, that he was entitled to have the special pleas read, as the jury were to assess the damages upon them as well as give a verdict on the general issue.

Lord TENTERDEN, C. J. Taking this as a general question, it would be contrary to all the practice in my experience, and I believe in that of every gentleman at the bar, to hold that the statements in a special plea may be evidence under the general issue. Then, as to the particular reason given, Mr. Wyborn-contends, that, because the jury are to assess the damages on the special plea, therefore he is entitled to read that plea. I am clearly of opinion that he isnot, because there can be no damages on the special plea until the plaintiff hasproved his case on the general issue. Now, this he has not done, as he has not proved that the defendant sued out the writ.

Wyborn, for the plaintiff. Hutchinson, for the defendant.

### [Attorneys-Frowd and Burt.]

In the ensuing term, Wyborn applied to the court to set aside the nonsuit; but the court refused a rule.

See the case of Firmin v. Crucifix, ante, p. 98, in which a similar decision upon the general question was given by Lord Lyndhurst, C. B.

# \*248] \*Adjourned Sittings in London, after Trinity Term, 1832.

## ARDEN and Another, Gent., two. &c. v. TUCKER. July 7.

Two persons in partnership as attorneys cannot recover in a joint action for business done in the Palace Court, if it appear that one of them only was a person authorized to practise in that Court.

Assumpsit on a bill for business done as attorneys. The business was done in the Palace Court, the costs had been taxed; and on the part of the plaintiffs, a letter was put in, written by the defendant to the plaintiffs, proposing to pay a smaller sum than was due, and asking for a month or six weeks' indulgence. It also appeared that he had made several promises to pay.

Campbell, for the defendant, proved that one of the plaintiffs only was an attorney of the Palace Court, and submitted, therefore, that the two could not maintain the action. He cited the case of Brand and Another v. Hubbard(a) as in point, and decisive, and contended, with respect to the promises to pay, that, if there was no liability originally, they would not make any difference in

(a) 4 B. Moore, 367, and 2 B. & B. 11. That case decides that a replevin clerk, who is partner in an attorney's firm, must sue alone for the expenses of preparing a replevin bond, though it be prepared at the office of the firm.

the case. On this point he cited Collins v. Godefroy.(a) The evidence consisted of the roll of attorneys of the Palace Court produced by a witness from the office of the Deputy Prothonotary of the Palace Court, from which it appeared that Mr. Joseph Arden's name only was on the roll, and not those of both the plaintiffs; the warrant to sue, which was in this form, "Joseph Arden is retained to prosecute," &c.; a rule of the Palace Court, commencing, "Upon hearing \*the plaintiff, and Mr. Arden, his attorney, it is ordered," &c. [\*249] The taxed bill appeared to be headed "Tucker, Esq., to Messrs. Jos. and R. E. Arden." It appeared also that the plaintiffs were in partnership.(b)

Sir J. Scarlett, for the plaintiff. As there were promises to pay made to both, the defendant is precluded from denying his liability. After the bill of both has been treated by him as the bill of both, it is too late for him to object to pay. The case of Brandram v. Hubbard has no analogy to the present; because in that case the plaintiffs were only partners as attorneys, but not as replevin clerks. There is not any law which says that no person shall have an interest in another's practice, except in the superior Courts, where it is prevented by statutes, which statutes do not apply to such a case as the present.

Campbell. The action is on the retainer, and not on any forbearance; and

therefore the two plaintiffs cannot maintain the action.

Lord TENTERDEN, C. J. I am of opinion with you. I cannot distinguish this case from that of Brandram v, Hubbard. And with respect to the promises to pay, I consider that they must apply to the original cause of action, and do not vary the case. I think, therefore, that the plaintiffs must be nonsuited. But I will give Sir James Scarlett leave to move to enter a verdict for them.

Nonsuit, with leave &c.

Sir J. Scarlett, Platt and White, for the plaintiffs. Campbell and Lloyd, for the defendant.

### [Attorneys-J. & R. E. Arden and Tucker.]

The Court of King's Bench afterwards made a rule absolute for entering a verdict for the plaintiff, thereby determining that the action was maintainable.

## \*WHITWORTH v. SMITH, FOSTER, and Others.

**[\*250** 

A., a tenant, owed rent to B., his landlord; B. distrained for more rent than was due, and removed the goods to the auction rooms of C.; A. gave C. notice not to sell, and C. delivered the goods back to the person from whom he received them:—Held, that, as some rent was due from A. to B., C. was not liable to A. in an action of trover.

ACTION on the case for an excessive distress. The declaration contained several special counts; and among them, a count for distraining for more rent than was due. There was also a count in trover. The defendant Foster, and some of the other defendants, pleaded the general issue. The remaining defendants suffered judgment by default.

It appeared in evidence that the plaintiff was tenant to one of the defendants of certain apartments; and a small sum being due for rent, a distress was made by the defendant, the landlord, for a larger sum than was really due; and for this, the whole of the plaintiff's goods, to a considerable amount, were seized and taken away. Some of the goods were afterwards removed to the rooms of

(a) 1 B. & Adol. 950. In this case, which was an action by an attorney to recover compensation for loss of time in attending to give evidence, it was held, that a promise to pay such compensation, it not being legally demandable, would not support the action.

(b) The defendant had given an undertaking in writing to pay what should be found due for the taxed costs. It was not stamped, and an objection was made to its being read; and after argument it was withdrawn without any decision.

the defendant Foster, who was an auctioneer, for the purpose of sale; and while they were with him, the plaintiff caused him to be served with a notice, stating that the goods had been illegally seized; and desiring him not to sell or part with them. He forbore to sell, them; and it appeared that they had afterwards been taken away, and, with the rest, were sold by the person who had originally left them at Foster's.

Barstow, for the defendant Foster, submitted that there was no evidence to affect him with any of the misconduct chargeable upon the original seizure, or the subsequent sale; that he had merely received the goods which had been legally seized for rent, and returned them to the party who brought them to him; that he could neither be liable upon any of the special counts, nor upon the count in trover, which was not maintainable in a case where the original seizure was lawful, and where there was no subsequent conversion.

\*Lord TENDERDEN. I am not satisfied that the distress was legal; \*251] and, therefore, it must not be so assumed. There is no evidence of any authority to seize, or of any notice, or of the usual formalities of a distress

and sale.

Those are not necessary for the purpose of shewing that the dis-Barstow. tress was legal at common law. The landlord himself might seize of his own authority; and as he is made a defendant, it must be taken that he did so seize. Notice of a distress for rent was not necessary at the common law. The notice, and the other formalities, prescribed by the 2 W. & M., sess. 1, c. 5, are only necessary where the distrainor desires to proceed to a sale. By the common law the distrainor could not sell; the distress being only in the nature of a pledge; and it is sufficient, to justify such a seizure at common law, to shew the tenancy and rent in arrear. Those two facts are in evidence, and serve to place the goods in legal custody so long as they remained in the possession of the defendant Foster. The cause of action, for want of compliance with the requisites of the statute, may apply to the landlord and the other defendants who proceeded to sell the goods. And the statute 11 Geo. 2, c. 19, s. 19, expressly declares that any irregularity in the dealing with a distress shall not make the party so dealing a trespasser ab initio, but refers the tenant to his remedy for the special damage. And upon this it was held in Wallace v. King, 1 H. Black. 13, (which has been followed in subsequent cases,) that trover will not lie for goods improperly sold under a legal distress.

Dodd, for the plaintiff. There is enough to maintain the count in trover. The statute 11 Geo. 2, applies in its terms only to cases "where rent is justly Here the rent distrained for was not justly due, as it was in the case of Wallace v. King. The distress therefore was not \*legal. No case has \*252] held that the protection given by the statute applies to cases where more

rent is distrained for than is justly due.

Barstow, in reply. It is sufficient if any rent is due, so as to justify the making of the distress. There is certainly no authority upon the point; but the opinion in the profession has been, that the remedy must be obtained by special action; for all the books of precedents in pleading contain the form of a count for distraining for more rent than was due; that count the plaintiff has, in the present case; and it is applicable to the conduct of the other defendants, but not to the defendant Foster.

Lord TENTERDEN observed, that the plaintiff's evidence traced only a part of the goods to the defendant Foster; and as there could not be a verdict against one defendant for a larger sum than against another, he asked the plaintiff's counsel, if he would take his verdict against the other defendants for the larger sum, and give up the defendant Foster, without any decision upon the present question.

**Dodd**, for the plaintiff, said—It was more important to retain the liability of the defendant Foster for the smaller sum, than to retain the liability of the

other defendants for a larger sum without him.

Lord TENTERDEN. Then, as I must decide the question, I think the defendant Foster is not liable. There was a tenancy, and there was rent in arrear. This justified the landlord in seizing the goods at common law, as for a distress. The goods then, being in legal custody, are taken to the rooms of Foster, and are afterwards taken away by the person who brought them. Foster did no one of the acts which are the subject of complaint in the special counts of the present declaration. But it is \*said that he is liable in trover; and a distinction is pointed out between this case and that in Henry Blackstone, inasmuch as there the whole rent for which the seizure was made was justly due. There certainly is that distinction; but I think the words of the statute are satisfied, for this purpose, if any rent is due at the time of the seizure. And this agrees with the general opinion of the profession, among whom it has been customary (as has been done in the present case) to add a special count, complaining of a distress for more rent than was due. I shall, therefore, direct the Jury to find a verdict for the defendant Foster.

Verdict for the defendant Foster. Verdict for the plaintiff against the other defendants who had pleaded: And damages assessed against a

defendant who had suffered judgment by default.(a)

Campbell and Dodd, for the plaintiff.

Barstow, for the defendant, Foster.

Platt and Ball, for the other defendants.

[Attorneys-W. Baker and Tilladams.]

# TRIAL AT BAR, TRINITY VACATION, 1832.

BEFORE LORD TENTERDEN, C. J., MR. JUSTICE LITTLEDALE, MR. JUSTICE J. PARKE, AND MR. JUSTICE TAUNTON.

## \*REX v. PINNEY, Esq.(b)

T\*254

The general rules of law require of magistrates, at the time of a riot, that they should keep the peace, and restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the King's subjects to assist them; and all the King's subjects are bound to do so, upon reasonable warning. In point of law, a magistrate would be justified in giving fire-arms to those who thus come to assist him, but it would be imprudent in him to do so.

It is no part of the duty of a magistrate to go out and head the constables, neither is it any part of his duty to marshal and arrange them; neither is it any part of his duty to hire men to assist him in putting down a riot; nor to keep a body of men, as a reserve, to act as occasion may require. Neither is he bound to call out the Chelsea pensioners any more than the rest of the King's subjects; nor is it any part of his duty to give any orders respecting the fire-arms in the gunsmiths' shops. Nor is the magistrate bound to ride with the military; if he gives the military officer orders to act, that is all that required of him.

Mere good feeling and upright intention in a magistrate will be no defence, if he has been guilty of a neglect of his duty. Nor will the fact of his having acted under the advice of others be any defence for him. The question is, whether he did all that he knew was in his power, and which could be expected from a man of ordinary prudence, firmness. and activity.

On the trial of a magistrate for neglect of duty, he ought not to be found guilty, unless all

(a) For the report of this case we are indebted to the kindness of one of the learned counsel engaged in it.

(b) Although this is not a Nisi Prius case, yet, as it is one of the greatest importance to magistrates, and as no note of the summing up of Mr. Justice Littledale was taken by any of the other gentlemen engaged in legal reporting, we have inserted it here, considering that this report of it will be acceptable to magistrates and the profession.

the Jury are satisfied that he has been guilty of the same act of neglect; and if four Jurors think him guilty of one act of neglect, and eight think him guilty of another act of neglect, that is not sufficient.

On the trial at bar of an information, the Special Jury were summoned from a distant county, in which the offence was not charged to have been committed:—Held, that the Court had no power to order their expenses to be paid. The Jurors who tried this information were only paid one guinea each, and other Jurors, who had come from the same county, and had been summoned to try another information, which was not tried, were not paid any thing.

INFORMATION filed by his Majesty's Attorney-General. The first count of the information stated, that on the 29th day of October, 1831, and also at all the times thereinafter mentioned, the defendant was Mayor of the city of Bristol, and one of the Justices of our Lord the King, "assigned to keep the peace in and for the said city and county of the same city; and also to hear and determine divers felonies, trespasses, and other misdemeanors, committed \*255] within the said city and county;" and that, on the 29th of October, "there had been divers tumults, riots, routs, and unlawful assembles, of great numbers of evil-disposed persons, within the said city and county; and divers and violent breaches of the peace of our Lord the King; and divers violent attacks and outrages had been committed in the said city and county upon the persons and property of divers of his said Majesty's subjects there; whereof the said Charles Pinney, so being such Mayor and Justice as aforesaid, then and there had notice: And the said Attorney-General further says, that, on the next day after the said 29th day of October, to wit, on the 30th day of October, in the year aforesaid, to wit, in the city and county aforesaid, divers wicked and evil-disposed persons to the number of five thousand and more, whose names are at present unknown to the Attorney-General, with force and arms, unlawfully, riotously, routously, and tumultuously, assembled themselves together in different parts of the said city and county, armed with iron bars, iron crows, pickaxes, hammers, pieces of wood, and bludgeons, with intent to disturb the public peace, and to make riots, routs, tumults, and affrays, in the said city and county, and to commit breaches of the peace, and outrages upon the persons and property of his Majesty's peaceable subjects there; of all which premises, the said Charles Pinney, so being such Mayor and Justice as aforesaid, then and there also had And the said Attorney-General further says, that divers, to wit, three thousand of the said persons, so being unlawfully, riotously, routously, and tumultuously assembled together, armed as aforesaid, and divers other persons to the said Attorney-General also unknown, afterwards, to wit, on the day and year last aforesaid, at the city and county aforesaid, with force and arms, wickedly and unlawfully attacked, and with the said hammers, pickaxes, iron crows, iron bars, and pieces of wood, forced and broke open a certain common and \*256] public gaol or prison there, called the Bridewell, \*and then and there made a great riot, noise, tumult, and affray there, for a long space of time, to wit, for eight hours, and during that time, unlawfully, wilfully, maliciously, and with force, burned, demolished, and destroyed the said gaol or prison, and rescued divers, to wit, one hundred prisoners who were then and there lawfully confined in the said gaol or prison, and suffered them to go at large; whereof the said Charles Pinney, so being such Mayor and Justice as aforesaid, then and there, to wit, on the day and year last aforesaid, in the city and county aforesaid also had notice." The information then went on to state, in nearly similar terms, the breaking open of the gaol, the burning and demolishing of "a certain messuage and dwelling house, in the city and county aforesaid, of and belonging to the Lord Bishop of Bristol;" and the burning and demolishing of "divers, to wit, one hundred messuages and one hundred dwelling-houses of and belonging respectively to divers of his Majesty's subjects, situate in a certain place in the said city and county, to wit, in a certain place called Queen's Square." It then stated that divers goods were stolen; and that the inhabitants of the said city and county were greatly terrified and alarmed.

"Nevertheless, the said Attorney-General, in fact, saith, that the said Charles Pinney, so then and there being such Mayor and Justice of the Peace, as aforesaid, and well knowing of the said riots, tumults, and affrays, and of the said burning, demolishing, and destroying of the said gaols and messuages, and of all other the premises aforesaid; but disregarding, and wilfully and wrongfully neglecting the duties of his said office as such Justice of the Peace as aforesaid, did not then and there suppress or put an end to, or endeavour to suppress and put an end to, or use due means or exertions to suppress and put an end to, the said riots, tumults, and affrays, and to the said burning, demolishing, and destroying of the said gaols and messuages, and the violences, breaches of the peace, and outrages as aforesaid, as he could and might, and ought to \*have done, or endeavoured to execute the powers and authorities by the laws of this realm vested in him the said Charles Pinney, as such Justice of the Peace as aforesaid, in that behalf; but the said Charles Pinney, then and there, to wit, on the day and year first aforesaid, and from thence continually during all the time aforesaid, in the city and county aforesaid, wilfully and unlawfully neglected his duty in that behalf, and omitted to suppress and put an end to, and to endeavour to suppress and put an end to the said riots, tumults, and affrays, and the said burning of the said gaols and messuages, and the said violences, breaches of the peace, and outrages as aforesaid, and to provide and organize sufficient force for suppressing the same, although he was, on the day and year first aforesaid, and frequently afterwards during the time aforesaid, requested so to do, to wit, in the city and county aforesaid; but, the said Charles Pinney, during all the time aforesaid, wholly refused and neglected so to do, or give such orders and directions as were necessary for restoring peace and tranquillity in the said city and county, and as he, the said Charles Pinney was of duty bound to have given; and did withdraw and conceal himself, not only from the said persons so unlawfully, riotously, and tumultuously assembled, as aforesaid, but also from all such of his Majesty's loyal and peaceable subjects, then and there being in the said city and county, as stood in need of his, the said Charles Pinney's orders and assistance, and did wilfully and unlawfully neglect and omit to execute or endeavour to execute any of those powers or authorities by the laws of this realm vested in him the said Charles Pinney, as Justice of the Peace as aforesaid in that behalf, and did then and there wilfully and unlawfully permit and suffer the said persons, so unlawfully, riotously, and tumultuously assembled as aforesaid, to be and continue so unlawfully, riotously, and tumultuously assembled in the commission of the aforesaid violences, \*burnings, and destructions of property, breaches of the peace, and outrages, for a long space of time, to wit, during all the time aforesaid, to wit, in the city and county aforesaid, contrary to the duty of his said office as Justice of the Peace as aforesaid, in contempt of our said Lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our said Lord the King, his crown and dignity." The information contained two other counts, stating the same charges more generally: and in these counts the defendant was not stated to be Mayor of Bristol, but only to be "one of the Justices of our said Lord the King assigned to keep the peace in and for the said city of Bristol and county of the some city; and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said city and county." Plea-Not guilty.

The trial occupied seven days. During the first three days Lord Tenterden was present, but evidently suffering much from severe illness; after that period his Lordship was unable to be present; and the remainder of the trial was before Mr. Justice Littledale, Mr. Justice J. Parke, and Mr. Justice Taunton.

The Jury was a Special Jury of the county of Berks.(a)

<sup>(</sup>a) We have not given any statement of the case, as those facts, on which the points of law arise, are stated by the learned Judge in his summing up.

Mr. Justice LITTLEDALE (in summing up). This is an information, filed by his Majesty's Attorney-General, which charges the defendant, as Mayor of Bristol, with neglect of duty; and there can be no doubt, that, if a public officer be guilty of neglect of his duty, he is liable to be prosecuted by information or indictment; but I do not know of any instance of a prosecution similar to the \*259] present except that of Mr. Kennett, (b) who was charged with not \*reading the riot act, in the city of London, at the time of the riots of 1780,

(b) See the case of Rex v. Kennet, post, p. 282. By the statute 13 Hen. 4, c. 7, it was enacted, "That if any riot, assembly, or rout of people against the law be made in parties of the realm, the justices of peace, three, or two of them at the least, and the sheriff or under-sheriff of the county where such riot, assembly, or rout shall be made hereafter, shall come with the power of the county, if need be, to arrest them, and shall arrest them." And by the stat. 2 Hen. 5, st. 1, c. 8, it is, after reciting the before-mentioned statute, enacted, "That the King's liege people being sufficient to travel in the county where such routs, assemblies, or riots be, shall be assistant to the justices, commissioners, sheriff, or under-sheriff of the same county, when they shall be reasonably warned to ride with the said justices, commissioners, and sheriff, or under-sheriff, in aid to resist such riots, routs, and assemblies, upon pain of imprisonment and to make fine and ransom to the King. And that the bailiffs of franchises shall cause to be empanelled sufficient persons as before, upon pain to lose to the King 40l., in case that such sufficient persons may be found within the same franchises; and that like ordinances and pains shall hold place and take effect in cities, boroughs, and other places and towns enfranchised, which have justices of the peace within the cities, boroughs and other places aforesaid; and that this statute shall begin to hold place presently after the proclamation thereof made." This statute is thus set forth in the Statutes at Large; but on the Parliament roll it is in French, and this enactment commences as follows:-"Et qe les lieges du Roy esteantz sufficeantz pur travailler en le countee ou tielx routes, assembles ou riotes sont, soient assistentz as justices, commissioners, viscont, et soutz-viscont de mesme le countee, qant ils serront resonablement garniz pur chivacher ove les ditz justices, commissioners, et viscont, ou soutz-viscont, en side de resistence de tielx riotes, routes, et assemblez, sur peine demprisonement et faire fyn et ranceon a Roy," &c. It seems that the word travailler is mistranslated, and that this word travailler means "to work," and not "to travel."

In the Case of Arms, Popham's Rep. 121, "upon an assembly of all the Justices and Barons, in Sergeants' Inn, this term, on Monday the 15th day of April, upon this question, moved by Anderson, Chief Justice of the Common Bench, whether men may arm themselves to suppress riots, rebellions, or to resist enemies, and to endeavour themselves to suppress or resist such disturbers of the peace or quiet of the realm; and upon good deliberation, it was resolved by them all, that every justice of the peace, sheriff, or other minister or other subject of the King, where such accident happened, may do it. And to fortify this their resolution, they perused the statute 2 E. 3, c. 3, which enacts, 'That none be so hardy as to come with force, or bring force to any place in affray of the peace; nor to go or ride armed night nor day, unless he be a servant of the King in his presence, and the ministers of the King in the execution of his precepts or of their office, and those who are in their company assisting them, or upon cry made for weapons to keep the peace, and this in such places where accidents happen, upon the penalty in the same statute contained; whereby it appeareth, that upon cry made for weapons to keep the peace, every man, where such accidents happen for breaking the peace, may by the law arm himself against such evil-doers to keep the peace; but they take it to be the more discreet way for every one in such a case to attend and be assistant to the Justices, Sheriffs, or other ministers of the King, in the doing of it."

This case is cited with approbation by the Judges. Kel. 76.

In 1 Curw. Hawk. 28, p. 517, it is said, "It seems clear, that every sheriff, undersheriff, and also every other peace-officer, as constables, &c., may and ought to do all that in them lies towards the suppressing of a riot, and may command all other persons whatsoever to assist them therein. Also it is certain that any private person may lawfully endeavour to appease all such disturbances by staying those whom he shall see engaged therein from executing their purpose, and also by stopping others whom he shall see coming to join them; for if private persons may do thus much, as it is most certain that they may, towards the suppressing of a common affray, surely a fortiori they may do it towards the suppressing of a riot. Also it hath been holden, that private persons may arm themselves in order to suppress a riot; from whence it seems clearly to follow, that they may also make use of arms in the suppressing of it, if there be a necessity for their so doing. However, it seems to be extremely hazardous for private persons to proceed to those extremities; and it seems no way safe for them to go so far in common cases, lest,

and also with the release of some prisoners. \*However, the case of Mr. Kennett differed from the present, as in his case there were two specific [\*260]

under the pretence of keeping the peace, they cause a more enormous breach of it; and therefore such violent methods seem only proper against such riots as savour of rebellion, for the suppressing whereof no remedies can be too sharp or severe." It is also said, Id. p. 513:—"But in some cases, wherein the law authorizes force, it is not only lawful, but also commendable, to make use of it: as for a sheriff or constable, or perhaps even for a private person, to assemble a competent number of people in order with force to suppress rebels or enemies, or rioters, and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to fear a violent resistance, to raise the posse, in order to remove a force in making an entry into or detaining of lands."

For the provisions of the Riot Act, 1 G. 1, st. 2, c. 5, s. 1 & 2, see ante, Vol. 4, p. 442. Lord Loughborough, in his charge to the Grand Jury, on the Special Commission, for the trial of the rioters, in 1780, 21 State Trials, 485, said, "I take this public opportunity of mentioning a fatal mistake, into which many persons have fallen. It has been imagined, that because the law allows an hour for the dispersion of a mob to whom the riot act has been read by the magistrate, the better to support the civil authority, that, during that time, the civil power and the magistracy are disarmed, and the King's subjects, whose duty it is at all times to suppress riots, are to remain quiet and passive. No such meaning was within view of the legislature, nor does the operation of the act warrant any such effect. The civil magistrates are left in possession of those powers which the law had given them before. If the mob, collectively, or a part of it, or any individual, within or before the expiration of that hour, attempts, or begins to perpetrate an outrage amounting to felony, to pull down a house, or by any other act to violate the law, it is the duty of all present, of whatever description they may be, to endeavour to stop the mischief, and to apprehend the offender. I mention this rather for general information, than for the particular instruction of the gentlemen whom I have now the honour of addressing; because the Riot Act, I believe, will not come immediately under your consideration. Fame has not reported that it was any where, or at any time, read, during the late disturbances.

In the case of Handcock v. Baker, 2 B. & P. 234, Heath, J., said "It is a matter of the last consequence, that it should be know upon what occasions bystanders may interfere to prevent felony. In the riots which took place in the year 1780, this matter was much misunderstood, and a general persuasion prevailed, that no indifferent person could interpose without the authority of a magistrate; in consequence of which much mischief was done, which might otherwise have been prevented." And in the same case, Chambre, J. said, "There is a great difference between the right of a private person in cases of intended felony and of breach of the peace. It is lawful for a private person to do any thing to prevent the perpetration of a felony."

In the case of Clifford v. Brandon, 2 Camp. 370, Mansfield, C. J., said, "If any person encourages or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter, he is liable to be arrested for a breach of the peace. In this case all are principals."

Lord C. J. Tindal, in his charge to the Bristol Grand Jury, on the Special Commission. on the 2d of January, 1832, said, "It has been well said, that the use of the law consists, first, in preserving men's persons from death and violence—next, in securing to them the free enjoyment of their property; and although every single act of violence, and each individual breach of the law, tends to counteract and destroy this its primary use and object, yet do general risings and tumultuous meetings of the people in a more especial and particular manner produce this effect, not only removing all security, both from the persons and property of men, but for the time putting down the law itself, and daring to usurp its place. The law of England hath, accordingly, in proportion to the danger which it attaches to riotous and disorderly meetings of the people, made ample provision for preventing such offences, and for the prompt and effectual suppression of them whenever they arise; and I think it may not be unsuitable to the present occasion, if I proceed to call your attention, with some degree of detail, to the various provisions of the law for carrying that purpose into effect. In the first place, by the common law, every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up, from joining the rest; and not only has he the authority, but it is his bounden duty as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace. Such was the opinion of all the Judges of England in the time of Queen Elizabeth, in a case called 'The case of arms,' (Popham's Rep. 121), although the Judges add,

\*261\*262] charges; whereas here a charge of general neglect of duty, \*from Saturday, the 29th of October, till Monday the 31st of \*that

'that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King in doing this.' It would undoubtedly be more advisable so to do; for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was either committed or could not be prevented without recourse to arms; and at all events, the assistance given by men who act in subordination and concert with the civil magistrate, will be more effectual to attain the object proposed than any efforts, however well-intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law. And whilst I am stating the obligation imposed by the law on every subject of the realm, I wish to observe, that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force. But, where the danger is pressing and immediate; where a felony has actually been committed, or cannot otherwise be prevented; and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities; the military subjects of the king, like his civil subjects, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the peo-Still further, by the common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace officer is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the king to assist them in that undertaking. By an early statute, which is still in force (the 13 Hen. 4, c. 7), any two justices, together with the sheriff or under-sheriff of the county, shall come with the power of the county, if need be, to arrest any rioters, and shall arrest them; and they have power to record that which they see done in their presence against the law; by which record the offenders shall be convicted, and may afterwards be brought to punishment. And here, I most distinctly observe, that it is not left to the choice or will of the subject, as some have erroneously supposed, to attend or not to the call of the magistrate, as they think proper, but every man is bound, when called upon, under pain of fine and imprisonment, to yield a ready and implicit obedience to the call of the magistrate, and to do his utmost in assisting him to suppress any tumultuous assembly; for in the succeeding reign another statute was passed, which enacts, 'That the king's liege people being sufficient to travel, shall be assistant to the justices, sheriffs, and other officers upon reasonable warning, to ride with them in aid to resist such riots, routs, and assemblies, on pain of imprisonment and to make fine and ransom to the king,' In the explanation of which statute, Dalton, an early writer of considerable authority, declares, 'that the justices and sheriff may command and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants and apprentices, of all other persons being above the age of fifteen years, and able to travel.' In later times the course has been for the magistrate, on occasions of actual riot and confusion, to call in the aid of such persons as he thought necessary, and to swear them as special constables; and in order to prevent any doubt, if doubt could exist, as to his power to command their assistance by way of precaution, the statute 1 Geo. 4, c. 37, and since that has been repealed by the still more recent act of 1 & 2 Will. 4, c. 41, the statute last referred to has invested the magistrate with that power, in direct and express terms, when tumult, riot, or felony was only likely to take place, or might reasonably be apprehended. Again, that this call of the magistrate is compulsory, and not left to the choice of the party to obey or not, appears from the express enactment of the latter act, that, if he disobers, unless legally exempted, he is liable to the penalties and punishments therein specified. But the most important provision of the law for the suppression of riots is to be found in the statute 1 Geo. 1, st. 2, c. 5, by which it is enacted, 'That, if any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace, and being required or commanded by any one or more justice

month; and this charge being more vague, it requires therefore more serious It appears that on \*Saturday the 29th of October, Sir Charles Wetherell was to hold a gaol-delivery, at Bristol, he being the

or justices, or by the sheriff, &c., by proclamation to be made in the king's name, and in the form stated in the act, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more, notwithstanding such proclamation, unlawfully, riotously and tumultously remain or continue together for the space of one hour after such command or request made by proclamation, then such continuing together shall be adjudged felony, and the offenders shall suffer death as felons.' Such are the different provisions of the law of England for the putting down of tumultuary meetings; and it is not too much to affirm, that, if the means provided by the law are promptly and judiciously enforced by the magistrate, and honestly seconded by the co-operation of his fellow-subjects, very few and rare would be the instances in which tumultuous assemblages of the people would be able to hold defiance to the laws Let me impress on the attention of all those who, from idleness, curiosity, or mere thoughtlessness, suffer themselves to form part of a riotous and disorderly meeting, that they subject themselves unconsciously to the danger of punishment for crimes which they never contemplated, for, where many are collected together in the prosecution of an illegal object, it is often impossible to discriminate between the active and unoffending part of the mob. It requires evidence on the part of the accused, which they may not be able to produce in order to defend themselves against the charge of participation in the guilt of others. The only safe course for the peaceable and well-disposed on all occasions of popular tumult, is, this, to lend their ready aid to assist the magistrates in suppressing it, or at all events forwith to separate themselves from the rioters.

"One class of cases likely to come before you, will be founded upon the statute 7 & 8 Geo. 4, c. 30, s. 8, by which it is enacted, 'that if any persons riotously and tumultously assembled together, to the disturbance of the public peace, shall unlawfully, and with force, demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any house, stable, coach-house, out-house, warehouse, office, shop, mill, &c., every such offender is guilty of felony, and, being convicted thereof, shall suffer death as a felon In cases of this description, you will consider whether the individual charged was one of the persons constituting a riotous assemblage, which was effecting the destruction of the building. If he formed part of such riotous assembly at the time the act of demolition commenced, or if he wilfully joined such riotous assembly, so as to co-operate with them whilst the act of demolition was going on, and before it was completed, in either case he comes within the description of the offence, and within the penalties imposed by the act. although he may not have been a person who actually assisted with his own hand in the demolition of the building. But the more numerous class of cases seems to be that which is founded upon the second section of the same statute, by which it is enacted that if any person shall unlawfully and maliciously set fire to any house or other building mentioned above, whether the same shall be in the possession of the offender, or in that of any other person, with intent thereby to injure or defraud any person, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon. In this offence you will perceive it is no constituent part of the descriptions in the statute, that the party charged should form one of a tumultuous or riotous assemblage for the disturbance of the public peace: it is an offence that may be committed by a single individual.—You will, therefore, in these cases, inquire, first, whether the party set fire to the building himself: in such case, no doubt of his guilt can exist: and if the proof falls short of this. you will then consider whether he was jointly engaged in the prosecution of the same object with those who committed the offence. If, by his word or gesture, he incited others to commit the felony; or if he was so near the spot at the time that he by his presence, wilfully aided and assisted them in the perpetration of the crime; in either of these cases, the felony is complete without any actual manual share in its commission and where the statute directs that, to complete the offence, it must have been done with intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law, when a man wilfully does that which is illegal, and which, in its necessary consequence, must injure his neighbour; and it is unnecessary to observe, that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him; nor will it be necessary to prove that the house which forms the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence, if he is shewn to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment, on the ground that the mischief which he committed was wider in its consequences than he originally intended.

\*264\*265] recorder \*of that city; and from the opinions of Sir Charles expressed in Parliament on the subject of Parliamentary Reform, it \*was feared that there would be a riot, and a deputation was sent to London

"Another class of offenders will be, that of persons who stand charged with acts of plunder and theft, and these may come before you, either aggravated by the circumstance of violence or threats to the person of the owner, or with the circumstance of breaking into his dwelling house, or stealing the property thereout, when the house was already broken open; in both which cases, the offence is considered of a more aggravated nature, and the measure of punishment is consequently more severe; or the facts may assume the shape of a simple larceny of the goods of another; in all which cases, as in the case of arson, before adverted to, all who are present, aiding, assenting, and co-operating in the fact, are in point of law principal offenders. The only other observation I would suggest upon the last-mentioned offence is this, that, where property which has been stolen is found in the possession of any person recently after the theft committed, unless circumstances appear to rebut such presumption, he may be presumed guilty of the theft, until he can explain or prove his innocent possession of the property.

"There is, however, one case which stands in a different situation from the rest, and to which it may be proper that I should call your particular attention, I mean the case of James Cossley Lewis, who is at present at large upon his recognizance, but who stands charged, upon an inquest before the coroner, with the offence of manslaughter, in shooting a boy of the name of Morris. It appears from the depositions before the coroner, that Lewis was acting in aid of the civil authorities, in assisting to clear the streets, after proclamation had been regularly made, requiring the rioters to disperse themselves, and after they had continued together for more than an hour from the time of making proclamation. It appears, also, by the testimony of the witnesses, that the pistol was not aimed at the boy, who was unfortunately struck by the ball. The nature, however, of the offence committed by Lewis will not depend so much upon that fact, as upon the circumstances under which the pistol was originally discharged. If the firing of the pistol by Lewis was a rash act, uncalled for by the occasion, or if it was discharged negligently and carelessly, the offence would amount to manslaughter: but if it was discharged in the fair and honest execution of his duty, in endeavouring to disperse the mob, by reason of their resisting; the act of the firing of the pistol was then an act justified by the occasion, under the riot act before referred to; and the killing of the boy would then amount to accidental death only, and not to the offence of manslaughter."

By the statute 1 & 2 Will 4, c. 41, s. 1, (which wholly repeals the statute 1 Geo. 4, c.

37) it is enacted, "That, in all cases where it shall be made to appear to any two or more justices of the peace of any county, riding, or division having a separate commission of the peace, or to any two or more justices of the peace of any liberty, franchise, city, or town in England or Wales, upon the oath of any credible witness, that any tumult, riot, or felony has taken place or may be reasonably apprehended in any parish, township, or place situate within the division or limits for which the said respective justices usually act, and such justices shall be of opinion that the ordinary officers appointed for preserving the peace are not sufficient for the preservation of the peace, and for the protec-tion of the inhabitants and the security of the property in any such parish, township, or place as aforesaid, then, and in every such case, such justices, or any two or more justices acting for the same division or limits, are hereby authorized to nominate and appoint, by precept in writing under their hands, so many as they shall think fit of the householders or other persons (not legally exempt from serving the office of constable) residing in such parish, township, or place as aforesaid, or in the neighbourhood thereof, to act as special constables, for such time and in such manner as to the said justices respectively shall seem fit and necessary for the preservation of the public peace, and for the protection of the inhabitants, and the security of the property in such parish, township, or place; and

oath; that is to say—
'I, A. B., do swear, That I will well and truly serve our Sovereign Lord the King in the office of special constable for the parish [or township] of , without favour or affection, malice or ill-will; and that I will to the best of my power cause the peace to be kept and preserved, and prevent all offences against the persons and properties of his Majesty's subjects; and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law. 'So help me God.'

the justices of the peace who shall appoint any special constables by virtue of this act, or any one of them, or any other justice of the peace acting for the same division or limits, are and is hereby authorized to administer to every person so appointed the following

Provided always, that, whenever it shall be deemed necessary to nominate and appoint such special constables as aforesaid, notice of such nomination and appointment, and of the circumstances which have rendered such nomination and appointment expedient, shall

to have an interview with the Secretary of State on the subject. ever, \*it was determined, that the gaol-delivery should be held; and [\*266 on the 29th of \*October, Sir Charles Wetherell came to Bristol. It had been deemed expedient to have three hundred special \*constables appointed which was the same of the bles appointed, which was thought a sufficient force. They were, indeed, not all special constables, as some \*persons refused to be sworn, and persons refused to be sworn, and refus hall, Bristol, the Court was opened, and the charter read; and, after some hisses and groans, Sir Charles Wetherell proceeded to the Mansion-house. There the rioting continued and stones were thrown. The Riot Act was read, and the mob had increased so much that Sir Charles was obliged to leave the town. The mayor again read the Riot Act, and addressed the people; and the military, the constables, and the mob, appeared to have alternately prevailed, and in the course of the evening a boy was unfortunately killed; however, by twelve or one o'clock on that night, all appears to have been quiet. Many persons went home; but the mayor remained in the Mansion-house, and did not go to bed. At about six or seven o'clock on Sunday morning, the mob assembled in greater force than ever, and Major Mackworth told the mayor, that, as a military man, he considered that he (the mayor) was bound to leave the Mansion-house; and he did so. The Bridewell was next attacked by the mob, and the prisoners released; and after that, the mob destroyed the governor's house at the gad, and set free the prisoners, whom Sir Charles was to have tried. The mob then destroyed the bishop's palace, and the prison at Lawford's-gate; and, in the evening, they burnt the Mansion-house, the Excise-office, the Custom-house, and two sides of Queen's-square; when they were stopped by the military, and no further mischief was done, and the mob was finally put down. A great number of lives were lost: many who were plundering the houses were burnt to death, by the houses being in flames; and it therefore becomes material to consider whether all this was occasioned by the neglect of the civil or military authorities, or either of them, or whether it was occasioned by the authorities not having sufficient \*force to put down the riot; and you are particularly to consider whether there was any default in the defendant. The information, in the first count, alleges, that, on the 29th of October, there was a riot in the city of Bristol, and a great destruction of property; that, on the next day, the rioters attacked and destroyed the Bridewell, and attacked the gaol, and set the prisoners at liberty; that they demolished the bishop's palace, and broke open a number of dwelling-houses, and burnt and demolished those houses; and that the defendant being mayor, and not regarding the duties of his office, but neglecting the same, did not use due means to put an end to the riot; and that he did not organize a sufficient force, nor give such orders and directions as he ought, and was bound to do; and that he absented and concealed himself, and permitted the rioters to continue assembled for a long time.

be forthwith transmitted by the justices making such nomination and appointment to one of his Majesty's principal secretaries of state, and to the lieutenant of the county."

This statute also contains provisions that the secretary of state, either on the representation of two magistrates, or of his own motion, may order that persons by law exempt shall become special constables; in the former case for two months, and in the latter for three months: and by other sections of this statute, justices may fine those who refuse to be sworn in, or to serve, or who disobey orders; and may make regulations for the special constables, and dismiss them for misconduct. The justices may also order them to be paid out of the county rate; and persons who resist the special constables, may be either fined on a summary conviction, or prosecuted by indictment or information; but special constables appointed under this act are not thereby to gain any settlement, or be exempt from the militia. This statute also contains a form of conviction, and various other details.

In addition to the authorities here set forth and referred to, an opinion given by Lord Ellenborough, when at the bar, on the subject of suppressing riots, will be found in Burn's Justice, tit. Riot.

The other counts of the information are rather more general. Now a person, whether a magistrate or a peace-officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on an information for neglect; he is, therefore, bound to hit the precise line of his duty; and how difficult it is to hit that precise line, will be matter for your consideration, but that, difficult as it may be, he is bound to do. Whether a man has sought a public situation, as is often the case of mayors and magistrates, or whether, as a peace-officer, he has been compelled to take the office that he holds, the same rule applies; and if persons were not compelled to act according to law, there would be an end of society; but still, you ought to be satisfied, that the defendant has been clearly guilty of neglect, before you return a verdict against him; and here, I ought to remark, that mere good feeling, or upright intentions, are not sufficient to discharge a man, if he has not done his duty. The question here is, whether the \*271] defendant did all he knew was in his power, and which \*would be expected from a man of ordinary prudence, firmness, and activity, to suppress these riots. Did he use those means, which the law requires to assemble a sufficient force? Did he make all the use of those means which an honest man ought to do by his own personal exertions? According to the testimony of Mr. Serjeant Ludlow, the defendant acted under his advice; he therefore had the best legal advice that a public officer could be reasonably expected to have; and Major Mackworth who is a man of high military rank, and of great spirit, says, that the defendant was, in a military point of view, willing to act on his advice; and if he acted under such advice, it forms matter for your serious consideration in the course of the case; not that, if the defendant acted contrary to law, it will be sufficient to shelter him, that he acted under the advice of others; still less will it guard him as to matters not within the scope of the advice; however, you will consider whether the advice so given was not the correct advice under all the circumstances. With respect to the not providing a sufficient force, there is no doubt that very great calamities afterwards occurred; but I think you ought not to consider that: for, although, if it could have been foreseen that the military would have been withdrawn and such destruction would have ensued, it was possible that a very large civil force might have been collected by over-exertion on the part of the magistrates; yet you ought to judge only of what appeared at the time, because, as the magistrates could not forsee all this, they might have collected an immense force, and no riot might have taken place; and then the magistrates would only have been laughed at by every body.

In this information, various acts of neglect are imputed to the defendantthe not assembling a sufficient force—not protecting the gaol—not protecting the palace, &c. Now if four of you think that one particular act of neglect is proved, and eight of you think that it is not, and those eight should think that another act of neglect is proved, \*which the first four think is not proved; though you should thus all think him guilty of neglect, that is not sufficient, and you ought not to find a verdict against the defendant, unless you all think him guilty of the same act of neglect. The first neglect that is imputed to the defendant is, that he did not assemble a sufficient force, and that he did not head the constables. On this part of the case, it appears that a meeting was held previously to the arrival of Sir Charles Wetherell, and such a number of special constables as was then considered sufficient, was sworn in. You will consider whether the Mayor was to blame so far; but then it is said that he did not go out and head these constables on the Saturday night. Now it is proved that he did go out and read the Riot Act, and that he was actually struck, and that his life was in danger, and he was always near the spot; and it appears to me that a mayor is not bound to go out to head the constables, which is usually the province of the chief constable, who would be likely to do that duty

Vol. XXIV.—86

much better than a mayor could be expected to do it; and for any thing that had required the presence of the defendant, it was very easy to have gone to him at the Mansion-house, where he was during the whole of the riots of that evening, the riot at that time being in Queen's-square, in which the Mansionhouse itself is situated. It is also alleged that the mayor did not "organize" the constables. The word "organize" is, I believe, a new term in legal proceedings; and I do not think that it ever before found its way into any indictment or information; nor do I believe that it was ever found before in any kind of pleading; I suppose that it means that the defendant should have marshalled and arrayed the constables: but it belonged much more to the chief constables to arrange the men of their wards than for the mayor to do it. However, to all this earlier part of the case there is a general answer to be given, which is, that all was quiet by twelve o'clock on the night of Saturday; and Mr. Hare, the under-sheriff, tells us that the mob, up \*to that time, was not greater than he had seen before at elections. The next thing imputed against the defendant is, that there was a want of energy in his conduct in not ordering the military to fire upon the rioters. Upon this part of the case, it appears that he was intending to do so, but was dissuaded by Colonel Brereton, and also by Major Mackworth; and if the defendant had given an order to fire upon the rioters, and death had ensued, he would, upon an indictment for murder or manslaughter, have had great difficulty to defend himself, if it had appeared that he had given the order to fire against the advice of two distinguished military officers. I cannot say that he could not have made a defence; but a strong prima facie case would have been made against him. However, the principal charge up to this time is, that the defendant did not assemble a sufficient force to suppress the riot; and on this charge the statutes I Geo. 4, c. 37, and 1 & 2 Will. 4, c. 41, have been referred to on the part of the prosecu-There is, however, in this information no specific charge founded on either of those statutes; and even if there had been, it must have been shewn that regular steps had been taken before the defendant could have acted upon either of those statutes. There is no proof of any deposition upon oath having been made as required by those acts of Parliament; and the majority of the Court are of opinion, that there is, in this case, no question for you to consider on either of those statutes; and that you must, therefore, deal with this case as if they had never been passed; and the great question for you to consider is, whether the defendant has done those things which the general rules of law require of magistrates: which are, that they should keep the peace and restrain rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them; and the king's subjects are bound to do so. They are to call on the king's subjects, who are bound to assist them upon reasonable warning. One great question is—Has this been done by the defendant in \*this case? If it has, he has done what is required [\*274] of him by law. It is said, on the part of the prosecution, that there was no plan proposed by the mayor or magistrates; that no magistrates were present to receive those who came to assist them; and that, at the demolition of the prisons, the palace, &c. there was no sufficient force to repel the rioters. doubt that is a sufficient prima facie case to call on the defendant for an answer. Now the answer of the defendant is this, that on the Sunday morning he sent to collect a civil force, and called at several houses, and spoke to persons in the streets; and that it being Sunday, he expected that persons would be at their places of worship, and he could have their attendance sooner than if he had had to send to them at their houses; and he therefore sent to the churchwardens of the parishes and had notices posted and circulated about the town, stating that he wished to assemble a constabulary force, and that the inhabitants of the several parishes should form themselves into bodies and attend him at the Guildhall. This was what the defendant, as mayor, was bound to do; and it appears that these notices were read in the different places of worship; and if sufficient

persons had attended in pursuance of these notices, there is great reason to believe that many of the unfortunate circumstances which afterwards occurred would not have taken place. By law, all the king's subjects are to come together upon reasonable warning from the magistrate, and to come to his aid. If this was a reasonable warning, that is all that was required of the defendant. Another question will be, whether this warning was sufficiently early? As the riot was at an end on the Saturday night, it was hardly necessary to send any warning during the night-time, and if the defendant had not waited for the assembling of the people at divine worship, he must have sent out a vast number of messengers, who must have delivered written notices, because, if verbal messages only had been left for them, the people might, and probably would, have affected not \*to understand the meaning of the notice. You will, therefore, consider whether the defendant did not act in a proper mode under all the circumstances of the case; and if the defendant did all that the law required of him, he is not liable to be found guilty upon this information. It further appears, that, when these notices had been sent out, many persons would not attend; and that, from one cause or another, not more than one hundred or one hundred and fifty did in fact attend. Now, the population of Bristol being about one hundred thousand, at least twenty thousand might have been fairly expected to attend upon these notices; and even of those who did come some would not act without the military, and others would not act without fire-arms being given to them; and although, in point of law, the defendant might have given fire-arms to them, still it would have been the height of imprudence to have given firearms indiscriminately to persons who might not know their use, and who might be under no control, and who, not being used to act together, might have been cut off from the rest of the force, and the arms have by those means got into the hands of the rioters; indeed, Major Mackworth states that it is considered imprudent to put arms into the hands of young troops. In point of law, the defendant would have been justified in giving those persons arms, but it would have been very imprudent for him to have done so. If the defendant did all that he could to assemble a force, it was no fault of his that they would not act; and it appears, on the evidence on both sides, that there was no great disposition to attend to the requisitions of the defendant. It has been said, that the defendant ought to have called out the Chelsea pensioners; but, with regard to that, I apprehend that the defendant was not bound to call out the Chelsea pensioners any more than any other of his Majesty's subjects; and you are to consider, not whether a very extraordinary exertion might not have procured more force, \*but whether the defendant has been guilty of a neglect of that duty which the law has imposed upon him. However, it appears that only about twenty Chelsea pensioners attended, which was but a small number. With regard to the defendant's not making the best use of such force as did come, it appears that there was an indisposition to assist the defendant, because some had a dislike to Sir Charles Wetherell, and others a dislike to the corporation; and at the Bishop's palace, on the Saturday night, we find that of the special constables who had attended, many went away and did not do what they had undertaken; and on the Monday morning we also find that several of the persons who came and offered to become special constables had been seen in the riot the night before; and you will have to consider whether there was any disposition on the part of the people to assist the defendant as mayor. It appears, that by the Monday a much greater force was organized. The services of two hundred men had been offered by a Catholic priest; but that was not till the Monday; and . by that time the under-sheriff had organized two thousand seven hundred, or two thousand eight hundred men, and more military had arrived in the city, and a considerable change of feeling had taken place; and it is reasonable to suppose that by that time people felt that, as the burnings continued, no one could tell whose property would be destroyed next. It appears, that, so early as the Saturday evening, something was said about the calling out of the posse comi-

tatus, but that that could not be effected that night. Now, the calling out of the posse comitatus may be by a justice or by the sheriff; and the calling out of the posse comitatus is only the calling out of the people to assist the magistracy; and what was done by the mayor on the Sunday morning was the same in effect, only that there was not the formality of summonses. It has been objected, that the defendant did not keep a force of ten or twelve resolute men to act as occasion \*might require: I do not think that that is any part of the duty of a justice of the peace; his duty is to quell riots, but not to keep men to act as occasion may require: besides, the force that the defendant had under his control seems to have been too small to admit of a corps de reserve of this kind being taken out of it. Another charge is, that the defendant did not protect the Bridewell; and it is said that a force of twenty resolute men might have protected it: but it seems that the mayor had no such force; indeed, these resolute men must have been men used to such duty, men used to give and receive hard blows, and to act at all hazards; now we find that the mayor's force was not of this description, as a part of those who had been with him went away instead of acting. I now come to the mayor's going to the White Lion on the Sunday night. It appears that he had been up all the Saturday night, and that the White Lion is in the same street as the Guildhall; and as he could be easily found when sent for, it was no more than if he had taken some repose in another room; and you will say whether he was not justified in taking even more repose than it appears that he did, more especially as he had no more authority than any other magistrate of the city of Bristol. With respect to the protection of the gaol, you will consider whether the defendant had any sufficient force for that purpose. It has been said that he might have cut it off from the city by destroying a draw-bridge. But that is rather the act of a military man; and it could hardly be expected of a civil magistrate (who probably had never heard of cutting off a place in his life,) that he should be competent upon a matter of military tactics or engineering. Another charge is, that the defendant did not protect the bishop's palace; and on this part of the case it appears that the defendant, accompanied by Mr. Serjeant Ludlow, went to it, but had not sufficient force to enable him to save it; and it appears also that the soldiers went away; but why they did so we have no account; and the other force with \*the defendant is proved to have been perfectly inadequate. Another thing alleged against the defendant is, that the Doddington troop of horse arrived in consequence of a requisition from the defendant, and that he was not in such a situation as was necessary to receive them. Now it appears that accommodations had been provided for them, and that they left the city because a person at the door of Fisher's livery stables told them, that there was no accommodation for them there. As to who that person was, we have no account; but probably he was some person who did not wish this troop to act against the rioters. Another charge is, that being required to ride with the 14th Light Dragoons, the defendant would not do so. In my opinion he was not bound to do so. I do not think that a justice of the peace is bound to ride up and charge with the military. The military officer may act without any magistrate, but no prudent military man would do so, because his acting may be attended with the loss of life; but if a magistrate gives him an order to act, that is all that is required. If the law were otherwise, great inconvenience would ensue; for if it were necessary that the magistrate should ride with the troops when they charged, it would be necessary for him to ride with them every time that they did so; and it would be very injudicious in many cases, that a magistrate should charge with the military; more especially, if, like the defendant, he was the mayor of a town, and many persons from various quarters were likely to come to him, from time to time, for orders. Some evidence has been given, that the defendant has been seen on horseback; and from this you are asked to infer that he could ride: but to ride in a charge of cavalry, it is not enough for a man to be merely able to ride. To ride with the military you must ride as they do; and if a

magistrate were to ride with the military, he would not only be in danger of being soon unhorsed, but he would also be, most probably, singled out by the rioters, and destroyed. Indeed, with respect to riding at the head of the troops, \*even military commanders do not do that on all occasions; they only do so at particular times, and under particular circumstances; and I see no reason why a magistrate should do it. Another ground of complaint against the defendant is, that he did not attend to the fire-arms that were in the town. in the gunsmiths' shops; and it appears that when one gentleman put a question on this subject, he was led to believe, from the answer he received, that no directions had been given respecting them. However, you will have to say, whether it was not prudent to conceal the state of the arms, as, in point of fact, early on the Sunday, the magistrates had caused all the locks to be taken off the fire-arms; and, besides, I am not aware that a magistrate is guilty of criminal neglect, if he does not give orders respecting the arms in the gunsmiths' shops; all that he is bound to do, is to give the people reasonable warning to come out and assist him in quelling the riot, and to make the best use of them when they are assembled. Some question has been made as to the personal conduct of the mayor. It is charged, that he escaped from the Mansion-house over some leads on the Sunday. Now it appears by the testimony of Major Mackworth, that the life of the defendant was in danger; and that, though he was told so, he was unwilling to leave the Mansion-house. Indeed, he seems to have had the same feeling as the captain of a ship at a time of shipwreck, that is, that he will be the last man to leave it: however, Major Mackworth, considering that the life of the defendant was in danger, again urged him to depart, and he left, and was advised to go to Clifton; but he refused to leave the city, and went to the house of Mr. Grainger, where it is proved that several persons knew that he With respect to the personal courage of the defendant, Major Mackworth says, that he never saw a man more cool and collected in his life, and that too at a time when he considered the life of the defendant to be in danger: indeed, the defendant appears to have displayed great personal \*courage. \*280] He was placed in a most unfortunate situation—he had no military force who would act—there was a feeling against the corporation—and no disposition Another charge is, that the defendant did not endeavour to to quell the mob. preserve Queen's-square; however, that seems to have been a very hopeless case, as it would have required a very strong force to have put down the riot that existed there. It was no part of the duty of the defendant to hire men to put down the riots; his duty was only to collect those who would come upon reasonable warning. It appears that, on the arrival of Major Beckwith, of the 14th Light Dragoons, he found the defendant and other magistrates assembled, and that he asked, that some of them would go out with him; but that they refused. He says, "I put the question to each individually, and one said, that it would make him unpopular, and he feared his shipping might be burnt; another said, that he feared that his property would be destroyed; and they all said, they could not ride: and, on some gentleman saying that Alderman Hilhouse could ride, Alderman Hilhouse said, that he had not been on a horse for eighteen years, and that he would hold any one responsible who would venture to say he could ride." Still it was no part of a magistrate's duty to ride with the troops; and it is proved that the defendant signed an order, giving Major Beckwith authority to act, and you will say whether he was, on that occasion, guilty of a neglect of his duty. The charge in this case is very general and indefinite; and you will consider whether the defendant took the steps prescribed by law to collect a force, and whether he used that force as he ought; you will consider whether there was in him a criminal neglect of duty; and if you think that there was, you will find the defendant guilty; but if you think there was not, you will acquit him. I will read over the evidence, if you wish it; and should either of my learned brothers think it necessary to add any thing to my remarks, they have the right of so doing if they think proper.

\*Mr. Justice J. PARKE. I do not think it necessary to add any thing. Mr. Justice TAUNTON. Nor do I.

Verdict—Not Guilty. The jury handed in a written paper in the following terms:—"We unanimously find Charles Pinney, the late Mayor of Bristol, not guilty of the misdemeanors wherewith he is charged. We are of opinion, circumstanced as he was; menaced and opposed by an infuriated and reckless mob; unsupported by any sufficient force, civil or military; deserted in those quarters where he might resonably have expected assistance; that the late Mayor of Bristol acted according to the best of his judgment, with seal and personal courage. (a)

Denman, A. G., Horne, S. G., Wilde and Coleridge, Serjts., Shepherd and

Wightman, for the prosecution.

Sir J. Scarlett, Campbell, Ludlow, Serjt., and Follett, for the defendant.

### [Attorneys-Maule & Bouchier, and Jennings & Bolton.]

The Foreman of the Special Jury (Captain Gardiner) asked the Court to order that the expenses of the jury might be paid, as they had all come from Berkshire, and had been in attendance eight days.

Mr. Justice LITTLEDALE (having conferred with Mr. Justice J. PARK, and Mr. Justice TAUNTON). The Court have no power to make such an order.

\*The Solicitor to the Treasury paid each of the Special Jurors one range

gnines.

There were other similar informations, against other magistrates of Bristol, which were not tried. The Special Jurors, who had been summoned to try the information which stood next in order, applied for their expenses, stating that they had been in attendance during the whole of the trial of Mr. Pinney, expecting to be called. They, however, were not paid any thing.

#### REX v. KENNETT, Esq.(b) March 10.

A magistrate may assemble all the King's subjects to quell a riot, and may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. At the time of a riot, a magistrate may repel force by force, before the reading of the proclamation from the Riot Act.

If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is prima facie evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather than apprehend the rioters, his sole care was for himself, this is also neglect.

This information, which was filed by James Wallace, Esq., his Majesty's Attorney-General, stated, in the first count, that, on the fourth day of June, 20 Geo. 3, "at the parish of Saint Giles without Cripplegate, in the ward of Cripplegate Without, in London aforesaid, divers wicked, seditious, and evil-disposed persons, to the number of fity and more, whose names are at present unknown to the said Attorney-General, with force and arms, unlawfully, riotously, and tumultuously assembled themselves together, to the dis-

(a) We are much indebted to the learned gentlemen engaged in this case, and also to Mr. Dealtry, for the assistance and information they have kindly afforded us.

(b) We believe that there is no report of the trial of Mr. Kennett contained either in the State Trials or in any law-book. But, in Doug. Rep. 436, (n. 4,) it is said—"the mischief the rioters did was from a persuasion, confirmed by example, that the troops did not dare to act. Brackley Kennett, the Lord Mayor of London, was prosecuted by information, and, upon a full trial, convicted of a breach of duty, because he had not ordered the troops to quell the rioters by force."

turbance of the public peace, tranquillity, order, and government of this realm, and to injure and destroy the properties of divers quiet and peaceable subjects of our said Lord the King; and being so assembled, did then and there unlawfully, riotously, tumultuously, and with force, feloniously, and against the form of the statute in such case made \*2831 and provided, begin to demolish and pull down the dwelling-house \*of Mary \*283] and provided, begin to demonstrate and pair there and there, unlawfully, riotously, and tumultuously injure and destroy the household furniture and effects of divers quiet and peaceable subjects of our said Lord the King, whose names are at present unknown to the said Attorney-General, and commit and perpetuate other outrages and enormities; and the said Attorney-General of our said Lord the King, for our said Lord the King, giveth the Court here to understand and be informed, that Brackley Kennett, late of London, aforesaid, Esquire, at the time of the said unlawful, riotous, and tumultuous assembly, to wit, on the said fourth day of June, in the twentieth year aforesaid, and before and afterwards, was Mayor of the City of London aforesaid, and also one of the keepers of the peace and justices of our said Lord the King assigned to keep the peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said City of London, (that is to say, at London aforesaid, in the parish and ward aforesaid,) and that the said Brackley Kennett being such Mayor and Justice of the Peace as aforesaid, well knew of, and was personally present at the time and place of, the said unlawful, riotous, and tumultuous assembly, and whilst the said persons, so unlawfully, riotously, and tumultuously assembled, were committing and perpetrating the aforesaid felony, injuries, outrages, and enormities, to wit, on the said fourth day of June, in the twentieth year aforesaid, at the said parish of Saint Giles without Cripplegate, in the ward aforesaid, in London aforesaid: And it was then and there the duty of the said Brackley Kennett, as such Mayor and Justice of the Peace as aforesaid, for the dispersing of the persons so unlawfully, riotously, and tumultuously assembled as aforesaid, and the suppressing and putting an end to the said unlawful, riotous, and tumultuous assembly, to have then and there made, or caused to be made, proclamation in the manner prescribed and directed in and by an act of Parliament, made in the Parliament of the Lord George the First, late King of Great Britain, &c., at a session thereof holden at Westminster, in the county of Middlesex, in the first year of his reign, intituled 'An Act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters.' And the said Attorney-General of our said Lord the King, for our said Lord the King, giveth the Court here further to understand and be informed, that the said Brackley Kennett, being such Mayor and Justice of the Peace as aforesaid, and well knowing of the said unlawful and tumultuous assembly, and being so present as aforesaid, but disregarding his duty as such Mayor and Justice of the Peace as aforesaid, and the directions contained in the said act of Parliament for the suppressing of tumults and riots, did not, at any time during the said unlawful, riotous, and tumultuous assembly, \*284] make or cause to be \*made proclamation in the manner prescribed and directed by the said act of Parliament, [see ante, vol. 4, p. 442, where the sections of this statute are set forth, but then and there, to wit, on the said fourth day of June, in the twentieth year aforesaid, at the said parish of Saint Giles without Cripplegate, in the ward aforesaid, in London aforesaid, wilfully, obstinately, and contemptuously neglected, refused, and omitted to make or cause to be made proclamation in the manner prescribed and directed by the said act of Parliament, and thereby then and there unlawfully permitted and suffered the said persons so unlawfully, riotously, and tumultuously assembled as aforesaid, to be and continue there unlawfully, riotously, and tumultuously assembled as aforesaid, for divers, to wit, four hours, doing, committing, and perpetrating the said felony, injuries, outrages, and enormities, contrary to the duty of him the said Brackley Kennett, as such Mayor and Justice of the Peace as aforesaid, in contempt of our said Lord the King and his laws," &c.

The second and third counts were nearly similar, except that they omitted such part of the charges in the first count as related to demolishing houses or furniture. The fourth count stated a riot to have occurred in the defendant's presence, and that he, disregarding his duty, did not make the proclamation, but refused, and neglected, and omitted so to do.

The fifth count stated the riot, and that the defendant was a Justice of the Peace and present at it, and then went on—"And that the said Brackley Kennett, being such Justice of the Peace as aforesaid, and disregarding the duty of his said office, did not apprehend or restrain the said persons so unlawfully, riotously, and tumultuously assembled as last aforesaid, or any of them, or endeavour so to do, or use any means or endeavours whatsoever to suppress and put an end to the said unlawful, riotous, and tumultuous assembly, or execute or endeavour to execute any of the powers and authorities by the laws of this realm vested in the said Brackley Kennett as such Justice of the Peace as last aforesaid in that behalf; but the said Brackley Kennett then and there unlawfully, wilfully, and contemptuously refused, neglected, and omitted to apprehend or restrain the said rioters, or any of them, or endeavour so to do, or to use any means or endea-

vours whatsoever to suppress and put an end to the said unlawful, riotous, and tumultuous assembly, or execute, or endeavour to execute, any of the powers and authorities by the laws of this realm vested in him, the said Brackley Kennett, as Justice of the Peace as aforesaid in that behalf; and then and there unlawfully permitted and suffered the said persons, so unlawfully, riotously, and tumultuously assembled, to be and continue there so unlawfully, riotously, and tumultuously assembled, for a long space of time, to wit, for the space of \*four hours, contrary to the duty of his said office of Justice [\*285 of the Peace as aforesaid, in contempt of our said Lord the King and his [\*285 laws," &c.

The sixth count was nearly similar to the fifth count, except that it stated the riot in

rather more general terms. Plea-Not Guilty.

Mr. Attorney-General stated that the powers given by the laws to Magistrates were admirably calculated to check mischiefs of the nature and tendency of those which were perpetrated in the Metropolis in June last; that the Riot Act points out their duty in terms so clear that it is impossible for them to mistake. They are directed to resort to The act (he the place where the tumult arises, and to make proclamation to disperse. said was made on great consideration, and was more universally known than perhaps any act in the statute-book. He stated that the riots in June began on Friday the 3d; on which day the chapels of the Sardinian and Bavarian ambassadors were pulled down by people not many in number, thirteen of whom were apprehended; then they assembled in Moorfields, but were for that time dispersed. The next day, about five o'clock, a few more assembled there, and the Lord Mayor was applied to to suppress the riots. He said he would go there; upon which the person who applied returned, and waited there some time, and the mob destroyed the chapel; he thereupon went again to the Lord Mayor; and Mr. Malo, whose house was threatened, came and desired assistance. The Lord Mayor asked him if he was a Roman Catholic, he said "Yes;" to which the Lord Mayor answered, "I thought so." In the evening he (the defendant) marched with a detachment of 30 Guards to Moorfields, and found the rabble destroying the chapel and burning the furniture. He entreated them to be quiet, they increased the tumult and pelted the soldiers. Mr. Kennett said—"Pray be quiet; don't do more mischief than is necessary." He was desired repeatedly by the officers to read the Riot Act, which he neglected. He said—"Let them proceed;" and on being applied to by Lord Beauchamp to act, he said they were only destroying the houses of people to whom they had conceived a dislike. The defendant was looking on, but took no steps to suppress the outrage. Mr. Attorney-General said it was impossible the Alderman could make any defence, for that his conduct did not admit of apology or extenuation; and he concluded with declaring it was his firm belief, that if the Lord Mayor had exerted himself in the infancy of the business, assisted as he was by 90 soldiers, the dreadful consequences which followed would not have ensued.

Mr. Dermot deposed that he knew the defendant Mr. Alderman Kennett; that he was Lord Mayor last year; that on Sunday, the 4th of June, the witness went to him at the request of some inhabitants of St. Giles's \*parish, who informed him that there [\*286] was a mob gathering in Moorfields, threatening the destruction of a Roman Catholic Change. He want to the Marrier W. Chapel. He went to the Mansion House and saw the Lord Mayor, and he told him he was informed that there was going to be a riot in Moorfields. On his being pressed, the Lord Mayor said, he would come directly. When he returned, he saw a few boys doing mischief, and that there were many people there. He entreated them to be quiet. He staid some time, and the Lord Mayor did not come; he then went back, and found the Aldermen Clark and Peckham at the Mansion House; and Mr. Alderman Clark said, he would venture, with some constables, to drive them away; he withdrew into another room; Mr. Malo and another gentleman came in, and Mr. Kennett came to them. Mr. Malo said he wanted troops to protect his house, for the rioters were going to pull it down. The defendant asked him if he was a Papist? Malo said he was; upon which the Lord Mayor turned round and said—"I thought so." That there was another gentleman there, who said—"My Lord, I am a Protestant;" and the Mayor went into another room. The witness's first application was about five o'clock, the second about six o'clock. On his cross-examination by Mr. Erskine, he said, that he was a native of this country; that when he went the first time to the Mansion House, it was between four and five o'clock. The Lord Mayor had done dinner. The witness told him that the mob had threatened to pull down the Roman Catholic chapel; and he said, he would be there immediately.

Mr. Joseph Gates, one of the City Marshals, deposed that he was in Moorfields, and quelled the rioters assembled on Saturday night; that he received orders from the Lord Mayor to be in the way on Sunday; he went to Moorfields before three o'clock on Sunday in the afternoon; that there were a few boys about, but no appearance of a riot; that he went away satisfied that there would be none; about five o'clock he returned there, and found them throwing out the furniture; that he sent for constables, but few came; that he went to the Mansion House between five and six o'clock; he saw the defendant, who was angry he had been out of the way; the Lord Mayor sent him with a letter to the

officer commanding at the Tower. Lord Speacer Hamilton, the officer, sent word he would send troops as soon as possible. Mr. Kennett and the Aldermen got their servants and flambeaux ready to attend the troops; this was between seven and eight o'clock. The troops were so long in coming, that the Lord Mayor sent again to the Tower; and about nine o'clock the troops came, and they went to Moorfields. The beat of the drum made them desist a little while, and the witness took several into custody. The constables hid their staves, for fear of being known, and the prisoners were released. The mob began again, and more troops were sent for; that he heard the Lord Mayor and several more gentlemen \*say they thought the force was not sufficient; that the witness thought then, and thinks now, the force was sufficient, for if they had fired, no doubt the mob would have run away; that more troops came; and the mob were then tired, and warming themselves round the fire; that the Lord Mayor staid there till one o'clock, but gave no orders; that the Lord Beauchamp desired the Lord Mayor to use some means to suppress the mob; he did not use any; and Lord Beauchamp told him his conduct should be reported; that a second party of soldiers came before one o'clock, and that the third party was sent for and came. One of the officers said, (and he believed to the Lord Mayor.) that they were sent for to be made fools of, and asked what they were to do, and said, that some of the soldiers had been pelted, and were angry. The witness said that the force at last was about ninety; he had no doubt but the force was sufficient. Upon his cross-examination by Mr. Bond, he said that his particular duty as one of the

Upon his cross-examination by Mr. Bond, he said that his particular duty as one of the High Constables was to summon constables; that he was at the Mansion House on the 3rd of June; that the Lord Mayor informed him he had received a letter from the other end of the town, importing danger, and desired him to be in the way; and when he went to the Tower, he found the officer at a coffee-house in Thames street; that he never thought at Moorfields there would be any danger in reading the Riot Act; that several of the Lord Mayor's company dissuaded him from reading it, thinking the troops too few; that he believed no man wished more to put an end to the riots than Mr. Kennett did; that he went among them and endeavoured to persuade to desist, and told them, if they did not, he must use the force in his hands. The witness said, that he saw no violence offered to the Mayor; and that if the Lord Mayor had ordered the soldiers to fire, he might have killed some of the mob out of the city [this produced a very hearty laugh;] that there were many innocent spectators, but the rioters might have been fired on without hurting them.

Dorothy Halsinbrooke deposed, that in June she was in Moorfields all the time of the riot, and saw a person by the title of "My Lord" addressed by several persons, and heard him say, "Do no more mischief than is needful;" the bystanders damned him and said — "Was any mischief necessary to be done?" Upon her cross-examination, she said she never saw the Lord Mayor, and did not know him; that she did not know that there was any other Lord there; and that she believed the person addressed was the defendant.

William Easton, an officer of the Sun Fire Office, deposed that he was with his engine at Moorfields on the 4th of June, and heard the commanding officer ask the Lord Mayor for orders; that he desired him to be quiet and let them alone; this was about eight or \*288] nine o'clock at \*night, and the mob were then pulling down the chapel. Upon his cross-examination he said, that he knew the Lord Mayor well, having rowed

him many score miles.

Mr. Dempsey deposed, that he was in Moorfields on the Sunday, and saw the mob pulling down two houses, and saw the Lord Mayor there about nine or ten o'clock in the evening, and saw soldiers and officers, and heard an officer ask him leave to do his duty; and that he repeated his request, and said he would be accountable for his conduct and the consequences; he did not hear the answer, and he went away soon after; and that

the soldiers by not acting encouraged the mob.

Mr. Gascoign, ensign in the Guards, deposed, that he went to Moorfields with the second detachment between ten and eleven o'clock at night; that he applied to the Lord Mayor, and told him he had orders to obey him; he said he was glad he was arrived, and desired him to form a half-circle before the house; that he applied again to him for orders, and he heard the Lord Mayor threaten the mob to read the Riot Act, but it was The Lord Mayor remained till the mob dispersed. There was no mob with not read. arms; and there were many women and children; the force was certainly sufficient, if they had received orders to use military force, but they must have shed much innocent blood; they might have kept them off with their bayonets, and the rioters might have been apprehended. The soldiers were very ready to have acted, and were vexed they did not. The Lord Mayor gave no satisfactory answer to his applications, they had done all they ntended, and would do no more mischief. Upon his cross-examination, he said, that the a namber of persons who were actually mischievous was small, but there were many backng them and pelting. The Lord Mayor was much confused, and the people about him Example so; he seemed desirous of doing his duty, if he had known how; he asked the veral people what to do. The witness said, that if the Lord Mayor had read the Riot he would have been pelted, but could not have been attacked by the mob, he being surrounded by the soldiers. Being questioned by Mr. Dunning, the witness said, he did not think the Lord Mayor had done his duty; the riot might have been suppressed by the bayonet without firing; but that charging with the bayonet would have been as dangerous to the women and children by-standers as the discharge of musketry, for that men charging in the line could not stop themselves; but he said, no doubt but that some of the rioters might have been apprehended. The witness told the defendant he had a sufficient force, and several persons called upon him to act.

James Hubber, a sergeant in the Guards, deposed, that he went with a party to the Mansion House, and from thence to Moorfields; that the mob were then pulling down the chapel; the Lord Mayor desired them repeatedly to disperse; but the witness never heard any orders given, nor \*the Riot Act read; after the second party came, which was about eleven o'clock, they might have dispersed the mob if they had been ordered; that they formed a ring for the Lord Mayor, until he retired into a house.

George Gurry, another sergeant, deposed, that he went with the second party of Guards to Moorfields, about half past nine o'clock, and staid till half past three o'clock; that he did not hear any orders given by the Lord Mayor, nor any application made to him for orders; that the soldiers did nothing, and were of no use; that they could have taken the rioters; and that the soldiers had some stones and brick-bates thrown at them.

Sergeant Hyde deposed, that he went to Moorfields with the last party of Guards; the mob were then pulling down the houses and making a bonfire; that the soldiers could have apprehended them all if they had been ordered, but they did no good there.

Lord Beauchamp deposed, that, between nine and ten o'clock on the Sunday evening. the 4th of June last, he heard there was a riot in Moorfields; that he went there, and, at the end of the street where the mischief was doing, there were a number of persons assembled, not of rabble, but of well-dressed citizens, returning to town from their country walks; that he saw an engine and some firemen in an adjacent street; that the mob were then making a large fire, and destroying the chapel; the firemen were ready to extinguish the fire, but said they could not get up, unless the soldiers would make way for Upon his lordship's speaking to one of the sergeants, he said they wanted orders. Mr. Reed begged Lord Beauchamp, if he had any influence with the Lord Mayor, to use it, that something might be done. The witness went to the defendant, and asked if his lordship's person was known to him? He said, yes; upon which Lord Beauchamp said to him, "This might be prevented by some means; it is your duty to do something." (His lordship begged it might be understood that he did not recommend firing, because he did not think it necessary.) The Lord Mayor said—" The whole mischief seems to be the destruction of some property of persons against whom the mob have an antipathy or That the witness (Lord B.) then told him, that the House of Commons was to meet on the Tuesday following, when he should think it his duty to lay before the public what he had observed of his conduct or misconduct. The Lord Mayor made no answer, but left the witness. The by-standers, who were many, were decent people, and expressed much concern at what had passed: the rioters were few in number. "I thought," said his lordship, "the force fully sufficient, without any firing; the mischief might have been prevented without any bloodshed. I do not think there was any danger in reading the Riot Act. There were not any arms nor even sticks among the mob; those who were active seemed acting as if employed by the owner of the \*house." Upon his cross-examination his lordship said, he did not think the Riot Act necessary to be read, because the rioters were then in actual perpetration of acts of felony.

John Cole deposed, that on the 4th of June he was in Moorfields; that he saw Mr. Alderman Kennett there, and applied to him to form his men; he seemed very placid and composed, and said—"I will, as soon as I have a reinforcement." The witness thought the mischief might have been suppressed easily; nothing was done for that purpose; but the rioters continued in doing their business without interruption. The witness added—"If I had dropt from the clouds, and had known nothing of the precedent business, or the laws of this country, I should have thought that the rioters were executing the sentence of the law, by razing the house of some state criminal, and that the Lord Mayor and sol-

diery were attending to protect them in their business."

The evidence for the prosecution being closed—
Mr. Erskine addressed the Jury in an animated and ingenious speech, in which it is impossible to follow him and do it ample justice. He observed that, among the many things which the Jury had heard to surprise them, it could not fail to surprise them to see him, a young and inexperienced man, come into the city to defend its chief magistrate, on a charge of so high a misdemeanor. It would have been (he said) more safe for the defendant, and more for the honour of the Crown, to have left him in the possession of that great and experienced lawyer (Mr. Dunning), who, upon this occasion, was added to the officers of the Crown, as an instrument to prosecute the defendant. It was not for the honour of the Crown, that did not design to give that great man any of its ordinary honours, which his abilities so well merit, to defraud an individual upon the present occasion of those abilities, (which, Mr. Erskins said, he could never attain); and that at

a time, too, when most of the bar were absent on the circuits. Mr. Erskine said, he felt some consolation, however, in his weakness, that entitled him to claim an extraordinary share of attention from the Jury; and he felt more at home than he expected he should have felt, since the prosecutors seemed to be arraigning his client before a court martial, or trying him for want of courage in a court of honour. A charge, which he did not feel himself called upon to meet, as the charge in the information was, that of a criminal abuse of magistracy. He condemned the conduct of the Crown in selecting the defendant as the object of their vindictive proceedings; since the magistrates of West-minster had been more culpable in not opposing that violence, which came from them into the city; and the officers of the Crown had themselves declared in Parliament, on a late occasion, that it was not the police of Westminster that was defective, but the \*execution of that police. He stated that the Riot Act was made upon the elevation of the family of Hanover to the throne, to prevent the disorders that might be occasioned by those who were enemies to that accession. It was not decent, he said, to speak in terms of disapprobation of a law which continued on the statute-book unrepealed; but the present, he begged it might be remembered, was the first occasion upon which a magistrate had been prosecuted under the act of 1 Geo. 1. In answer to what had been said by Mr. Attorney-General, that the act was universally understood, he (Mr. Erskine) declared he did not know any subject on which so universal an ignorance had prevailed. Men of eminence in the profession of the law had entertained doubts upon the legality of calling in the military upon tumults of the sort which formed the subject of discussion; for, in times of tranquillity and order, men do not examine into their powers to suppress or prevent disorders which they do not foresee. He observed that men did not want laws to inform them, that, when others are doing acts of felony, every man is bound, by the laws of God and of civil society, to oppose force to suppress the violence, and that without orders; and the reading of the Riot Act in such a case is unnecessary. But that this was not so understood was manifest, from the total ignorance on the subject in the most august assembly in the kingdom, where men were planet-struck on hearing the doctrine laid down by the noble and learned Lord who was then trying the cause. Mr. Erskine said, that, antecedent to the administration of the noble lord, the hunting a justice of the peace was fine fun for an Attorney-General, and many honest well-meaning men had been disgraced for the errors of their heads. This was an abuse which Lord Mansfield had corrected; and whenever an application was made to the Court of King's Bench for leave to file an information against a magistrate, (a step which every body but an Attorney-General was obliged to take), the Court protected him; and, if the heart was right, would not suffer him to be harassed for errors merely of judgment. For this position he cited two cases from Sir James Burrow, (a) and he contended, that on this principle, in which he should be confirmed from the Bench, the Jury must, if they should find a verdict of guilty, be convinced that his client had acted mala fide, or, in the words \*292] of the information, wilfully, obstinately, and perversely. Mr. Erskine \*observed, that cowards were always brave when danger was over; that he was not addressing the Jury in the case of an ordinary riot; a greater danger never before visited any country. The only crimes the Lord Mayor had been guilty of were those of shewing too great fear and exercising too much humanity. He reminded the learned advocates for the Crown, that they had themselves partaken of the universal panic, when imprisoned and besieged in the House of Commons. Under all these circumstances, he contended that it was too much to impute criminal neglect to a magistrate who had the inclination to do his duty, but who was distracted, and threatened with indictments at the Old Balley, and had the horrors of massacre and murder urged to deter him from using the military. A gentleman, who knew something of the present prosecution, had alarmed him with the bloody massacre in Saint George's Fields, where an old apple woman had been shot by accident; a subject on which volumes of paper had been wasted; a gentleman, against whom he wondered the Attorney-General had not directed his vengeance, as it would have been diversion to have hunted Mr. Wilkes, a gentleman who, when called upon to co-operate for preserving the peace of the city, said he must look to his own ward, which he protected so well that the prisons of Newgate and the Fleet, and Mr. Langdale's house were destroyed in it. Mr. Erskine professed a great respect for Mr. Wilkes; but said, he believed he had more experience in raising multitudes. Mr. Erskine enforced his arguments respecting the quo animo of the defendant, and declared, that, if he was defending his own case, he would rest his defence on the evidence produced by the prosecutor; but, in a case of such importance, he should call some witnesses, of the most respectable character, to put the subject out of all doubt.

<sup>(</sup>a) Rex v. Young, 1 Burr. 556, and Rex v. Palmer, 2 Burr. 1162. In these cases it was held, that where a justice of the peace has acted illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention, the Court will not grant a criminal information against him, but will leave the party complaining to the ordinary legal remedy, or method of prosecution by action, or by indictment.

The Reverend Dr. Kennett deposed, that, on the 4th of June, at half past two o'clock, he was at the Mansion House when the Mayor came in; he brought a notice from one of the Secretaries of State, informing him there was a suspicion of a riot within his jurisdiction, and recommending to him to use every legal method to suppress it; that the witness, by his desire, wrote to the commander of the Tower, to give him notice, and to desire that a force might be in readiness. That Aldermen Clark and Peckham came; they sent for the Riot Act. About five o'clock Mr. Malo came and informed him there was an alarm of a mob; the Mayor told him of the letter which was written, and promised his assistance; that the witness wrote a second letter, at about eight o'clock, to the commander of the Town, informing him there was a riot, and requesting the attendance of his lordship and the military force, and informing him that he would be attended from the Mansion House by the Mayor and \*two other Aldermen to the place of the riot. The officer wrote, that he should have a force detached, and soon after \*293\* Lord Spencer Hamilton came without one. The troops did not come till half past nine. The witness pressed Lord Spencer Hamilton to make haste; he said, those things were not to be done in a minute, and that he could not spare more than thirty men, having forty thousand stand of arms in the Tower under his care. As soon as the thirty men came, the Lord Mayor, two Aldermen, and Sheriff Pugh, went away with them. The witness said, he never saw a man in greater anxiety than his father was in.

Lord Spencer Hamilton deposed, that, having received two letters from the late Lord Mayor, on the 4th of June, he went to the Mansion House, where the defendant and two Aldermen were waiting for the detachment; that the witness had told the defendant he thought thirty men too few for him to go with, and that he would send thirty more. Mr. Kennett said he would go as soon as they arrived; that he was impatient for them, and went immediately on their arrival; that he lost no time. The witness told him he should

not want men, and sent him two other detachments.

Mr. Alderman Clark deposed, that in his attending the late Lord Mayor, pursuant to his summons, he found him very impatient for the arrival of the troops; when they came, they went together to the spot. The Lord Mayor exhorted the mob to depart, and threatened that if they did not he would use the military force. The witness was informed that one of the Mayor's footmen had been struck with a stone, which fractured his skull, and a very large stone hit his own hat. The firemen were afraid to act. The witness believed it was the intention and desire of Mr. Alderman Kennett to suppress the riot. The military

could not have fired without destroying many innocent people.

Mr. Samuel Thorp, a common councilman, deposed, that he went to the Lord Mayor, who was with the Aldermen Clark and Peckham in an adjoining house, while the mob were destroying the chapel in Moorfields. The witness inquired if the Riot Act had been read, and found it had not; the reason assigned for not doing it was the expectation of a reinforcement. No magistrate in the room disapproved the Mayor's conduct, or recommended any other. The witness said, as it was Sunday evening, in the midst of summer, the flame had drawn together a number of holiday people, who would suffer if the Riot Act was read. Upon the arrival of the reinforcement at two o'clock, the officer said—"My lord, now we have a sufficient force." The Mayor did not answer. The witness told the Mayor he did not understand what the officer meant, for his lordship would be answerable for the mischief that might ensue; that Alderman Pugh had said they would do no mischief; and he should \*consider whether saving the remainder of the [\*294 timber was worth involving many innocent people in the promiscuous carnage.

George Brown, Secretary to the Westminster Insurance Office, deposed, that he was at the riot in Moorfields, and was two or three times in the room with the Lord Mayor, and heard an officer of the Guards say—"My lord, we are now ready." His lordship's reply was—"I fancy they have done all the mischief they intend to do, and will disperse without doing more, or going to greater extremities." Upon the witness proposing afterwards to the officer to drive the mob out, he said—"Sir, we are not strong enough." Upon his cross-examination he said, he thought the number of soldiers sufficient to reduce the riot without bloodshed, and that he did prevail on many of the rioters to go home, by giving

them money to drink.

The Aldermen Pugh and Peckham, and many others, attended, but Mr. Erakine declined

calling more witnesses.

Mr. Solicitor-General, in reply, said, that there were very few facts in dispute; that the information was not founded on an abuse of magistracy, as stated by Mr. Krakine; but for making no use of the office entrusted to the defendant, and that he did no act of duty, and was therefore charged with gross neglect. No male fides being necessary to support this information, there would be an end of the administration of justice if a magistrate could excuse himself by saying, "I was an egregious fool, and did not know my duty." He (the Solicitor-General) declared, that there were some circumstances in evidence which created a suspicion in his mind, that the defendant was not absolutely free from the diabolical and disgraceful spirit of persecution and fanaticism which disgraced that period.

Lord Mansfield then proceeded to state to the Jury that the case before them was an information which the Attorney-General, or the authority under which he acted, had thought fit to bring before them to decide. His Lordship then stated the terms of the information, and proceeded-"The common law and several statutes have invested justices of the peace with great powers to quell riots, because, if not suppressed, they tend to endanger the constitution of the country; and, as they may assemble all the King's subjects, it is clear they may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. It is well understood that magistrates may call in the military. It would be a strange doctrine, if, in an insurrection rising to \*295] rebellion, every subject had not a power to act, when they possess the power in a case of a mere breach of the peace. By the act of the 1st \*George the First, a particular direction is given to every justice for his conduct; he is required to read the act, and the consequences are enplained. It is a step in terrorem and of gentleness; and is not made a necessary step, as he may instantly repel force by force. If the insurgents are not doing any act, the reading of the proclamation operates as notice. There never was a riot without by-standers, who go off on reading the act. The counsel for the defendant has done me the honour of attributing a doctrine respecting magistrates to me. Where any thing is in my discretion, I will never punish where the intent is good, and the magistrate has only mistaken the law; but that is only where it is in my discretion. In such a case, I always leave the party complaining to go before a grand jury; but that is not the case of the present information. This information does not charge any intent of favouring or conniving at the riots, but only a neglect of duty; and every neglect of duty depends upon circumstances. In this case the charge is proved. In law, to say, "I was afraid," is not an excuse for a magistrate; it must be a fear arising from danger, which is reduced to a maxim in law to be such danger as would affect a firm man. In this case the neglect, at first view, is proved. The witnesses have sworn that the defendant used none of the authorities vested in him by law; he did not read the proclamation, nor restrain or apprehend the rioters, or give orders to fire, or make any use of the military under his direc-But this does not exclude a defence. The defence here relied on is-"Tis true, I did not restrain or apprehend any rioters, nor use the military; but, under all the circumstances, this was not a neglect." It is prima facie the duty of a magistrate to read the act; but this duty depends on circumstances; he might be alone, and not able to do it. If he did what a firm and constant man would have done, he must be acquitted. If, rather than apprehend the rioters, his sole care was for himself, this is neglect. The sole question is, under all the circumstances of the case—Has the defendant laid before you the justification of a man of ordinary firmness?" His Lordship said, in a case of this sort, he would purposely avoid drawing the attention of the Jury to material parts of the evidence, which might intimate an opinion of his own. He then stated very clearly and impartially the evidence on both sides.

The Jury went out of Court before five o'clock, and his Lordship went away about six.

The Jury, about seven o'clock, went to his Lordship's house, and expressed a wish to deliver a verdict, finding the neglect, but acquitting of the criminal part of the charge; but his Lordship having informed them that the verdict must be general, guilty or not \*296] guilty, and that it would \*be in the power of the Court to receive any favourable circumstance in exculpation of the defendant's conduct, before any judgment was given against him. The verdict was brought in—

Guilty.(a)

Mr Kennett's counsel were Mr. Erskine and Mr. Bond; his attorney, Mr. Woodhouse, solicitor of Bedlam and Bridewell.

There was another information against Mr. Kennett, for discharging six prisoners out of the Poultry Compter; (b) but it appearing that the defendant had acted in that instance in conjunction with seven aldermen, and other circumstances appearing in the defendant's favour, which had not before come to Mr. Attorney-General's knowledge, he was pleased to drop that prosecution; and the special jury were discharged.

(a) No sentence was ever passed in this case, as Mr. Kennett died soon after the trial.
(b) This information charged that John Lloyd, William Beard, Henry Jones, Solomon M Daniel, John Hughes, and Thomas Dunkley, and divers others, to the number of five hundred, were riotously assembled, attempting to break open a certain prison, called the Poultry Compter; that Jos. Gates, then being a constable, apprehended them, and delivered them, the said J. L., W. B., H. J., S. M., J. H., and T. D., into the custody of Henry West, the keeper of the said prison, to be safely kept, it not then being a fit time to carry them before a justice of the peace for examination; and that the defendant, being one of the Justices of the city of London, and intending to obstruct and hinder the due course of justice, did order that the said J. L., W. B., H. J., S. M., J. H., and T. D., should be brought before him, and did order that they should be discharged, without any examination, and in the absence of, and without notice to, Joseph Gates; and that they were discharged and set at liberty.

# \*OXFORD SPRING CIRCUIT.

1832.

BEFORE MR. JUSTICE LITTLEDALE, AND MR. JUSTICE TAUNTON.

### WORCESTER ASSIZES.

BEFORE MR. JUSTICE LITTLEDALE.

#### REX v. JOHN COX. March 6.

Where, on a charge of rape, the Jury found that there had been penetration, but that there had been no emission from the prisoner. The 15 Judges held that the prisoner was rightly convicted of the rape.

INDICTMENT for carnally knowing and abusing Sarah Blakeway, a child un-

der the age of ten years.

It appeared that the prisoner, who was a man upwards of sixty years of age, had induced the child to go up stairs with him by promising to give her an apple; and that a woman who went up stairs soon after found a mark as if some one had lain on a bed which was there. It was also proved that the person of the child exhibited marks of violence; and that both she and the prisoner had gonorrhoea.

The Jury found that there had been penetration, but that there had been

no emission from the prisoner.

Mr. Justice LITTLEDALE passed sentence on the prisoner, \*and reserved the case for the consideration of the fifteen Judges, who held the conviction right.(a)

F. V. Lee, for the prosecution.

Godson, for the prisoner.

# STAFFORD ASSIZES.

(Crown side.)

BEFORE MR. JUSTICE TAUNTON.

### REX v. JAMES WEDGE. March 12.

On an indictment for carnally knowing and abusing a female child under ten years of age, the best evidence of the age of the child ought to be produced. Where an offence of this kind was committed on the 5th of February, 1832, and the child's father proved, that, on his return after an absence from home of a few days, on the 9th of Feb., 1822, he found that the child had been born, and was told by her grandmother that she had been born the day before; and the register of baptisms shewed that the child had been

(a) For the report of this case we are indebted to the learned counsel engaged in it. This case overrules the decision in the case of Rex v. Russell, 2 M. & M. 122. But see the cases of Rex v. Jennings, ante, Vol. 4, p. 249; and Rex v. Wedge, infra, and Rex v. Gammon, post, p. 321.

baptized on the 9th of Feb., 1822: it was held not sufficient to prove that the child was under ten years old.

INDICTMENT for carnally knowing and abusing Mary Underhill, a child under

the age of ten years.

The offence was alleged to have been committed on the 5th of February, 1832. To prove the child under ten years old at the time of the alleged offence, the father of the child was called; he stated, that he was in the habit of going out with boats for a week or fortnight at a time; and that, in the month of February, 1822, he went from home for a few days, and that his wife had not then been confined; and that, on his return, on the 9th of \*February, 1822, he found that this child had been born; and he was told by his wife's mother, that it had been born the day before. An examined copy of the register of the baptism of the child was put in; and from that it appeared that the child had been baptised on the 9th of February, 1822. The mother of the child was dead, but the grandmother was living at the time of the trial.

Mr. Justice Taunton (having conferred with Mr. Justice LITTLEDALE.) My learned brother concurs with me in thinking that this evidence is not sufficient. The whole amount of the evidence to prove the time of the child's birth is the declaration of the grandmother to the father. The father was from home at the time of the birth, and the mother is dead; but still the grandmother might have been called. As this is a matter of so much importance in a case of this

kind, we think that the best evidence ought to be adduced.

Verdict-Not guilty.

Corbet for the prosecution.

See the case of Rex v. Cox, ante, p. 297; and Rex v. Gammon, post, p. 321.

# REX v. HILDITCH and Others. May 13.

Any evidence that is a confirmation of the original case, cannot be given as evidence in reply; and the only evidence that can be given in reply is that which goes to cut down the defence, without being any confirmation of the original case.

INDICTMENT for a robbery. The case for the presecution had been closed, and the defence of the prisoners was an alibi, viz. that they were at a public house, at a considerable distance from the place at which the robbery was committed.

\*300] W. J. Alexander, for the prosecution, wished to call a witness in reply, to prove, that he saw all the witnesses near the spot at which the robbery was committed; and that, therefore, they could not have been at the

public-house.

Mr. Justice Taunton. Proving that the parties were near the place at which the offence was committed is evidence in chief and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply: and the only evidence which can be given as evidence in reply, is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution.

The evidence was rejected.

W. J. Alexander, for the prosecution.

F. V. Lee, for the prisoner.

See the case of Rex v. Stimpson, ante, Vol. 2, p. 415.

### SHREWSBURY ASSIZES.

#### BEFORE MR. JUSTICE LITTLEDALE.

#### REX v. BOOTYMAN. March 16.

Where a party is charged with embezzlement, the Judge, before the indictment is found. will order the prosecutor to furnish the prisoner with a particular of the charges, if the prisoner make an affidavit that he does not know what the charges are, and that he has applied to the prosecutor for a particular, and it has been refused.

EMBEZZLEMENT. Before the indictment was found by the Grand Jury, the prisoner having been held to bail-

\*Curwood (with whom was F. V. Lee) applied to the learned judge to grant an order calling on the prosecutor to deliver a particular of the

charges. This was moved on an affidavit stating that the prisoner, who had been farming bailiff to the prosecutor, did not know what charges of embezzlement were intended to be brought against him; and that he had applied for a particular, which had been refused. The case of Rex v. Hodgson, ante, Vol. 3, p. 422. and the authorities there referred to, were cited in support of the motion.

Bather and Maclean opposed the application; but-

Mr. Justice LITTLEDALE granted an order for a particular; which was delivered to the prisoner's attorney accordingly.

The prisoner was afterwards tried and convicted.

Bather and Maclean, for the prosecution. Curwood and F. V. Lee, for the prisoner.

[Attorneys-Nock and Asterley.]

#### REX v. EDWIN TAYLOR. March 17.

On the trial of an indictment for manslaughter, the surgeon will only be allowed for his attendance on the trial, and not for his fee for opening the body by order of the coroner.

MANSLAUGHTER. After the trial, Bather, who was for the prosecution, stated, that the coroner had ordered the body of the deceased to be opened, and had ordered the churchwardens to pay the surgeon's fee for it; but a magistrate having told the churchwardens not to pay it, Sir J. Scarlett, whose opinion had been taken, had advised that the churchwarden could not be compelled to pay it; and he, \*therefore, applied to the learned judge to order it to be paid [\*302 by the county, as a part of the expenses of the prosecution.

Mr. Bellamy (the clerk of assize). Where the examination in a case of felony is before a magistrate, he grants a certificate for the costs before him;

but a coroner has no power to grant any such certificate.

Mr. Justice Littledale. I can only allow the surgeon the usual costs of his attendance here.

# MONMOUTH LENT ASSIZES, 1832,—Cor. LITTLEDALE, J.

#### REX v. REES. March 27.

The Judge, on a trial for murder, has no power to allow the expenses of the witnesses for their attendance at the coroner's inquest.

MURDER. After the trial, Watson, for the prosecution, applied to the learned Judge to order the costs of the witnesses for their attendance at the coroner's inquest.

Mr. Justice Littledals.—I have no power to make such an order.

See the stat. 7 Geo. 4, c. 64, s. 22, set forth Carr. Supp. p. 106.

## \*3037

# \*MONMOUTH ASSIZES.

BEFORE MR. JUSTICE TAUNTON.

### HARGEST v. FOTHERGILL, Esq. March 28.

A cause came on to be tried at the Assizes on a Wednesday morning; on the previous Monday evening, the defendant's attorney being at the assize town, was served with a notice to produce a book, which would probably he at his office, which was nineteen miles from the assize town:—Held, that this service was too late.

TRESPASS against the late Sheriff of Monmouthshire for taking the plaintiff's goods.

To connect the sheriff with the seizure, the officer was called on his subpoens, but he did not appear. It was then proposed to give other evidence of the warrant.

The cause came on for trial on the morning of Wednesday, March 28th; and on the evening of Monday the 26th, the plaintiff's attorney had served Mr. Phillips, the under-sheriff of the defendant, and who was also attorney for the defendant in this action, with a notice to produce a book kept in the undersheriff's office at Newport, containing an entry of the warrant from the undersheriff to the officer. The notice was served on Mr. Phillips, at Monmouth, he being at that place attending the Assizes, and his office being at Newport, which is nineteen miles from Monmouth.

Maule, for the defendant, objected that this notice was served too late.

Curvood and Carrington, for the plaintiff. The notice was served in ample time for the book to have been obtained from Newport. There was an entire day for any messenger to have gone and returned with it.

Mr. Justice Taunton. I think the service is too late. It is very desirable \*304] that all these notices should be served \*while the parties are at home, and before they come to the Assizes. Nonsuit.

Curwood and Carrington, for the plaintiff.

Maule, for the defendant.

# [Attorneys-Owen and Prothero & Phillips.]

In the ensuing term, Curwood moved for a rule to show cause why the non-. Vol. XXIV.—37

suit should not be set aside; and subsequently a rule was made absolute for a new trial, on payment of costs.

In the case of Doe d. Wartney v. Gray, 1 Stark. 283, service of notice on the wife of the defendant's attorney, at his lodgings, on the evening before the trial, to produce a lease, was held insufficient. See the case of Bryan v. Wagstaff, ante, Vol. 2, p. 125.

# OXFORD SUMMER CIRCUIT,

1832.

BEFORE MR. JUSTICE BOSANQUET AND MR. BARON GURNEY.

### BERKSHIRE ASSIZES.

BEFORE MR. BARON GURNEY.

### \*REX v. DENNIS COLLINS. July 16.

**[ \*305** 

If a true bill be found against a person for high treason, the Judge will, on the application of the counsel for the Crown, order the Sheriff to furnish the solicitor to the Treasury with a list of the persons to be summoned on the Jury, that a copy of it may be delivered to the prisoner.

Semble, that counts charging a party with high treason in "compassing, &c., the main and wounding" of His Majesty, and with "compassing, &c., the wounding" of His Ma-

jesty, are bad.

The prisoner, in a case of high treason, has a right to address the Jury in addition to the speeches of his counsel—and semble, that both the prisoner's counsel have a right waddress the Jury, although there be no evidence on the part of the defence.

HIGH TREASON. As soon as the Grand Jury had returned a true bill—
Jervis, for the Crown, moved that the Sheriff should furnish the solicitor to
the Treasury with a list of the persons who should be summoned on the Jury
in this case, that a copy of it might be delivered to the prisoner pursuant to the
statute.

Mr. Baron Gurney ordered that the Sheriff should give the list applied for.

The prisoner having been brought into Court—

GURNEY, B., saked him whom he wished to have as his counsel and attorney. The prisoner named Swabey and Carrington as his counsel, and Mr. Frankum as his attorney; and his Lordship having ascertained that they consented to act as such, assigned them as counsel and attorney for the prisoner; and an order was drawn up, that they should have access to the prisoner at all seasonable hours.

The Assize was adjourned till the 22nd of August, to give time for a copy of the indictment, and lists of the Jurors and witnesses, to be delivered to the

prisoner.

Considerably more than ten days before the trial, a copy of the indictment and caption, including the names of the witnesses on the back of the indictment, and also the words "a true bill;" and a list of the witnesses' names, with their

residences and additions; and also a list of the Jurors (a hundred in number) with their residences and additions, (a) were delivered to the prisoner.

\*307] \*BEFORE MR. JUSTICE BOSANQUET, AND MR. BARON GURNEY.

THE indictment consisted of five counts. The first count charged, that the prisoner, on the 19th of June, 2 Will. 4, at &c., maliciously and truitorously, with force and arms, "did compass, imagine, devise, and intend the death and destruction of our Lord the King; (b) and to fulfil, perfect, and bring to effect his most evil and wicked treason, and treasonable compassing and imagination \*aforesaid, he the said D. C., as such false traitor as aforesaid, on the said 19th day of June, in the second year of the reign aforesaid, at the parish aforesaid, in the county aforesaid, with force and arms, maliciously and traitorously did obtain and procure, and in his custody and possession did have and keep, divers, to wit, three stones, with intent thereby and therewith maliciously to kill and destroy our said Lord the King; and further to fulfil, perfect and bring to effect his most evil and wicked treason and treasonable compassing and imagination aforesaid, he the said D. C., as such false traitor as aforesaid, on the said 19th day of June, in the second year aforesaid, at the parish aforesaid, in the county aforesaid, with force and arms, maliciously and traitorously did, with great force and violence, cast and throw divers, to wit, two of the said stones, at and against the person of our said Lord the King, with intent thereby and therewith maliciously and traitorously to kill and destroy our said Lord the King, and with one of the said stones so cast and thrown as aforesaid, then and there struck, bruised, and wounded the person of our said Lord the

(a) As to the delivery of a copy of the indictment, the list of witnesses, and the list of the Jurors, to the prisoner—see the stat. 7 & 8 W. 3, c. 3; 7 Ann. c. 21; and 6 Geo. 4, c. 50. The indictment is to be delivered after bill found, and before arraignment. The number of days is reckoned, with respect to the indictment, exclusive of the day of delivery and day of arraignment; and with respect to the lists, exclusive of the day of delivery and day of trial; and in neither case ought Sundays to be reckoned. 1 Ea. P. C. 112. But by the stat. 39 & 40 Geo. 3, c. 93, it is enacted, that the provisions of the stat. 7 & 8 W. 3, c. 3, and 7 Ann. c. 21, shall not extend to any indictment for high treason in compassing and imagining the death of the King, where the overt act is any direct stack on his Majesty; and in the stat. 6 Geo. 4, c. 50, the like exception is made; so that f the indictment in the principal case had consisted of the first count only, the prisoner would not have been entitled to a copy of the indictment, &c.

(b) By the stat. 36 Geo. 3, c. 7, it is enacted, "that, if any person or persons whatwever, after the day of the passing of this act, during the natural life of our most gracious overeign lord the king, (whom Almighty God preserve and bless with a long and proserous reign), and until the end of the next session of Parliament after a demise of the rown, shall, within the realm or without, compass, imagine, invent, devise, or intend leath or destruction, or any bodily harm tending to death or destruction, maining or rounding, imprisonment or restraint of the person of the same our sovereign lord the ting, his heirs and successors, or to deprive or depose him or them from the style, honour, ir kingly name of the imperial crown of this realm, or of any other of his majesty's doninions or countries; or to levy war against his majesty, his heirs and successors, within his realm, in order, by force or constraint, to compel him or them to change his or their neasures or counsels, or in order to put any force or constraint upon, or to intimidate r overawe both houses, or either house of parliament; or to move or stir any foreigner r stranger with force to invade this realm, or any other his majesty's dominions or ountries under the obeisance of his majesty, his heirs, and successors; and such comassings, imaginations, inventions, devices, or intentions, or any of them, shall express, tter, or declare, by publishing any printing or writing, or by any overt act or deed; being egally convicted thereof, upon the oaths of two lawful and credible witnesses, upon trial, r otherwise convicted or attainted by due course of law, then every such person and ersons, so as aforesaid offending, shall be deemed, declared, and adjudged to be a traitor nd traitors, and shall suffer pains of death, and also lose and forfeit, as in cases of high

By the stat. 57 Geo. 3, c. 6, the stat. 36 Geo. 3, c. 7, is made perpetual, so far as its rovisions relate to the heirs and successors of his majesty, the sovereigns of these calms.

King, against the duty of the allegiance of him the said D. C., against the form of the statute in such case made and provided, and against the peace of our said

Lord the King, his crown and dignity."

The second count charged that the prisoner did compass, &c. "bodily harm to our said sovereign Lord the King, tending to the death and destruction of our said Lord the King." It stated the same overt acts as the first count, alleging an intent "to do bodily harm to our said Lord the King, tending to the death and destruction of our said Lord the King."

The third count charged that the prisoner did compass, &c., "the main and wounding of the person of his said Majesty;" with the same overt acts as the first count, the intent being stated to be, "to main and wound his said Majesty."

\*The fourth count charged that the prisoner did compass, &c., the wounding of the person of his said Majesty;" and stated the same overt acts, alleging the intent to be, "to wound the person of his said Majesty."

The fifth count charged that the prisoner did compass, &c., "bodily harm to our said Lord the King, tending to the maim and wounding of the person of his said Majesty; alleging the same overt acts, but stating the intent to be, to do bodily harm to our said Lord the King, tending to maim and wound the person of his said Majesty."

It was proved that the prisoner had thrown two stones at his Majesty, while on the Ascot Heath Race-course; one of which struck his Majesty on the head.

Every part of the case was proved by two witnesses.(a)

Suabey addressed the Jury for the prisoner, and contended that the prisoner was insane, but called no witnesses.

Carrington was beginning to address the Jury-

Denman, A. G. I do not mean to object to my learned friend, Mr. Carrington, addressing the Jury, but I would \*merely submit that a second counsel has no right to address the Jury, if no witnesses are called for the defence.

Carrington referred to Brunt's case.(b)

Mr. Justice Bosanquer. By the statute 7 & 8 W. 3, c. 3, the prisoner is to make his full defence by counsel learned in the law.

Mr. Baron Gurney. Perhaps, Mr. Attorney-General, you may be right.

Carrington addressed the Jury, and submitted (inter alia), that either the third and fourth counts, or the fifth count of this indictment were bad. By the statute 36 Geo. 3, c. 7, it is enacted, that, if any person "shall, within the realm, or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction—maiming or wounding, imprisonment or restraint of the person" of his Majesty, he shall be guilty of high treason. Now, if the offences of intending to maim, and intending to

(a) By the stat. 7 & 8 Will. 3, c. 3, s. 2, no person can be convicted of high treason except on the oath of two witnesses, unless he plead guilty. But it has been held, that, if one witness prove an overt act of treason, and another witness prove another overt act of the same species of treason, that is sufficient. 1 Ea. P. C. 130. It has also been held that this statute has made no new restriction on confessions, but any confession must be proved by two witnesses. Id. 134. But by the stat. 39 & 40 Geo. 3, c. 93, this statute is not to extend to any case of high treason in compassing and imagining the death of the King, where the overt act is a direct attack on his Majesty; but the party is to be "indicted, arraigned, tried, and attainted in the same manner, and according to the same course and order of trial in every respect, and upon the like evidence, as if such person or persons were charged with murder; but the judgment and execution are to be the same as in other cases of treason.

(b) 33 St. Tr. 1272. In that case Mr. Curwood had addressed the Jury, and proposed to examine a witness who was sworn, but whom he did not examine. Mr. Adolphus, as the junior counsel for the prisoner, then addressed the Jury, and commenced his address in the following terms:—"Gentlemen of the Jury, the case for the prisoner having closed, without the calling of any witness on his behalf, it nevertheless falls to my lot to address to you a very few observations, and that arises from the peculiar benevolence of the law on the sub-

ject of high treason.'

wound, were high treason, then the words of the statute must be read thus, "shall intend death or destruction, or any bodily harm tending to death or destruction," and the sentence must end there; and if so, the fifth count was bad: but if it were to be read thus—that the intending "any bodily harm tending to either the death or destruction, maining or wounding" of his Majesty, is high treason, then the third and fourth counts were bad.

\*311] \*After both the prisoner's counsel had addressed the Jury, Mr. Justice Bosanquer informed the prisoner, that if, in addition to what had been said by his counsel, he wished to add anything himself, he was at liberty to

do so.

The prisoner made a statement of considerable length, to the Court and Jury.

Mr. Justice Bosanquer left it to the Jury to say whether the prisoner had thrown the stones with either of the intents stated in the indictment.

The Jury found the prisoner guilty on the fifth count of the indict-

ment.(a)

Denman, A. G., Jervis, Campbell, Shepherd, and Maule, for the Crown. Swabey and Casrington, for the prisoner.

[Attorneys-Maule & Bouchier and Frankum.]

#### BEFORE MR. BARON GURNEY.

\*312] \*REX v. GREEN and Others. July 17.

A prisoner ought to be told by the magistrate, that, if he makes any statement, it may be used as evidence against him; and that he must not expect any favour if he confesses: but the magistrate ought not to dissuade him from confessing.

Indictment for burglary. Two of the prisoners had made statements before the committing magistrates. The magistrates' clerk stated, that, before the prisoners said any thing, they were not only told that they must not expect any favour from confessing, but that they were also dissuaded from confessing.

Mr. Baron Gurney. That was wrong. A prisoner ought to be told that his confessing will not operate at all in his favour; and that he must not expect any avour because he makes a confession; and that, if any one has told him that it will be better for him to confess, or worse for him if he does not, he must pay to attention to it; and that any thing he says to criminate himself will be used as evidence against him on his trial. After that admonition, it ought to be left in tirely to himself whether he will make any statement or not: but he ought not o be dissuaded from making a perfectly voluntary confession, because that is hutting up one of the sources of justice. Verdict—Guilty.

Justice, for the prosecution.

#### [Attorney for the prosecution—Ward & Son.]

(a) Sentence was passed on the prisoner; but he was afterwards reprieved. By the tat. 54 Geo. 3, c. 146, the sentence in cases of high treason is, that the person "shall be rawn on a hurdle to the place of execution, and there be hanged by the neck until such erson be dead; and that afterwards the head shall be severed from the body of such erson, and the body, divided into four quarters, shall be disposed of as his Majesty and is successors shall think fit." But, by section 2 of the same statute, his Majesty may y his sign manual direct that the party shall not be drawn on a hurdle; or that the arty shall be beheaded instead of being hanged; and may order the disposal of the body, ead, and quarters.

# (Civil Side.)

#### BEFORE MR. JUSTICE BOSANQUET.

# \*SHELLY, Administratrix of SHELLY, v. FORD. July 18.

A. let a horse on hire to B. for one month, B. kept it for two months, and then sold it w C.:—Held, that A. might recover the value of the horse from C., although C. had acted bona fide, and had paid B. the full value.

THE first count of the declaration stated, that the intestate was the owner of a horse, which had been by him let to hire to one William Lewis; and that the defendant, to the injury of the intestate's reversionary interest in the horse, took it into his possession, and sold it. There was a similar count, stating the whole matter, except the letting of the horse, to have occurred since the death of the deceased; and there were also counts in trover. Plea—Not guilty.

It appeared that, in the month of September, 1830, the intestate had let the horse on hire to Captain Lewis, for one month; and it was proved, by the admission of the defendant himself, that, in the month of November, 1830, he had bought the horse of Captain Lewis for 101. which was then the full value of it; and that, after keeping it at livery for some time, he had sold it.

Justice, for the defendant. I submit that this action cannot be maintained.

Justice, for the defendant. I submit that this action cannot be maintained. The defendant acted bona fide in the buying of the horse; and he has at least a lien upon it for the amount of 10%, the sum which he has paid for it; and, in any view of the case, that sum ought to have been tendered before any action was brought.

Mr. Justice Bosanquet (in summing up.) In this case the property in this horse was in the intestate, and Captain Lewis had only a limited interest in it; he, therefore, \*when he sold it, could give the defendant no better title than he had got himself. Verdict for the plaintiff—Damages 15t.

Curwood, Carrington, and Jeffreys Williams, for the plaintiff.

Justice, for the defendant.

#### [Attorneys-C. Carus Wilson and G. S. Ford.]

In general, no sale by a person who has no right to sell, is good against the rightful owner, except it be made in market overt; and it is laid down (Bac. Abr. tit. Fair, E.) that every sale made in a fair or market overt, transfers a complete property in the thing sold to the vendee, however illegal the title of the vendor. In London, every day is market-day, except Sunday; so that a sale on any of these days is as good as it would be on the fair or market-day in the country; and in London every shop, except a pawn-broker's, is a market overt for such things as the owner professes to trade in; but in the country, the market overt is confined to the particular place or spot set apart by custom for the sale of particular goods. However, the property in a horse is not changed as against the rightful owner, unless the provisions of the stat. 2 & 3 P. & M. c. 7, and 31 Eliz. c. 12, (which will be found in Burn's Justice, tit. Horses), are complied with.

See also the case of Gimson v. Woodfull, ante, Vol. 2, p. 41.

As to factors and agents dealing with goods intrusted to them, see the stat. 6 Geo. 4, c. 94: and the case of Dyer v. Pearson, 4 D. & R. 653, as to the effect of the true owners allowing another to hold himself out as the owner of goods. As to the restitution of stolen goods on the conviction of the offender, see the stat. 7 & 8 Geo. 4, c. 29, s. 57. which is set out Carr. Sup. 334.

### OXFORD ASSIZES.

#### BEFORE MR. BARON GURNEY.

\*DOE on the demise of CRAKE v. BROWN. July 19. [\*815]

A counsel, to whom a retainer in a cause has been given, no brief having been delivered, cannot withdraw the record.

EJECTMENT. When this cause was called on in its order, it appeared that no brief had been delivered for the lessor of the plaintiff, and the attorney was not in Court.

Talfourd stated that he had a retainer for the lessor of the plaintiff, and

wished to withdraw the record.

Mr. Baron Gurney. A retainer without a brief does not authorise you to withdraw the record. Mr. Jervis, you are for the defendant; do you wish the Jury to be sworn, and to nonsuit the plaintiff?

Mr. Jervis. Yes, my Lord.

The Jury were sworn, and the plaintiff— Talfourd, for the lessor of the plaintiff. Jervis and Carrington, for the defendant. Nonsuited.

[Attorneys-Mathews and Eyre.]

## WORCESTER ASSIZES.

BEFORE MR. JUSTICE BOSANQUET.

\*3167

### \*REX v. CROWTHER. July 23.

An indictment which charges a forged check to be "a warrant and order for the payment of money, which said warrant and order is in the words and figures following," is good.

A forged check on the W. Bank was presented for payment at the S. Bank, where the supposed drawer never kept cash:—Held, that this was sufficient evidence of an intent to defraud the partners of the S. Bank, although there was no probability of their paying the check, even if it had been genuine.

FORGERY. The indictment charged the prisoner with having forged "a certain warrant and order for the payment of money, which said warrant and order is in the words and figures following—that is to say:

"WORDESTER OLD BANK. "Hanbury Hall, Nov. 28, 1828.

"Messrs. Berwick, Wall, Isaac, and Lechmere, pay to Mr. John Perkins, or bearer, twenty-five pounds ten shillings.

£25: 10: 0.

with intent then and there to defraud Francis Rufford and others. There were other counts, which charged, that the prisoner did "utter," and also "did offer, dispose of, and put off," the forged instrument, knowing it to be forged.

It appeared that this check, which purported to be a check on the Worcester Old Bank, was presented by the prisoner for payment at Messrs. Rufford's bank, at Stourbridge; and it was proved that they would not pay the amount, and that no person named John Phillips kept cash with them.

Godson and F. V. Lee objected that this case must fail upon two grounds:—First, because this indictment charged, in every count, that the prisoner either forged, uttered, or offered a warrant and order;" which imported that he had committed an offence with respect to two instruments; and secondly, because it could not have been done \*to defraud Messrs. Rufford, as they had no customer of the name of John Phillips; and there was, therefore, not the most remote chance of their paying the money.

most remote chance of their paying the money.

Mr. Justice Bosanquer. I am of opinion that this indictment is sufficient. In each of the counts there is only one instrument set out, and it is called—"A warrant and order for the payment of money, in the words and figures following." I think it is both a warrant and an order—a warrant authorizing the banker to pay, and an order upon him to do so. With respect to the other point, I think that the prisoner going to Messrs. Rufford's and presenting this paper for payment, is quite sufficient evidence of an intent to defraud them.

Verdict—Guilty.

Shutt, for the prosecution. Godson and F. V. Lee, for the prisoner.

### [Attorneys-Robesons and Pumfrey.]

By the statute 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, it is enacted, "that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any warrant or order for the payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon." By the statute 2 & 3 Will. 4, c. 123, the capital punishment is repealed, except as to wills and testamentary papers, and certain powers of attorney; and by s. 3 of that stat. it is enacted—"That in all informations or indictments for forging, or in any manner uttering any instrument or writing, it shall not be necessary to set forth any copy or fac-simile thereof, but it shall be sufficient to describe the same in such manner as would sustain an indictment for stealing the same; any law or custom to the contrary notwithstanding."

# \*REX v. JANE RICHARDS. July 24.

[ **\*3**18

A girl, accused of poisoning, was told by her mistress, that if she did not tell all about it that night, a constable would be sent for in the morning to take her before a magistrate; she then made a statement, which was held to be not admissible in evidence. Next day, a constable was sent for, and as he was taking her to the magistrate, she said something to him, he having held out no inducement to her to do so:—Held, that this was receivable, as the former inducement ceased on her being put into the hands of the constable.

INDICTMENT for administering poison, called oxalic acid,(a) to Mary Duce, on the 28rd of April, 1832. It appeared that the prisoner, a girl of about 15 years of age, was in the service of the prosecutrix; and that, on the night of the 24th of April, 1832, the prosecutrix went into the prisoner's bedroom, just as she was going to bed, and told her that if she did not tell all about it that night, the constable would be sent for next morning to take her to Stourbridge, meaning before the magistrate there; and the prisoner then made a statement.

Mr. Justice Bosanquer. I think that we must not hear that.

It further appeared, that next morning a constable was sent for, who took the prisoner into custody; and while they were on the way to the magistrates' meeting at Stourbridge, she, without any inducement having been held out by the constable, made a statement to him.

<sup>(</sup>a) See sect. 11 of the stat. 9 Geo. 4, c. 31, set forth, ante, Vol. 4, p. 372; and the case of Rex v. Harley, Id. 369.

The prisoner's counsel objected to this statement being received, as the in-

ducement held out by the prosecutrix must be taken to have continued.

Mr. Justice Bosanquer. I think that this statement is receivable. inducement was, that if she confessed that night, the constable would not be sent for, and she would not be taken before the magistrates. Now, she must have known, when she made this statement, that the constable was then taking her to the magistrates. The inducement, therefore, was at an end. \*3197 \*The evidence was received. Verdict-Not guilty.

Godson, for the prosecution.

Curwood and Carrington, for the prisoner.

[Attorneys-Holdsworth & F., and Collis.]

# STAFFORD ASSIZES.

JONES, Assignee of STUBBS, an Insolvent, Demandant, v. BREARLY, Tenant. July 31.

On the trial of a writ of right, though the demi-mark has been tendered, the tenant must begin.

WRIT of right. At the previous assizes, four knights (who were in fact esquires returned as knights by the sheriff) elected the grand assize; and at these assizes the four knights appeared, and twelve of those whom they had chosen appeared, and were sworn as the grand assize, together with the knights.

As soon as they were sworn-

Campbell, for the defendant, placed 6s. 8d. on the table of the Court, contending, that, as he had tendered the demi-mark, the demandmant must begin by proving the seisin of his ancestor.

Jervis, Talfourd, and Justice, contrà, relied on the case of Tooth v. Bag-

Ante, Vol. 2, p. 271.

Campbell. If the demandant does not begin with proving his seisin, the greatest inconvenience will ensue. In \*this case a great deal of property is claimed by this writ of right, and it is held by my client under several different titles, and nothing is more probable than that when all these titles are gone through by us, the demandant may prove the seisin of his ances-

tor as to some very small part of the property.

Mr. Justice Bosanquer. I hold myself bound by the decision of the Court in Tooth v. Bagwell. In a case on the Northern Circuit, Mr. Baron Wood considered that there should be a previous finding of the seisin, but that is not so. The Court, in Tooth v. Bagwell, held, that the tenant should begin, though the seisin of his ancestor must be proved by the demandant at some time or other. Anciently, the tender of the demi-mark put the party on the proof of his seisin in some particular reign; but since the limitation of writs of right has been sixty years, it is held to put the party on the proof of his seisin within that time. However, the question here is, whether the demandant must prove the seisin of his ancestor in the first instance, or whether the tenant must begin. I think the tenant must begin.

The tenant began and went through his title. The demandant's leading counsel then addressed the Jury and went into his evidence; and the leading coun-

sel for the tenant replied.

The Grand Assize found for the tenant.

Jervis, Talfourd, and Justice, for the demandant. Campbell and R. V. Richards, for the tenant.

[Attorneys-Chilcote and White.]

# \*HEREFORD ASSIZES.

**[\*321** 

BEFORE MB. BARON GURNEY.

### REX v. JAMES GAMMON. August 7.

If, in a case of rape, there has not been sufficient penetration to rupture the hymen, the offence is not complete.

INDICTMENT for carnally knowing and abusing Charlotte Powell, a child

under ten years old.

The child proved the offence, and Mr. Woollett, a surgeon, stated, that he found considerable local inflammation about the parts of the child, and that the hymen had been recently ruptured, and that he had no doubt that penetration had taken place; and it was also proved by the mother of the child, that, on examining the child, she found semen within the pudendum.

Mr. Baron Gurney. I think that if the hymen is not ruptured there is not a sufficient penetration to constitute this offence. I know that there have been cases in which a less degree of penetration has been held to be sufficient; but I have always doubted the authority of those cases; and I have always thought, and still think, that if there is not a sufficient penetration to rupture the hymen, it is not a sufficient penetration to constitute this offence.

Verdict-Guilty.

Greaves, for the prosecution. Godson, for the prisoner.

#### [Attorneys—Griffiths and ——.]

See the cases of Rex v. Cox, ante, p. 297, and Rex v. Wedge, ante, p. 298. As, under the present state of the law, penetration is really the whole offence, it is highly proper that there should be most satisfactory evidence that it really occurred. In Russen's case, 1 Ea. P. C. 438, it was held, that there might be a sufficient penetration to constitute the offence, altough the hymen had not been ruptured.

# MIDLAND SPRING CIRCUIT.

1832.

# NOTTINGHAM ASSIZES.

### \*KNOTTS v. CURTIS.

**[\*322** 

In case for selling goods under a distress, without appraisement, if the sum produced is less than the fair value to the tenant, he may recover the difference without any allegation of special damage.

THIS was an action on the case for an excessive distress. The plaintiff failed in proving any of the counts in the declaration, except one, stating that the defendant sold the goods without having them previously appraised, under statute 2 W. & M. sess. 1, c. 5, s. 2. The sale was by public auction, and fairly conducted; but the full value of the goods to the plaintiff was not obtained. The count was framed on statute 11 Geo. 2, c. 19, s. 19, and no specific damage was stated in it.

It was objected, on the part of the defendant, that, as this was an irregularity in the conduct of a distress, in order to entitle the plaintiff to recover on this count, he should both state and prove that specific damage had resulted to him from the omission to appraise; the statute enacting, that the party aggrieved by the irregularity shall "recover full satisfaction for the special damage he shall have sustained thereby, and no more, in any action, &c.;" and that, unless

special damage was proved, the defendant was entitled to a verdict.

Mr. Justice J. Parke. The measure of the damages to be recovered by the sales plaintiff upon this count, is the \*difference between the amount of the rent discharged by the sale, and the fair value to the tenant of the goods which have been sold. If the landlord sell fairly, for the best price which can be obtained, and which, doubtless, was in this case done, he will be protected if all his proceedings are regular, although the full value of the goods may not be obtained; but until an appraisement is made, the landlord has no right to sell, but only to keep; and, until sale, the tenant has a right to come in at any time and redeem his goods. The sale, therefore, being illegal, the tenant is entitled to the damages he has sustained thereby, i. e. to the difference between the fair value of the goods to him, and the amount of the rent discharged by the produce of the sale; and as this damage is the result of the illegal sale, it need not be specially stated in the count. In this case the amount of rent discharged by the sale, after deducting all expenses, was 5l. 10s.; the value of the goods to the tenant, as is proved, was 17l.; the verdict, therefore, must pass for 11l. 10s.

Miller, for the plaintiff.

Adams, Serjt., and Clinton, for the defendant.

# OLD BAILEY APRIL SESSIONS, 1832.

BEFORE LORD TENTERDEN, C. J., MR. BARON VAUGHAN, MR. JUSICE ALDERSON, AND N. KNOWLYS, ESQ., BECORDER.

\*3247

# \*REX v. DANIEL LYNCH. April 6.

It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon and death ensues, reduce the crime from murder to man-slaughter.

THE prisoner was indicted for the wilful murder of William Harrington.

It appeared that the prisoner and the deceased, who had been for three or four years upon terms of intimacy, had been drinking together at a public house on the night of the 27th of February, till about twelve o'clock; that, about one, they were together in the street, when they had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and, on a policeman coming, went away. He, however, returned again between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdo-

men. The prisoner's father proved, that the knife, a common bread and cheese knife, was one which the prisoner was in the habit of carrying about with him, and that he was rather weak in his intellects, but not so much so as not to know

right from wrong.

Lord TENTERDEN, in summing up, said. It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce \*the crime from murder to manslaughter. But it depends upon the time elapsing between the blow and the injury; and also. whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent. The witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain. The prisoner may have been absent less than five minutes. There is no evidence that he went anywhere for the knife. The father says, it was a knife he carried about with him, it was a common knife, such as a man in the prisoner's situation in life might have: for aught that appears, he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other. there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind. then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious, and diabolical mind, (which, under the circumstances, I should think you hardly would), then you will find him guilty of murder. Verdict—Guilty of manslaughter only.

Barry, for the prisoner.

# OLD BAILLY MAY SESSION, 1832.

REFORE MR. JUSTICE LITTLEDALE, MR. BARON BOLLAND, AND MR. JUSTICE ALDERSON.

# \*REX v. NOAKES. May 17.

**F\*326** 

Semble, that bats, which are long poles used by smugglers to carry tubs of spirits, are not offensive weapons within the meaning of the 6 Geo. 4, c. 108, s. 56.

A prisoner ought not to be convicted upon the evidence of any number of accomplices,

unconfirmed by other testimony.

THE prisoner was indicted under the 56th section of the 6 Geo. 4, c. 108, which enacts, "That if any persons, to the number of three or more, armed with fire-arms, or other offensive weapons, shall be assembled in order to be aiding and assisting in the illegal landing of uncustomed goods, every person so offending, and every person aiding, abetting, or assisting them, shall, being thereof convicted, be adjudged guilty of felony, and suffer death as a felon."

From the evidence for the prosecution, it appeared, that about a hundred persons were assembled, about twelve o'clock at night, at a place upon the Sussex coast, for the purpose of landing smuggled goods; that they were, as is usual on such occasions, divided into two different parties; one, called the company,

who had bats in their hands for the purpose of carrying the tubs of spirits, (which bats were hop poles about seven feet in length), and the other, the protecting party, who were armed with muskets. The prisoner was one of the company, and carried a bat; but it appeared that he did not go down to the beach, but remained with several others, who also had bats, at the distance of a few fields off, for the purpose of preventing any who might be so disposed from running away without the tubs, if any firing should take place. He did not strike any one with his bat, either of his own party or of the revenue officers. But some of the men with bats struck with them some of the preventive men on duty. A witness was asked \*whether the prisoner had, in his hearing, engaged any persons to go out, and what he said to them?

Clarkson, for the prisoner, objected, that what took place previous to the

transaction in question was not evidence against him.

Denman, A. G., for the prosecution, replied, that it was evidence, under the particular terms of the act of Parliament, necessary to establish the facts required to be proved.

Mr. Justice LITTLEDALE was of opinion that the evidence was admissible.

The witness stated a conversation between the prisoner and the landlord of a public-house, in which, when the landlord said that some of the men had been frightened, the prisoner observed "I had the biggest right to be afraid, for I called the fire-arm men, and went down with them, and brought away a pair of tubs."

This and some other part of the evidence depended upon the testimony of two accomplices; they stated, that the company did not know, before they went, that there was to be any firing, or any men with fire-arms, and that their object was to land the goods without violence. After the firing commenced, the prisoner was engaged in preventing the people from running away without the tubs.

C. Phillips, for the prisoner.—There is nothing to go to the Jury. The act requires, that the persons must be armed with fire-arms, or other offensive weapons, for the purpose of assisting in the landing of smuggled goods; and the evidence shews, that the bat which the prisoner had in his hand was not intended as an offensive weapon, as it was the thing used for the purpose of carry-

ing the tubs.

\*Mr. Justice Littledale, (in summing up, inter alia), said—You will have to consider whether bats are offensive weapons or not. The evidence is, that they are used to carry away small casks. But as they may be used for other, viz. for offensive purposes, you will have to say whether they are such or not. Then, was the prisoner there? Two of his accomplices speak distinctly to him. If these statements were the only evidence against him, I should not advise you to convict upon their testimony. It is not usual to convict upon the evidence of one accomplice without confirmation; and in my opinion it makes no difference that there are more than one. It does not appear that the persons hired were hired to use fire-arms. The prisoner is not proved to have carried any fire-arms himself. Supposing the bats to be offensive weapons, then a person, who, after the fire-arms had begun to be used, assisted in carrying away the goods, will have committed the offence, though he might not originally have gone to assist in landing with fire-arms, or might not have known at that time that fire-arms were to be used at all.

Verdict-Not guilty.

Denman, A. G., Shepherd, and R. Scarlett, for the crown. C. Phillips and Clarkson, for the prisoner.

### \*REX v. ANN POULTON. May 18.

To justify a conviction on an indictment charging a woman with the wilful murder of a child of which she was delivered, and which was born alive, the Jury must be satisfied affirmatively that the whole body was brought alive into the world; and it is not sufficient that the child had breathed in the progress of the birth.

Where the indictment in such a case states the child to have been born a basterd, the proof that it was so, lies on the prosecutor; but evidence that the prisoner told a person that she had only mentioned her being with child to the father of it, who had lately

got married, has been held to be sufficient proof to support the allegation.

THE prisoner was indicted for wilful murder. The indictment stated, in substance, that the prisoner, on a certain day, was delivered of a female bastard child, which was born alive; and that she afterwards, to wit, on the same day, a certain string of no value, around the neck of the said female bastard child, did bind, tie, and fasten, and by such binding, &c., the said child feloniously

and wilfully, of her malice aforethought, did choke and strangle, &c.

It appeared that the prisoner denied to several persons that she had had a child; but it was afterwards found concealed in a box. Three medical men were called on the part of the prosecution: the first said—"It frequently happens that a child is born as far as the head is concerned, and breathes, but death takes place before the whole delivery is complete. My opinion in this case is, that the child had breathed; but I cannot take upon myself to say that it was wholly born alive." The second said—That death might have occurred when the child was partly born, if no medical man was present to assist in the delivery. The third said—"It is impossible to say when the child respired; but there is no doubt, from the state of the lungs when they were examined, that it had breathed: children may breathe during the birth."

With respect to the child being illegitimate, the only evidence was that of Mr. Thomas, the superintendent of the police; to whom, on his asking her whether any one beside herself knew of her situation, the prisoner said, that she had never told any one but the father of the child, and that he was a long way in the country; that his name was Thomas Harris or Harrison, and he had lately

got married.

On the part of the prisoner, a woman proved, that, about three weeks before the delivery, the prisoner asked her to \*buy her a piece of diaper to make napkins, and afterwards, seeing her again, asked her if she had bought

it, and desired her "to let her daughter set on to make the napkins."

Mr. Justice LITTLEDALE (in summing up,) after stating the indictment, said—The allegation is, that this was a female bastard child, and on the form of this indictment it becomes necessary to prove that fact. But it seems to me that the evidence of Mr. Thomas is sufficient to make it out, if you believe that he speaks the truth, which there does not appear any reason to doubt. Then the material question for you will be, was the child born alive. For, if it was not, the prisoner cannot be convicted of the murder. But, if you think there is sufficient evidence that the child was born alive, then you will inquire if the prisoner was the cause of its death; and if you think she was, you will find her guilty of the murder. But if you are of opinion, either that the child was not born alive, or that the prisoner was not the cause of its death, then she may be found guilty of endeavoring to conceal the birth, if you think that fact is made out under the provisions of the 9 Geo. 4, c. 31, s. 14. With respect to the concealment, it seems to me, that the putting the child in the box is very strong evidence of concealment, coupled with the denial of the fact of her having had a child at all; notwithstanding, there is some little evidence of previous preparation in the ordering of the napkins. With respect to the birth, the being born must mean that the whole body is brought into the world; and it is not sufficient that the child respires in the progress of the birth. Whether the

child was born alive or not depends mainly upon the evidence of the medical men. None of them say that the child was born alive; they only say that it had breathed: and if there is all this uncertainty among these medical men, perhaps you would think it too much for you to say that you are satisfied that the child was born alive.

\*2217 \*The Jury said, they thought that the child was not born alive.

Mr. Justice LITTLEDALE then told them, that he thought they could

have no doubt on the evidence as to the concealment.

The Jury then found the prisoner not guilty of the murder; but, said that she did, by disposing of the body in a box, endeavour to conceal the birth.

Clarkson, for the prisoner.

See Archibold's Criminal Law, pp. 333 et seq.

### BEFORE NEWMAN KNOWLYS, ESQ., RECORDER.

### \*REX v. CHALMERS. May 24.

An indictment preferred in 2 Will. 4, for a felony committed on the 12th of March, 1830, charged the offence to have been "against the peace of our Lord the King." This was objected to as soon as the case for the prosecution had closed. The prisoner was convicted, and the fifteen Judges held the conviction right.

FORGERY. The prisoner was indicted for forging the acceptance of a bill of exchange. The offence was alleged in the indictment to have been committed on the 12th of March, 1830 (which was in the reign of his late Majesty, King George the Fourth;) and the indictment concluded, "against the peace of our Lord the King."

At the conclusion of the case for the prosecution, the prisoner's counsel objected that the indictment was bad, as it concluded "against the peace of our Lord the King," and for an offence alleged to have been committed in the time of his late Majesty; and they submitted, that, although the entire omission of the contra pacem could, since the statute 7 Geo. 4, c. 64, sect. 20, (set forth Car. Supp. p. 40,) only to be taken advantage of on demurrer; yet the stating of the \*332] offence to have \*been against the peace of his Majesty, at a period before his reign began, was as much an objection as it would have been before the statute.

The RECORDER reserved the point, and the prisoner was found- Guilty.

C. Phillips and Sturgeon, for the prosecution.

Adolphus and Barry, for the prisoner.

The case was afterwards considered by the fifteen Judges, who held the conviction right.

# OLD BAILEY JUNE SESSION, 1832.

REFORE MR. JUSTICE GASELEE AND MR. JUSTICE JAMES PARKE.

### REX v. SMITHIES.

Observations made by a wife to her husband, upon a subject which afterwards becomes

matter of a criminal charge against him, and to which he gave no direct reply, may be opened to the jury by the counsel for the prosecution.

THE prisoner was indicted for the wilful murder of Ellen Tawnley by setting fire to his own house.

Adolphus, in opening the case for the prosecution, was about to state some observations made to the prisoner by his wife on the subject of the fire, to which

he made an evasive reply.

Clarkson, for the prisoner, stated that he was informed the wife was in Court. and, if she could by law be examined, would give a direct contradiction to the proposed statements; and submitted that, under these peculiar circumstances, it was doubtful whether the evidence could be \*received, and therefore

the statements ought not to be made.

Mr. Justice GASELEE and Mr. Justice J. PARKE, were both of opinion that the statement might be made to the jury; and that the circumstance of the observations being stated to have been made by the wife, who could not be called as a witness, did not vary the general rule, that whatever was said to a prisoner on the subject-matter of the charge, to which he made no direct answer, was receivable as evidence of an implied admission on his part.

Verdict—Guilty.

Adolphus, and C. Phillips, for the prosecution. Clarkson, and Barry, for the prisoner.

[Attorneys- and Humphreys.]

See the case of Rex v. Swatkins, ante, Vol. 4, p. 548.

# OLD BAILEY DECEMBER SESSION, 1832.

BEFORE MR. BARON BOLLAND AND MR. JUSTICE BOSANQUET.

#### REX v. CATHERINE SPILLER. Dec. 4.

Any person, whether a licensed medical practitioner or not, who deals with the life or health of any of his Majesty's subjects, is bound to have competent skill; and is bound to treat his or her patients with care, attention, and assiduity; and if a patient dies for want of either, the person is guilty of manslaughter.

An allegation in an indictment, charging that the death of a person was caused by a plaster made and applied by the prisoner, is sufficiently proved, by shewing that three plasters were applied, and that two of them were applied by the prisoner, and the third

made from materials furnished by the prisoner.

MANSLAUGHTER. The first count of the indictment charged that the prisoner, on the 7th of November, 3 Will. 4, at, &c., in and upon one Mary Elizabeth Landon feloniously "did make an assault; and that the said \*Catherine Spiller a certain plaster made and prepared by the said S. C., with certain corrosive and dangerous ingredients, then and there feloniously did put, place, and fix upon the head of the said M. E. L., she the said C. S. then and there well knowing the said plaster so made and prepared by her the said C. S. to be made and prepared with corrosive and dangerous ingredients; and that the said C. S., by such putting, placing, and fixing the said plaster upon the head of the said M. E. L. as aforesaid, then and there feloniously did head of the said M. E. L., of which said mortal wounds and sores the said M. rive unto the said M. E. L. divers mortal wounds and sores in and upon the E. L., from the said 7th day of November in the year aforesaid, until the 15th day of November in the same year, at," &c., did languish, &c. The second count charged that the prisoner, on, &c., at, &c., in and upon the deceased feloniously "did make an assault; and that the said C. S. a certain plaster, made and prepared by her the said C. S. with certain corrosive and dangerous ingredients, then and there feloniously did put, place, and fix upon the head of the said M. E. L., by means of which putting, placing, and fixing the said plaster upon the head of the said M. E. L. as aforesaid, the said M. E. L. then and there became and was mortally sick and diseased; of which said mortal sickness and disease the said M. E. L., from the said 7th day of November in the year aforesaid, until the 15th day of November in the year aforesaid, at," &c., did languish, &c.

It appeared that Mary Elizabeth Landon, the deceased was a child of the age of two years and eight months; and that for the last eighteen months previous to her death, she had been afflicted with scald-head; and that she had been attended in succession by two physicians and a surgeon, but without any more than temporary relief; and that, in the month of November, 1832, the deceased was \*335] taken to the prisoner, who applied two plasters successively \*all over the deceased's head. But a third plaster, which was applied the last before the deceased died, was applied by the child's mother, in the absence of the prisoner, it being made with the materials which had been given by the prisoner to the mother for that purpose. It was proved by two surgeons, that there was a general sloughing of the scalp of the deceased's head, which had caused the death of the deceased; and they stated, that in their opinion this might have been produced by the plasters. There was no evidence at all to shew of what

ingredients any of the plasters were composed.

Adolphus, for the prisoner. Some time ago, I should have argued that this prisoner, having used her best skill to cure the child, was not answerable, although she was not a licensed practitioner; but I will now draw the attention of the Court to the form of the indictment, which charges that the death of this child was caused by the application of a plaster made of corrosive and dangerous ingredients, which was made by the prisoner: which allegation ought to be proved. Now, there is no evidence that any one plaster caused the death, nor that the ingredients were either corrosive or dangerous, or that any of these plasters were made by the prisoner; and it is also not proved that, even if any plaster caused the death, it was either of those put on by the prisoner.

BOLLAND, B. It is my opinion, and that of my learned brother, that this case must go to the jury. The indictment charges that the prisoner made a plaster of corrosive and dangerous ingredients, which was put on the child's head; and though indictments often go on to say, that the prisoner "caused and procured" the thing to be done, we think that if the plaster was made by the direction of the prisoner, that is enough. As to the question, whether it be manslaughter or not, the Judges have considered, \*that any person, whether licensed or unlicensed, who deals with the life or health of any of his Majesty's subjects, is bound to use competent skill, and sufficient attention, and if the patient dies for the want of either, the person is guilty of manslaughter.

The prisoner, in her defence, said, that in this instance she had used the same

remedy which she had previously applied with success to other persons.

Seven witnesses (many more being in attendance) were called, who stated that they had applied to the prisoner to cure them, or some member of their families, of diseases of which regular practitioners had not been able to cure them; that the prisoner had cured them; and that they were perfectly satisfied with her skill, attention, and humanity of treatment.

The jury expressed a wish that the case should go no further.

BOLLAND, B. (to the Jury)—The law, as I am bound to lay it down (and I believe that I lay it down as it has been agreed upon by the Judges, for cases of this kind have occurred of late more frequently than in former times,) is this—

Vol. XXIV.—38

if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity.

Verdict—Not guilty.

Adolphus and C. Phillips, for the prisoner.

[Attorneys—Harmer & Co.]

See the cases of Rex v. Long, ante, Vol. 4, pp. 398 and 423, and the authorities there referred to.

### \*COURT OF COMMON PLEAS.

**F**\*337

Adjourned Sittings at Westminster after Hilary Term, 1832.

BEFORE LORD CHIEF JUSTICE TINDAL.

### CUTLER and ANOTHER v. CLOSE. Feb. 3.

Where a party contracted to supply and erect a warm air apparatus, for a certain sum:—
Held, in an action for the price, (the defence to which was, that the apparatus did not
answer) that, if the jury thought it was substantial in the main, though not quite so
complete as it might be under the contract, and could be made at a reasonable rate,
the proper course would be to find a verdict for the plaintiff, deducting such sum as
would enable the defendant to do what was requisite.

Assumpsit to recover the sum of 70l., upon a contract for providing and erecting a warm air stove and apparatus in a chapel at Kilburn. The defend-

ant was one of the congregation.

On the part of the plaintiffs, it was proved that the stove was erected, and, after it had been tried for some time, an objection was made to the position of some of the air pipes, and an alteration had been made. It was also proved by several witnesses, who went to the chapel for the purpose of giving evidence, that the effect of the stove was considerale.

On the part of the defendant, the clergyman, and several of the congregation proved, that, in one part of the chapel the heat was very great, while at another part it was very cold. Some of the witnesses for the plaintiffs attributed the inconvenience to the mismanagement of the servants of the chapel, and some of those for the defendant contended it was caused by the improper placing of the pipes, and the want of a dry drain. Soon after the alterations had taken place, the defendant wrote a letter to the plaintiffs, in which he mentioned the imperfect manner in which the apparatus had been executed, adding these words "It cannot, in the judgment of any competent person, even now, be said to be completed in such a way as to satisfy us as trustees of a chapel, or tradesmen of such respectability as we have always considered you to be."

Wilde, Serjt., for the defendant, contended that the plaintiffs were not entitled to recover the price, as they had not made the stove reasonably

fit and proper to answer the purpose for which it was intended.

Bompas, Serjt., for the plaintiffs.—The law is this: If we have done the work imperfectly, they may bring a cross action against us; but if they have derived any advantage from it, they must pay us the price. They have kept the apparatus and used it; and their letter to us does not point out any specific thing to be done; if it had we would immediately have done it. They only speak of the imperfect manner in which the apparatus had been executed, and

say, that it could not be said to be completed in such a way as to satisfy them

as trustees of a chapel, or the plaintiffs as tradesmen of respectability.

TINDAL, C. J. (in summing up) said.—This is an action for the price of a hot air stove, which the plaintiffs contracted to erect in Kilburn chapel. contract, which was made in September 1829, was to erect a powerful stove for a price not exceeding 701. The plaintiffs say that they have performed their contract, and are entitled to be paid. On the contrary, the defendant says, that the apparatus is not at all the sort he contracted for, and therefore he is not liable to pay for it. The law on the subject, as it seems to me, lies in a narrow compass. If the stove in question is altogether incompetent and unfit for the purpose, and, either from that or from the situation in which it is placed, does not at all answer the end for which it was intended, then the defendant is not bound to pay. If it is perfect, and the fault lies in mismanagement at the chapel, then the plaintiffs will be entitled to recover the whole price. But there is another view of the case. The apparatus may be in the main substantial, but not quite so complete as it might be according to the contract; and, in that

\*339] case, if it cannot be made good at a reasonable expense, \*the proper course will be to give your verdict for the plaintiffs, deducting such sum as will enable the defendant to do that which is requisite to make it complete. The question upon this part of the case will be, whether it was a stove calculated to answer the purpose intended, though it might not be altogether and completely sufficient. It seems, from the evidence, that the defendant never considered this as a complete answer to the claim until the present action was brought, because in May 1831, he speaks of it in his letter, as an apparatus which might be made better, and not as a complete failure. It appears, from the evidence on both sides, that the stove does warm a part of the chapel, but not the whole. If you think, as the defendant says, that the stove is of no service, not at all answering its purpose, then you will find your verdict for the defendant. On the contrary, if you think, as the plaintiffs say, that it is perfect, and that the fault is in the management of the fire, &c., then you will find for the plaintiffs, and give them full price. But, if you are of opinion that any thing is required to be done to make it complete, you will deduct what sum you think right on that account.

Verdict for the plaintiffs—Damages 60%.

Bompas, Serjt. and Comyn, for the plaintiffs.

Wilde, Serjt., and C. Cresswell, for the defendant.

[Attorneys-H. H. Duncombe, and Bell & Co.]

See the case of Milner v. Tucker, Vol. 1 of these Reports, p. 15; Percival v. Blake, Vol. 2, p. 514; Cash v. Giles, Vol. 3, p. 407; and De Sewanberg v. Buchanan, post, p. 343.

\*340]

### \*DAY v. DAVIS. Feb. 4.

It will not prevent a plaintiff from giving evidence on a special count in his declaration, that he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts.

ASSUMPSIT. The first count of the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would accept a bill of exchange made by him for 35t. 12s. 6d., and would deliver it, so accepted, to defendant, that he might negotiate it for his own benefit, the defendant undertook to indemnify him from any loss or damage for or by reason of his acceptance of the bill. It then avered the acceptance, &c., and that the bill had long become due, yet the defendant did not nor would indemnify him; in consequence whereof the holder commenced an action in the Palace Court against the plain-

tiff, and caused him to be arrested, whereby he was kept in custody, and was forced to give a bail-bond, and to pay costs, and was injured in his business. There were counts for money paid, money had and received, &c. Plea—The

general issue, with a notice of set-off.

The particular of demand was as follows:—"The plaintiff seeks to recover, under the indebitatus counts of the declaration in this cause, the sum of 351. 12s. 6d., being the amount of a certain bill of exchange drawn by the defendant on the plaintiff, and accepted by the plaintiff for the accommodation of the defendant, on or about the 22nd day of June, 1830, and which bill the plaintiff has been compelled to take up and pay, together with costs, making up the sum of 50l."

Taddy, Serjt., contended, that the plaintiff must, under this particular, be

confined to the claim stated in it.

TINDAL, C. J., was of opinion that the particular was only required to explain the common counts, but that the plaintiff might recover on the special count any damage which he had sustained in consequence of the dishonour of the bill, and was not confined to the recovery of money \*which he had actually paid. It did not follow, that, because a particular had been given [\*341 applying only to the indebitatus counts, therefore the plaintiff was precluded from going into evidence upon a special count, to which the particular did not profess to apply.

Verdict for the plaintiff—Damages 381.

Wilde, Scrit., and Rogers, for the plaintiff.

Taddy, Serjt., and A. A. Park, for the defendant.

[Attorneys-J. D. Blake and Cowburn.]

### TEMPERLEY v. SCOTT. Feb. 9.

Where the examination on interrogatories of an absent witness is read on the part of the plaintiff, the whole, including the answers to the cross-interrogatories, must be read us part of his case.

Assumpsit on a policy of insurance on the ship Kinnersley Castle.

The examination on interrogatories of the ship's carpenter, who was abroad at the time of the trial, was used on the part of the plaintiff, but the examination in chief only was read.

Wilde, Serjt., for the defendant, required that the answers to the cross-inter-

rogatories should be also read.

Taddy, Serjt., for the plaintiff, contended, that he was not bound to read them on the part of the plaintiff, but that if the defendant wanted them he

might introduce them as his case.

TINDAL, C. J. I cannot form any distinction between the examination viva voce and the examination on paper. If the witness was here, the cross-examination would immediately follow on the examination in chief; and I do \*not see any reason why they should be separated when the examination is in writing. On the contrary, it rather seems to be more important when the witness is absent that the whole should appear at once. The evidence is not sifted till the cross-interrogatories are put.

The answers to the cross-interrogatories were then read. Nonsuit.

Taddy, Serjt., R. Alexander, and Addison, for the plaintiff.

Wilde, Serjt., and C. Cresswell, for the defendant.

[Attorneys-Williamson, and Bell & B.]

#### WILLIS v. BERNARD. Feb. 9.

In an action of crim. con., letters written by the wife to third persons, before she became acquainted with the defendant, and in which she mentioned her husband, are receivable in evidence to shew the terms on which they were with respect to affection.

CRIM. Con. On the part of the plaintiff, in addition to letters written by his wife to him, while they were absent from each other, it was proposed to read one which was written by her, before she became acquainted with the defendant, to the plaintiff's brother, who was a clergyman, on the subject of some arrange-

ment of her property for the benefit of her husband and family.

Spankie, Serjt., objected to this as a novel species of evidence, and also as improper to be received upon principle. He contended, that when a wife wrote letters to a third person, there was not that security for the honest and bona fide expression of sentiment which there was in letters written to the husband himself, as various reasons might induce her to gloss over or conceal matters when communicating with a third person.

\*343] \*TINDAL, C. J. I think it is receivable. We are in the habit of hearing what the wife has said, to other persons, of her husband, and I do not see why we may not hear what she has written of him. The letter is less likely to be mistaken than the oral statements, which depend upon the recollec-

tion of a witness. But I will take a note of your objection.

The letter was read. Verdict for the plaintiff—Damages 1000%.

Wilde, Serjt., and Wightman, for the plaintiff.

Spankie and Storks, Serjts., and Thesiger, for the defendant.

[Attorneys-Whitton & G., and J. & W. Lowe.]

A Rule nisi was obtained in Easter Term, which, after argument, was, in the course of the same term, discharged. See 1 Moore & Scott, 584.(a)

### DE SEWHANBERG v. BUCHANAN. Feb. 11.

A. sold a picture to B. as a Rembrandt. There was contradictory evidence in an action on an accommodation bill given for the price, as to whether there was a warranty, or only a representation. The picture was kept:—Held, that if the Jury thought there was a warranty, and that it was broken, then they should find their verdict for that sum which they considered to be the actual value of the picture.

Assumpsite by the plaintiff, as indorsee of a bill of exchange for 2001, drawn by one Marsack, on, and accepted by, the defendant, for Marsack's accommodation. The consideration for the bill was a picture, which was the property of the plaintiff, a Dutch Baron, and which Marsack, who was a picture \*314] déaler, saw at the house of a \*person named Child, to whom it was sent to be cleaned. Marsack, when he saw the picture, said that it was a very pretty picture, and that he should like to have it, but had no money to pay for it. Upon this, an interview took place at Child's house, between the plaintiff and Marsack, at which the price was stated to be 2001., and, according to the testimony of one person who was present, the plaintiff said—"I warrant you that it is a true picture of Rembrandt's; I am an ancien militaire, and would not deceive you." But Child, who was also present at the interview,

<sup>(</sup>a) See the cases of Edwards v. Crock, 4 Esp. 39; Trelawney v. Coleman, 1 B. & A. 90, and 2 Stark. 192; and Hoare v. Allen, 3 Esp. 276.

stated that he did not recollect the using of the word "warrant," and that he did not think that it was used by the plaintiff. He also said, that he thought it a very beautiful picture; but he was not asked whether he thought it was a Rembrandt. The bill, when it became due, was in the hands of a person named Gregory; and, on his applying for payment, several letters were, in the absence of the defendant in the country, written by his wife, requesting time. On the part of the defendant, several witnesses were called, who were acquainted with the value of pictures, who, being shown the picture in question, said, that they did not think it was a Rembrandt, or even a Gerard Dow, who was his pupil; and that, in their opinion, it was not a picture which a connoisseur would purchase at all. They varied in their estimate of its value from 25% to 10%. They said that the pencilling was not like that of Rembrandt.

Andrews, Serjt., for the defendant, submitted that the plaintiff was not entitled to recover, as the picture had been proved to be comparatively worthless as it was a not a Rembrandt, and was valued, at the highest, only at 25*L*, and was, in fact, of no use to a connoisseur in pictures. He contended, also, that the letters written by the defendant's wife, in his absence, were of no effect in the case, as they were not written to the plaintiff, but to Mr. Gregory, against whom, as the holder, she might think that her husband had no defence.

\*Wilde, Serjt., for the plaintiff. Under the circumstances of the case, it is evident, that what took place did not amount to a warranty, and that Mr. Marsack, who was a dealer in pictures, acted upon his own judgment in the matter. In the case of Jendwine v. Slade, 2 Esp. N. P. C. 572, which was an action to recover damages on the sale by auction of two pictures, one of which was stated in the catalogue to be a Sea Piece, by Claude Lorraine. and the other a Fair, by Teniers, when, in fact, they were only copies. On the one side it was contended, that the statement in the catalogue amounted to a warranty; and on the other, that it was not a warranty, but merely a statement of a supposed fact, upon which the buyer was to exercise his own judgment: and Lord Kenyon said, it was impossible to make it the case of a warranty, as the pictures were the work of artists some centuries back; and there being no way of tracing the picture itself, it could only be matter of opinion; and that the catalogue only imported that, according to the notion of the seller, the picture was the work of the artist whose name was set against it. Now, the opinion of the Judge in that case will clearly apply to the present, if there was not, in fact, any warranty, as I submit there was not; for, if there had been, Child, who was present at the time, must have heard it given.

TINDAL, C. J., in summing up, said—The question is, whether you think that a warranty was, in fact, given, and that it was broken? For, if you do, you must find your verdict for such sum as you think to be the real value of the picture.(a) But, if there was no express warranty, but only a representation, then, as there is no evidence \*that the plaintiff did not believe that the picture was not a Rembrandt, he will be entitled to recover the full amount.

Verdict for the plaintiff for the full amount.

Wilde, Serjt., and White, for the plaintiff.

Andrews, Serjt., and Follett, for the defendant.

### [Attorneys-J. Duncombe and Lane.]

(a) If the picture had not been kept by Marsack, the plaintiff would not have been entitled to recover any thing on the bill. See the case of Lomi v. Tucker, Vol. 4, of these Reports, p. 15. See also Cutler v. Close, ante, p. 338, and the authorities there referred to

# Adjourned Sittings at Guildhall, after Hilary Term, 1832.

### GARTH v. HOWA:RD and FLEMING.

If A., without the authority of B., pledges his property with C., a joint action of detinue is maintainable by B. against both A. and C. Whether in such an action a verdict

may be taken against one defendant only-Quære.

Statements made by the shopman of a pawnbroker who is left in the shop to answer in his master's absence, can only be received in evidence in an action against the master, when they relate to transactions which are strictly within the business of a pawnbroker; and are not receivable if they relate to an advance of money not within the terms of the Pawnbroker's Act.

If the Jury, in such a case, are satisfied that B. held out A. as a person authorized to pledge his property for the purpose of raising money, they may find a verdict for both

defendants.

DETINUE for plate. Pleas-First, the general issue by each defendant-Secondly, a plea by the defendant Fleming that the plate was deposited with him as a security for a sum of 2001. advanced by him to the other defendant, Howard, for the use of the plaintiff—and Thirdly, another plea by the defendant Fleming, stating that the plaintiff was indebted to him in the sum of 2001. and that the plate was pledged for the debt. The replication traversed the pleas.

It appeared that the plaintiff was the son of General Garth, who died about the latter end of the year 1829; and the defendant Howard, who was the plain-\*347] tiff's solicitor, went down to the General's country house in Dorsetshire, and told his solicitor, Mr. Boswell, that he was come down to take possession of the goods, which consisted of furniture and plate; and in consequence two boxes of plate, accompanied by an inventory, were sent from the General's bankers to Howard, who gave a receipt in this form :-

"February 6th, 1830.

"Received of Mr. Edward Boswell two boxes of plate belonging to the late General Garth.

"For Captain T. Garth, Edwd. Jno. Howard."

It was also proved, that another quantity of plate, which was at the General's town house, was handed over to Mr. Howard, who compared it himself with the inventory. The witness who proved this (who was the town solicitor of the General,) said, that he knew that Mr. Howard was acting as Captain Garth's solicitor, and that the captain was in pecuniary difficulties.

To connect the defendant Fleming, who was a pawnbroker, with the possession of the plate, a demand of it was proved to have been served at his shop on a young man, who told the person who served it, that Mr. Fleming was at Paris, and that he answered for him when he was away. It was also proved that the young man went the same day to the office of the plaintiff's attorney; and it was proposed, on the part of the plaintiff, to give in evidence what he said there.

TINDAL, C. J., thought that he ought to be called as a witness; and that, as no act had been proved to have been done by Mr. Fleming, they could not treat the shopman as his agent, and give his declarations in evidence to affect his master.

Spankie, Serjt., submitted, that, under the circumstances \*of the case, the shopman must be taken to be the agent of his employer.

TINDAL, C. J., said, he thought that it would be going further than the Courts had ever gone before; but that he would receive the evidence and take a note of the objection.

It was then proved by the plaintiff's attorney that the shopman said, when

he came to the office, that Mr. Fleming was at Paris, and requested that process might not be sued out against him for ten days. He said, it would be a hard thing on Mr. Fleming, who had advanced Mr. Howard 2001. upon the plate, if he were forced to give it up. He also said, that he would go to Mr. Fleming's brother, and take his advice as to what he was to do. This was on the 17th of September, and the attorney waited till the 1st of November, when he wrote a letter to Mr. Fleming, and three days after sued out process.

Wilde, Serjt., for the defendant Howard. To sustain this action, the plate should have been shewn to be potentially in the possession of Mr. Howard at the time the action was brought. Now the plaintiff has shewn that it was out of his custody on pledge, and on a pledge, too, apparently for the benefit of the

plaintiff.

TINDAL, C. J. The question is, whether Howard has wrongfully pledged. If he has done so he is answerable. As he has the right to claim the plate, as between him and Fleming, he might acquire the possession of it from Fleming by paying him the money advanced upon it.

Wilde, Serjt. It was not in his power at the time of action brought, and it

should have been to maintain this form of action.

the raising of money upon some books.

\*TINDAL, C. J.—I think it may be considered as in his power, [\*349 though not in his actual possession.

Wilde, Serjt., then addressed the Jury for the defendant Howard. Andrews, Serjt., addressed the Jury for the defendant Fleming.

Various letters were put in and read, written by the plaintiff to the defendant Howard, shewing that he was in very great want of money, and also a power of attorney dated the 12th of December, 1828, relating, among other matters, to

Spankie, Serjt., for the plaintiff. An authority to pawn books at one time does not give the authority to pledge plate at a considerable time afterwards. But the power of attorney does not give any authority to pledge, it is only to sell in the ordinary way. A factor could not pledge by the common law, though he could sell. It is not shewn that the state of the account between the plaintiff and Mr. Howard authorized any pledge. He who, after a demand, detains property on the authority of a person who obtained it illegally, is a co-delinquent, and liable to answer for the detention as much as the person from whom he received it.

TINDAL, C. J., left it to the jury to say whether there was any authority from the plaintiff to Howard to pledge the plate; for, if there was not, the verdict must pass against both defendants, as one could not stand in a better situation than the other.

The Jury, after some consultation, said that they wished, if possible, to protect the pawnbroker; but, under his \*Lordship's direction found a verdict for the plaintiff generally.

Spankie, Serjt., and Platt, for the plaintiff.

Wilde, Serjt., and Follett, for the defendant Howard. Andrews, Serjt., and Godson, for the defendant Fleming.

[Attorneys-Whitelock, and Howard-Fleming.]

In the ensuing Easter Term a rule nisi for a new trial, pursuant to the leave given, was moved for and obtained. Which rule, after argument, was made absolute, on the ground, that, as the transaction was not one entered into by the defendant in his business of a pawnbroker, (a) the shopman's declarations

<sup>(</sup>a) The Pawnbroker's Act, 39 & 40 Geo. 3, c. 99, only allows pledges to be taken to the amount of 104. For the report of the motion in banc, see 1 Moore & Scott's Reports, p. 628.

were not admissible; and the cause came down again for trial at the adjourned sittings after Michaelmas Term.

### SAME v. SAME. Dec. 20.

THE same evidence was given as on the former trial, with respect to the delivery of the plate to the defendant Howard, and also as to the service of the demand at the shop of the defendant Fleming. But instead of giving in evidence the statements made by the shopman of the defendant Fleming, the shopman was called as a witness, and proved, that, about the 1st of February, 1830, he went to the house of the defendant Howard, and looked at the \*plate in question; that he told his master that he had seen it, and that the 2001. was advanced upon it; and it was brought to his master's house. He further stated, that during his master's absence at Paris in September, the time when the demand of the plate was served upon him at the shop, he was authorized to conduct the business of the shop; and that, in consequence of such service, he went to the office of Mr. Whitelock, the plaintiff's attorney, on behalf of his master.

He was then asked what he told Mr. Whitelock.

Andrews, Serjt., objected, that what was stated by the shopman on a subject not within the scope of his agency was not receivable in evidence.

TINDAL, C. J. You may ask him whether he told Mr. Fleming afterwards

what he had said to Mr. Whitelock.

The witness stated, that when Mr. Fleming returned from Paris he shewed him the demand, and told him he had been to Mr. Whitelock to stay proceedings till his return; that Mr. Fleming asked him whether he knew that the plate was Garth's; and he replied, that he did not; that he communicated to Mr. Fleming the conversation between Mr. Whitelock and himself; and that Mr. Fleming did not say whether he had done right or not; that he told Mr. Whitelock it would be a very hard case to proceed against Mr. Fleming, as they had often done business for Captain Garth before. The witness further stated, that no duplicates were given for the plate, and that Mr. Howard told him, when the 2001. was advanced, that he wished to raise the money for the use of Captain Garth, as he had done before.

It appeared that the accounts between the plaintiff and Mr. Howard had been referred, by an order of the King's Bench, to Master Goodrich, who, on the 17th November, 1831, stated, by his allocatur, that Mr. Howard had \*re-\*352] ceived of Captain Garth 1776l. 11s. 5d.; that his bills of costs delivered

amounted to 2053l. 13s. 10d., of which 788l. was taxed off.

From Mr. Howard's cash account, delivered under a Judge's order, it appeared, that, on the 1st of January, 1830, the balance in his favour was 703L. 18s. 11d., and that, on the 1st of February, he received a sum of 300l. more. The 2001. was included in the account, and also 10s. for expenses connected with it; but these were struck out by the Master as being the subject-matter of this action.

The bills of costs were produced, and the following items read—

"15th February, 1830—Clerk's attendance on Mr. Fleming, in Brewer Street, to request him to call at my office to look over your plate, as I wished him to advance a sum of money thereon.

"16th—Attending Mr. Fleming this morning, going over the whole of the

plate with the inventory delivered by Mr. Boswell.

"Same day-Attending him, when he informed me he would lend the sum of 2001."

Also the following-

"18th January, 1830—Attending Mr. Fleming this morning, on the subject

of a dressing case and a diamond ring, on which he was willing to advance 40t. Attending for duplicates, and paid for same 2s. 6d. Writing Lady Astley, in-

forming her &c. &c., and sending her the 40l."(a)

On the 2nd December, 1829, a letter was written by Mr. Howard to the plaintiff, commencing, "My dear Garth," informing him of two persons who had suits against him, but, not being willing to incarcerate him, had given notice of the fact. It concluded with these words—"Therefore, if you are not off five minutes after this you will be caught."

\*Wilde, Serjt., applied for a nonsuit. It is not like an action of trover, being an action for detaining the plate. The case assumed on the part of the plaintiff is, that Howard has pledged the plate with Fleming for a sum of 200l. Assuming for the moment that the action may be maintained against Howard, yet it cannot against Fleming. The common action of trover might be maintained, but not this.

Spankie, Serjt. It is in substance an action of trover, though not in form. TINDAL, C. J. I will reserve the point, and that will let in the other question, whether in this action there can be a verdict for one defendant and not the other.

Wilde, Serjt., then addressed the jury for the defendant Howard. not be taken that the sum in the cash account, appearing to the credit of the plaintiff, was the absolute state of the account, but the state subject to the bills of costs which were running on, and any other transactions; for Howard was acting generally on behalf of the plaintiff, and not merely as his attorney. It appears that he discharged servants, and did various other acts. From the cash accounts, it appears that the plaintiff, having confidence in Howard, left him a general discretion. It is no matter whether Howard, mistaking the state of the account, pledged this plate. The plaintiff cannot now say the account turns out differently to what was supposed, and, therefore, I will deny that I gave you any authority. It is clear that the plaintiff was distressed for money; and whether there was a balance due to him or not, if Howard could not give him money, it would be necessary to raise it upon the plate. The circumstances of the case import an authority to Howard to raise money on the plate. instance of the ring and dressing case, and the money sent to Lady Astley, or otherwise applied for the plaintiff's \*benefit, shew that there were similar [\*354] dealings before. It is no matter whether Howard acted improperly or These two parties, Howard and the plaintiff, were distressed, and the authority to pledge is to be implied from the circumstances and documents in the case. And if so, the plaintiff has no right now, having had the benefit of the money, to turn round and bring a speculative action, and try to cheat the pawnbroker out of the money. Howard also had no control over the plate, he having pledged it with the pawnbroker.

Andrews, Serjt., for the defendant Fleming. The transaction was clearly not one entered into by the defendant in his capacity of pawnbroker. It is evident, from the letters between the plaintiff and Howard, that there was a great intimacy between them; and Howard had pledged with Fleming for the plaintiff before; and Fleming had reason to conclude, as a man using reasonable caution, that Howard was clothed with authority to pledge this plate. He has advanced the 200l. What is there to shew that Howard had no authority, to rebut the presumptive evidence arising from the circumstances of the case? For what purpose was the plate delivered to Howard, except to be used to raise money, according to the necessities of the plaintiff, as they occurred? The question is, what was the understanding between the parties at a time when they were on friendly terms; not what is pretended, now they are at variance and

<sup>(</sup>a) The nature of the acquaintance between Captain Garth and Lady Astley may be gathered from the case of Astley v. Garth, which was tried in the Court of Common Pleas.

Howard is unable to pay. Why was not a separate action brought against Howard? Or why was not the action brought against Fleming alone; and then he could have called Howard to explain the transaction. But it is an then he could have called Howard to explain the transaction. instance of cunning to shut the mouth of Howard. Why, if there is any thing in the present statement, did not the plaintiff immediately tell Fleming that he had not given the authority to pledge the plate? The statements of the shop-\*355] man, in the absence of Fleming \*at Paris, do not affect the case. Fleming has conducted himself with perfect good faith, and there is evidence in the case upon which you may say that he acted upon reasonable grounds as to the authority of Howard to pledge for the purpose of raising money.

No evidence was produced on the part of either of the defendants.

TINDAL, C. J., in summing up, said—This is an action to recover the value of some plate, which, as is alleged on the part of the plaintiff, the defendant Howard improperly, and without any authority, pledged with the defendant Floring. The question is, whether the plaintiff did authorize Howard to pledge the plate; whether, without the evidence of direct authority, you, from the circumstances, can infer that there was an authority; for, if you can, you will find your verdict for the defendants. If you think that the plaintiff never authorized Howard to pledge the plate, or to hold himself out as a person having authority to deal with the property in such a way, then you will find for the plaintiff against Howard, on the ground that he acted without authority; and if so, then Fleming will also have acted without authority, and you will find your verdict against him also. There appears to have been a great intimacy between the plaintiff and Howard. We are to draw our attention particularly to the date of the 16th February, 1830, when the plate was pledged. It appears that, on the 2nd December, 1829, the plaintiff was in considerable pecuniary embarrassment, as a letter was written to him by Howard, commencing "My dear Garth," and mentioning circumstances of a peculiar nature with regard to those embarrassments. The next transaction, in order of time, is one of the 18th January, 1830, when, it appears, a pledge was made with Fleming, through Howard, to raise money for the purposes of Lady Astley. It may be a question, whether the articles pledged were \*the property of Lady Astley; but still, \*356] whether they were or not, they were pledged through the instrumentality of Howard. It seems clear that the plate was obtained for the purpose of being used for the benefit of the plaintiff; and the question for you will be, whether it was obtained to be pledged under a specific authority, to be given in each individual case, or under a general authority to pledge for the purpose of raising money. There is a little difference as to the cases of the two defendants. there was no authority at all to Howard, there is an end of the case, and a verdict must pass against both. But, if Howard had no specific authority, but the plaintiff had so held him out as his agent as to justify Fleming in dealing with him as such, then the plaintiff cannot have a verdict. For, if a man holds out another as his agent, in dealings with a particular person, he cannot object to the subsequent conduct of that person, unless he gives notice that he has revoked his authority.

His Lordship, at the desire of Spankie, Serjt., afterwards told the Jury, that, in the cash account, it did not appear that any advance of money was made to

the plaintiff by Howard, after the time of the pledging.

erdict for the defendants.

#### HILL and Another v. PHILLIPS. Feb. 14.

If the subscribing witness to the acceptance of a bill of exchange, being one of the acceptor's family, cannot be served with a subpæna in consequence of the conduct of that family, the bill may be read without his evidence.

Assumpsit on a bill of exchange against the defendant, as acceptor. There was a subscribing witness to the acceptance, whose name was George Phillips, one of the defendant's sons. He was not called; but, to account for his not being present, it was proved, on the part \*of the [\*357] plaintiffs, that many attempts had been made to subposna him, but without success. It appeared that he lived with his father, and, on applications at the house, at different hours of various days, answers were given sometimes that he was out of town, and sometimes that he was gone out for a walk. One witness stated, that when told he was gone out for a walk, he watched the house for hours, but did not see him return. On one occasion, he watched from five in the morning till nine, and then inquired for him. The servant said, he had been gone out an hour. The witness said, it is impossible, for I have been watching since five. The servant replied, laughing, "He went out the back way this morning."

Wilde, Serjt., for the plaintiff, referred to the cases of Crosby v. Percy,(a) and Burt v. Walker, (b) and contended, that it was evident the witness was kept out of the way; and, therefore, the bill might be read without calling him.

TINDAL, C. J. I think you have hunted quite enough after George Phillips.

It is evident they were keeping you at arm's length.

The bill was read, and eventually there was a-

Verdict for the plaintiffs.

\* Wilde, Serjt., and R. V. Richards, for the plaintiffs. **F\*35**8 Erle, for the defendant.

[Attorneys-Baxendale & Co., and Greenfield.]

### ESSERY v. COBB. Feb. 14.

The captain of a ship, who gives directions for repairs, is liable to the tradesman in the first instance, if it does not appear that any credit was given to the owners.

Assumpsit for work and labour. Plea—The general issue.

The plaintiff was a ship-joiner, and the defendant was the captain, but had not any share, as owner, of a ship called the Falcon. It was proved that work was done to the ship to the amount of 281. 5s., and that the defendant was the only person who interfered in the matter, and that he gave directions for various alterations to be made.

Wilde, Serjt, for the defendant, upon this proof, admitted that the verdict

must pass for the plaintiff.

TINDAL, C. J. The captain is liable in the first instance, if it does not appear that any credit was given to the owners.

Verdict for the plaintiff—281. 5s.

Taddy, Serjt., and Payne, for the plaintiff. Wilde, Serjt., for the defendant.

### [Attorneys-West & Morris, and Oliverson & Co.]

(a) 1 Taunt. 364, and 1 Camp. 303. That case decides, that, "if, upon fair, serious. and diligent inquiry, without evasion, an attesting witness is not to be found, evidence of his handwriting is admissible, to prove the attestation."

(b) 4 B. & A. 697. According to this case, which was an action upon a bail bond, the clerk of the defendant was the subscribing witness, and, when he was subpœnsed, said, that he would not attend, and the trial had been put off twice, in consequence of his absence. Search had also been made at the defendant's house, and in the neighbour-hood: and, upon receiving information at the defendant's that the witness was gone to Margate, inquiry was there made without success. It was held, that, under these circumstances, evidence of his handwriting was admissible.

See the case of Thompson v. Finden, Vol. 4 of these Reports, p. 158, which decides, that, "in an action against one of the owners for work done to a vessel, by the order of the ship's husband, such owner will be liable, unless it be shewn that the dealing was, that the person who directed the work to be done should be looked to exclusively." See \*359] also Harrington v. Fry, Vol. 1, p. 289, which decides, that "a \*person is not liable for goods supplied for the use of a ship, unless he either is owner, or has held himself out as such, or has made an express promise to pay, or has received profit from the ship." And, in Cox and Others v. Reid, Id. 602, it was held, that "the registered owner of a ship is prima facie liable for goods furnished for the use of that ship; but such presumption of liability may be rebutted by evidence of the credit having been given to others." See also the next case of Castle and Another v. Dukc.

#### CASTLE and Another v. DUKE. Feb. 18.

If a person, who is mortgagee as well as broker of a ship, gives directions for repairs to be done, the question for the jury will be, in an action by the tradesman against him, whether he gave the directions only in his character of broker, or as a person having an interest in the vessel.

Assumpsit for work and labour in repairs done to the ship Laurel of Shields. The captain was called as a witness for the plaintiff.

Bompas, Serjt., for the defendant, produced a bill of the plaintiff's, headed "The Captain and Owner of the Ship," &c., and objected that the witness was incompetent, as he was himself liable.

TINDAL, C. J. Generally speaking, the ship builder has a double claim: against the captain, if he employs him, or against any persons whom he may find out to be owners. I think that the witness is competent; but I will take a note of the objection.

The captain then proved, that the ship, having met with an accident, was taken to the plaintiff's dock; that he afterwards saw the defendant, who told him to have done whatever the surveyors ordered; adding, that the ship was insured, and he could not pay the dock bill until he had received the insurance. He further stated, that he told the plaintiffs what the defendant had said to him. A ship owner and publican, named Browne, was also called as a witness; he stated, that the defendant and the owner of the ship, Mr. Leslie, came together to his house, and the defendant asked him (Browne) whom he could \*360] tiffs; and the defendant thereupon told him to take the ship to them, and tell them to do what was necessary, and no more; and also told him to get them to send the bill to him (Browne), that he might look it over on his behalf. It did not, however, appear that the witness told the plaintiffs, what the defendant had said to him. Browne afterwards saw one of the plaintiffs, who told him, that if neither Leslie nor the defendant paid, they should look to him.

The register of the ship was put in, from which it appeared that Leslie was the sole owner, and the defendant mortgagee. The defendant had also acted as broker, and gave a receipt for the insurance, which was also put in.

Bompas, Serjt., for the defendant. They call the captain who is unquestionably liable if he gives the directions for what is done; and it does not appear that the work was done expressly for the owner. The defendant is not liable, either as mortgagee or as broker. It does not appear that Browne told the plaintiffs that Duke was the person who directed him to get the repairs done; and the account of the plaintiffs was sent to Browne. Leslie, the known where of the vessel, was present at the time when Duke and Browne had the conversation. The ship broker is bound to give instructions to the captain at the time best dock, &c.; but, to make him personally liable, he must himelf give orders to the party doing the work. Leslie has compounded with his creditors. The evidence only is of Duke's telling Browne to get the recairs done, but not of Castle's being informed of this by Browne. There is

no evidence that Duke every gave any orders at the dock. Both the captain and Browne come to discharge themselves. The 6th Geo. 4, c. 110, s. 45, provides, that where the mortgagee enters his mortgage on the register, he shall not be deemed owner. They do not shew that \*Duke has charged. According to Browne's evidence, Castle said to him—"If Leslie does not pay, or Duke does not pay, I will make you pay." The receipt for the insurance has nothing to do with the case; as, if Duke was liable at all, he was so personally, and must pay, whether he received the insurance or not.

TINDAL, C. J.—The question is, whether the defendant gave the directions for the work only in his character of broker, or as a person having an interest in the vessel. It appears that he stood in an ambiguous character: he was not only intrusted by the owner, but also had an interest of his own to protect.

Verdict for the plaintiff.

Wilde and Andrews, Serjts., and Knowles, for the plaintiff.

Bompas, Serjt., and R. C. Nicholl, for the defendant.

### [Attorneys-Browne, and Willins.]

See the preceding case of Essery v. Cobb, and the cases cited in the note to it.

### HAY v. WEAKLEY. Feb. 20.

In an action for maliciously suing out a commission of bankrupt, it is not sufficient to prove merely that the commission was superseded, as a supersedeas may proceed upon strict legal grounds, and does not, therefore, furnish evidence of the want of probable cause.

Action for maliciously suing out a commission of bankrupt against the

plaintiff.

On the part of the plaintiff it was proved, that, in December, 1828, the defendant made an affidavit in the Mayor's Court of London, that the plaintiff was justly and truly indebted to him in 610l., for money had and received. \*Upon this, process issued, the plaintiff was arrested, and removed by habeas corpus to the King's Bench, where he continued till July, 1829, 1826 and was then discharged by an order of Mr. Justice Bayley. The affidavit on which the docquet was founded, was sworn by the defendant on the 31st of October, 1829. The commission was dated the 2d of November, 1829. It was afterwards superseded by the Lord Chancellor. It appeared, also, that the plaintiff had been taken before a magistrate, and charged with felony, by a person named Curis; but the plaintiff failed to shew, by the witness he called, that the defendant, although he was proved to be present with his solicitor, then made the subject-matter of his claim the foundation of a criminal proceeding.

Merewether, Serjt., was addressing the jury for the defendant, when— TINDAL, C. J., inquired, what evidence there was in the case of the want of

probable cause?

Jones, Serjt. There is the supersedeas. According to Cotton v. James, decided in the King's Bench, 1 Barn. & Ad. 128, the slightest evidence, after a supersedeas, is sufficient to throw the burden of proof on the defendant. If a man swears against me, without having any real debt, what can I do to shew that there was not any?

TINDAL, C. J. Supposing you had taken a step higher, and brought an action for maliciously holding to bail, would it be sufficient to prove that there was judgment as in case of a nonsuit? Or, in an action for malicious prosecution, why does not proof that the party was acquitted suffice? The supersedess may have proceeded upon strict legal grounds.

\*Jones, Serjt. It was in fact treated as a question of felony. I 1\*363

trust your Lordship will allow the case to go to the jury.

TINDAL, C. J. I must tell the jury at last, that, although the facts are proved, they do not amount to what, in law, is a want of probable cause. But, as the defendant's counsel has partly addressed the jury, the case had better go on.

The case proceeded, and eventually there was a-

Verdict for the defendant.

Jones, Serjt., and Curwood, for the plaintiff.

Merewether, Serjt., and Hoygins, for the defendant.

[Attorneys-E. Isaacs and R. Cole.]

### CORBETT and Another v. BROWN. Feb. 25.

A tradesman can only recover against a person making a false representation of the means of one who referred to him, such damage as is justly and immediately referable to the false representation. Therefore, if the tradesman gives an indiscreet and ill-judging credit, he cannot make the referee answerable for any loss occasioned by it.

CASE. The declaration stated in substance, that the plaintiffs before, and at the time, &c., carried on the business of warehousemen, in London; and that on the 16th of April, 1830, one Henry Brown applied to them, and stated that he was about to commence business at Norwich, and had about 300l. capital, his own property, to commence business with, and requested them to sell him goods; and referred them to the defendant to corroborate his statement, of which the defendant, before the sale of the goods, had notice, and was requested to inform them, if the said Henry Brown had such capital or not; and that he, well knowing that he had not, falsely, fraudulently, and deceitfully informed them, in answer to these inquiries, that the statement was perfectly correct, as \*364] he had advanced him \*the money; in consequence of which, they were induced to give Henry Brown credit, and sold him goods to the amount, altogether, of 700l., which remained unpaid, and which they were likely to lose.

Plea—the general issue.

It appeared that the plaintiffs, who were wholesale haberdashers and general warehousemen, carrying on business in London, were applied to by the son of the defendant, who looked out goods to the amount of nearly 300l. Before they were sent to Norwich, where he stated he was about to begin business, he made a statement to the plaintiffs, and gave a reference to his father, in consequence

of which the following letter was written by them to him:-

"Sir,—Your son, Mr. Henry Brown, has purchased goods of us, and referred us to you, in order to corroborate his statement of having 300l. capital, his own property, to commence business with at Norwich. We require to know if such be the case. Any information you may please to give will oblige us, and which we shall be happy to apply in promoting your son's object, provided we can

consistently do so. We shall be glad of an answer by return of post."

The defendant, on the 17th, wrote the following reply.

"Gentlemen,—In reply to your letter of yesterday, I beg to acquaint you, that the statement made to you by my son Henry, as to the 300*l*., is perfectly correct, as I advanced him the money, being the utmost I could spare at the present time, in consequence of having a numerous family. I hope that my son's dealings with you will always be as correct as the present statement."

After the receipt of this letter the goods were sent. The plaintiffs, on the whole, supplied goods to the son to the amount of 1200l., between the 16th of April and the \*4th of October, when he stopped payment, a bill for 240l having become due that day. The practice of the plaintiff's house, as

to credit, was, that all goods supplied during the current month, from the 20th to the 20th, were drawn for at two months on the 1st of the succeeding month. The plaintiffs had always an account running with the defendant's son. The first month's supply was 2901. 9s. 1d., which was settled by a cash payment of 100l., and a bill for the remainder at three months. This extension from two to three months was an indulgence to him. The whole of the goods supplied during the first three months, amounting to 500%, were paid for. A witness, in the employ of the plaintiffs, proved that it was not their practice ever to credit persons trading on a borrowed capital. A letter, dated the 26th of March, 1830, addressed by the defendant to his son, was put in: it inclosed (accepted) a bill for 200%, which had been sent down to the defendant for acceptance, and contained this passage:—" If you prefer an additional 100%, instead of security. I will, on receipt of your note for 300%, send you another 100% acceptance. Should you prefer the bill, instead of security, draw it yourself." Another letter from the same to the same, dated 14th of June, 1830, was put in; it contained this sentence: -- "I also received 3l. and 15s. for a quarter's interest." On the 25th of October, 1830, a commission of bankrupt was issued against the son, on the petition of the plaintiffs, and his stock in trade was sold by private contract. It appeared that the defendant had not proved any debt under the commission; but the bankrupt had inserted the 300l. as a debt in his balance sheet.

Jones, Serjt., for the defendant. In order to charge the defendant in this action, you must look, First, at the knowledge, the notion, the intentions of the Secondly, you must be satisfied that it was the father's letter, which induced the plaintiffs to trust the son; and Thirdly, that \*the loss was occasioned by their so trusting him. The words in their letter are, 'has purchased;' not 'is about to open an account' to any particular amount. the money had been advanced, in one sense of the word, has not been denied; and the charge of fraud depends on the construction of the word "advanced;"on the meaning which the father had when he used it. But it is said that the father received interest; true, but is it proved that he ever demanded it? The son might send him the interest to show that he was going on well, and to induce him to make further advances. The question is, did the father, at the time he wrote the letter, ever intend to require the money from the son. If he had ever required it, this very letter would have furnished evidence against him. But 9s. 7d. in the pound has been received under the son's commission. action was then brought, no application was then made. And why did not the father prove under the commission? His not doing so, shows that he did not consider himself a creditor of his son. It is said that the plaintiffs never commence business with persons on a borrowed credit. If they meant to make the defendant liable, they should have communicated that in their letter to him. They trusted the son in five months to the amount of 1200%; this can have no reference to the 300l. capital. The property inquired about would be proportioned to the dealings in amount. Again, the dealings in the first month amount to 2901.; in three months, to 5001.; and every farthing of that is paid. Taking the letter to be a guarantie, which it is not, it would not be a guarantie for all In construction of common sense, the father cannot be considered the cause of the loss sustained by the plaintiffs. The loss was occasioned by their own negligence. They made the son a bankrupt.

TINDAL, C. J. (in summing up) said—The question, first, is, whether there

was that false and fraudulent representation of which the plaintiffs complain: and, secondly, if \*there was, what is the damage which they have sustained in consequence of such false and fraudulent representation. The representation must not only be false, but false to the defendant's own knowledge. If he has made a representation which was untrue to his own knowledge, then he is answerable for the damage, which would naturally and properly flow from such representation. The goods it seems were looked out, but not deliv-

ered; they were still detained in the custody of the plaintiffs, and not delivered over so as to make them the property of the defendant's son. They were at liberty to waive the purchase or confirm it. You must ask yourselves this question, whether you think the object of the inquiry was sufficiently stated in the letter of the plaintiffs. If the letter of the defendant had stopped at the words "is perfectly correct," then the effect would have been in the words of the letter of inquiry; but it goes on with an explanatory statement, "as I advanced him the money." The first inquiry for you will be (putting these two letters together), whether the father intended to convey to the plaintiffs the idea that his son had 300% his own property, in contradistinction to money lent. If you find this proposition in the affirmative, then you will go on to inquire, whether it was false, and, if false, whether it was so to the knowledge of the defendant. They put in two letters, written about a fortnight before the letter of inquiry, by the father to the son, for the purpose of showing that the money was borrowed. [His Lordship read and commented upon the letters and then con-Do you or not feel yourselves justified in saying, that the negotiation for the loan was afterwards carried into effect; and that the 300l. was money borrowed, and not money given? Did the father understand the nature of the inquiry? and, if he did, did he intend to represent that the son had 300l. his own property? Then as to the damages, the verdict must be for such damage as is justly and immediately referable to the falsehood of the statement. The goods first \*purchased, to the amount of 500%, have been paid for; but 600% worth since have not, and the son was made a bankrupt by the plaintiffs in the month of October. You must say how much of this is justly and immediately referable to the false statement; that is a problem which you must solve for yourselves. I will only make one observation, and that is, if they gave the son an indiscreet and ill-judging credit, they cannot in fairness call upon the father to be answerable for the loss occasioned by it. It is not put to you as a guarantie which limits the amount; a guarantor is in a different situation, he has the money in his own pocket, and is called on for the first time; here the father has actually advanced the 300l. You will say, would the plaintiffs, without this letter, have trusted the young man at all? If the father had said, I have advanced him 300% on his promissory note, would they have trusted him at all? They say, it is the practice of their house, never to trust a person who begins with a borrowed capital. You will consider, then, whether this representation was false to the defendant's knowledge, and then give your verdict for the damage immediately and necessarily consequential upon such false repre-Verdict for the defendant.(a) sentation.

Wilde, Serjt., and J. H. Smith, for the plaintiffs. Jones, Serjt., and Kelly, for the defendant.

[Attorneys-Tilleard & M., and J. S. Thompson.]

\*3697

\*YATES v. DUFF. Feb. 27.

Where a vessel bound for the East Indies, is advertised to sail by a certain day, and does not the shipowner will be entitled to recover half the passage money of a person who refused to go, after having engaged a passage, unless either time was of the essence of the contract, or the delay in sailing was unreasonable.

THIS was an action to recover damages from the defendant, for the breach of a verbal agreement, by which he engaged two cabins on board the ship Sesostris,

(a) This was a new trial; the verdict on the former, which was also for the defendant, having been set aside as against evidence. The Court, on application for another trial, refused to grant a rule, on the ground that two verdicts on such a question of fact were sufficient to settle the matter. See 1 Moore & Scott, 85.

Vo L. XXIV.-39

on a voyage from England to Madras, for which he was to pay three hundred and fifty guineas. He refused to go, because the vessel, which was to have left the docks by the 10th of October, did not. There was contradictory evidence as to what took place when the bargain was made between the broker and the defendant, as to the importance to the latter of the vessel's sailing on the particular day specified. It was proved that it was the rule of the East India Trade, that, when a passenger refused to go, in consequence of the delay in the sailing of the vessel, he was to forfeit half of the amount of the passage-money agreed for. On the 3d of October, the defendant wrote the following letter to the broker:—

"I have just been informed that the Sesostris will not sail from Portsmouth by the 15th instant. Is this to be the case? I beg a specific answer."

To which the following answer was sent:--

"Dear Sir,—In reply to your note, I beg to assure you, that the Sesostris will certainly leave Blackwall on the 10th, and Portsmouth on the 15th, of October, wind and weather permitting. This may be relied on, and you may make

your arrangements accordingly."

On the 10th of October, the defendant wrote a letter to the broker, commencing—"I was much surprised to receive, on my arrival in Nicholas-lane, a message from you, that the Sesostris will not leave the docks until the \*13th, 1\*370 although your arrangement with me was for to-day. I have been induced, by the various postponements, to watch the ship," &c. It concluded by the defendant's declaring off the bargain, and adding, that he should look out for the first ship, and engage his passage in it. The defendant went by a ship called the Neptune. The Sesostris left the Docks on the 21st of October, and arrived at Portsmouth about the latter end of that month, but did not sail from thence till the 9th of November, being detained there by contrary winds.

Spankie, Serjt., for the defendant, contended that there was not, in point of law, any right to delay the sailing of the ship, according to the convenience of the owner; and that, under the circumstances, on the 10th of October, the con-

tract between the parties was at an end.

Wilde, Serjt., for the plaintiff. I do not mean to contend, that if there is a specific contract, of which time is the essence, that the parties will not be governed by it. But the present is not that case. The parties only spoke of time with a view to their forming some idea as to when they should get ready, but not to be precise as to the day. The defendant should have given notice, that, if the ship did not sail on the 10th, he would be off his bargain, instead of employing a person to watch. Where time is not of the essence of the contract, then it is to be performed in a reasonable time, and that will depend upon what

were the intentions of the parties.

TINDAL, C. J. There are two questions for your consideration in this case. The first is, whether the time of sailing formed an essential part of the contract? For, if it did, it has not been complied with. If, on the contrary, it was not a real and essential part, but only matter of representation while the matter was going on, then you will \*consider, secondly, whether, under the circum-tances, the ship sailed within a reasonable time. In this case, I should think, much will not turn upon the second point; for, if you assume that time was not an essential part, one would not say that a delay of about a week amounted to an unreasonable stoppage. The main question is, was there any understanding, at the time of the contract, that the ship was to sail positively by the 10th and the 15th? Was the 10th of October understood by the parties to be of the essence of the contract? This will depend upon the conflicting evidence. If you think time was not understood to be a part of the contract, then you will find for the plaintiff, unless you think the delay was unreasonable; and, if you find for the plaintiff, you will give half the passage money, which, it appears from the evidence, he is entitled to, under the circumstances.

Verdict for the plaintiff—Damages, 1751.

Wilde, Serjt., and Gambier, for the plaintiff. Spankie and Andrews, Serjts., for the defendant.

[Attorneys—Bazendale & Co., and Davis & R.]

First Sitting at Westminster, in Easter Term, 1832.

BEFORE MR. JUSTICE BOSANQUET.

\*372]

\*JAMES v. CAMPBELL April 25.

If one of two persons fighting unintentionally strikes a third, he is answerable in an action for an assault, and the absence of intention can only be urged in mitigation of damages.

Assault and battery. It appeared, that, at a parish dinner, the plaintiff and defendant (who it seemed were not on good terms, in consequence of something which took place with respect to a leet jury,) together with Mr. Paxton and others were present. Mr. Paxton and the defendant quarrelled, and had proceeded to blows, in the course of which the defendant struck the plaintiff, and gave him two black eyes, and otherwise injured him. Afterwards Mr. Paxton wrote, and the defendant was desired to put his name to, the following paper:—

"Frank Paxton having struck me, I returned the blow, but must, as I have been since informed, have struck Mr. James instead of Mr. Paxton, for which I

am sorry."

The defendant, upon this, said—"I wont have that in; I'm not sorry, I will

hunt the vagabond in all quarters."

Bodkin, for the defendant, in his address to the jury, contended, that if the defendant did not intentionally strike the plaintiff, they ought to find their verdict for him.

Mr. Justice Bosanquer (to the jury.) If you think, as I apprehend there can be no doubt, that the defendant struck the plaintiff, the plaintiff is entitled to your verdict, whether it was done intentionally or not. But the intention is material in considering the amount of the damages.

Verdict for the plaintiff—Damages 101.

\*373] \*Andrews, Serjt., and ———, for the plaintiff. Bodkin, for the defendant.

[Attorneys-Allen & Co., and Lovell.]

First Sitting at Westminster in Easter Term, 1832.

BEFORE MR. JUSTICE BOSANQUET.

## WILSON v. COLLINS.

If a person has a communication to make to an inquest for their information, not on oath, he is bound to do it in such a way as to satisfy a jury, if he is afterwards charged with slander, that he was only stating the fact for the information of the inquest, and that he did it in a proper manner.

SLANDER. The plaintiff carried on business in Walbrook, and the defendant

was ward beadle of Walbrook ward, and the words complained of were uttered in the plaintiff's shop in the presence of fourteen of the ward inquest, whom the defandant was attending in his official capacity. Some of them were addressed to the plaintiff, and some to the inquest. They were heard by an acquaintance of the plaintiff's, and other persons who were passing.

The words were—"The business going on here is a shameful one"—"He has been taken for kite-flying." "You are no better than a swindler, you are connected with rogues and vagabonds, and have taken this house as a receptacle

for plunder.—I will take care you shall not remain."

Andrews, Serjt., for the defendant, centended, that this was not that utterance of wilful and malicious slander, which was necessary to maintain the action. If the defendant did not speak louder than was requisite to inform \*the [\*874]

jury, it must be considered as a confidential communication.

Mr. Justice Bosanquet, in summing up, said—It is suggested in this case, that, notwithstanding the words have been proved, the plaintiff is not entitled to a verdict, because they were uttered under circumstances which sufficiently justify the utterance. If a person has to make a communication to an inquest, he is bound to do it in such a manner as to satisfy a jury, if he is afterwards charged with slander, that he was only stating the fact for the information of the inquest when assembled, and was doing it in a proper manner. place, there is very imperfect evidence of the assembling of the inquest; but it seems that some of the conversation was addressed to the plaintiff himself in the back part of the premises, and in such a tone as to call the attention of the passers-by to it. It does not appear that any of the inquest asked any questions about the matter, and the defendant had no right to act officiously in making the communication. If you think that the act was not done by him in the discharge of his official duty, then you will say to what damages you think the plaintiff is entitled. Verdict for the plaintiff—Damages 201.

Wilde, Serjt., and Steer, for the plaintiff. Andrews, Serjt., and Comyn, for the defendant.

[Attorneys-E. W. Smith and W. Richardson.]

\*First Sitting in London in Trinity Term, 1832. [\*375

BEFORE MR. JUSTICE ALDERSON.

# PLUCKWELL v. WILSON, Bart. May 31.

A person driving a carriage is not bound to keep on the regular side of the road; but if he does not, he must use more care, and keep a better look-out, to avoid concussion. than would be necessary if he were on the proper part of the road.

ACTION for an injury done to the plaintiff's chaise by a carriage of the defendant's, driven by his servant. There was contradictory evidence as to the cause of the injury, and also as to whether the defendant's carriage was in the

centre, or on its proper side, of the road.

Mr. Justice Alderson left it to the jury to say whether the injury to the plaintiff's chaise was occasioned by negligence on the part of the defendant's servant, without any negligence on the part of the plaintiff himself; for that, if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict. Also, they would have to say, whether it was altogether an accident; in which case also the defendant would be entitled to the verdict. His Lordship also observed, that a person was not

bound to keep on the ordinary side of the road; but that, if he did not do so, he was bound to use more care and diligence, and keep a better look-out, that he might avoid any concussion, than would be requisite if he were to confine himself to his proper side of the road.

Verdict for the plaintiff—Damages, 251.

Andrews, Serjt., and Thesiger, for the plaintiff. Scriven, Serjt., and Ryland, for the defendant.

[Attorneys-Wilks and Liddon.]

See the cases of Wakeman v. Robinson, 8 J. B. Moore, 63, and 1 Bing. 213; Chaplin v. Hawes and others, Vol. 3 of these Reports, p. 554; and Lack v. Seward, Vol. 4, p. 106.

\*376] \*Sitting in London, after Trinity Term, 1832.

BEFORE LORD CHIEF JUSTICE TINDAL.

#### PUGH v. HOOKHAM. June 19.

If an insolvent debtor knows, at the time of filing his schedule, that a bill of exchange had been indorsed to a particular person some time before, he is bound to give notice to that person, although he cannot tell whether he continues to be holder at the time of filing the schedule.

Assumpsir by the plaintiff, as holder of a bill of exchange, drawn by one Kedge, on, and accepted by, the defendant, and made payable to the order of the drawer. There was no plea of the general issue, but only a plea of a dis-

charge, under the Insolvent Debtors' Act, on which issue was taken.

The bill was inserted in the defendant's schedule as held by the drawer himself. No evidence was given by the defendant (who began, as the affirmative of the issue was on him) to show under the 46th section of the Insolvent Debtors' Act,(a) that the plaintiff was not known to the defendant, as the holder of the bill, at the time when he made out his schedule. But on the part of the plaintiff, it was proved, that on the arrest of a person for whom the defendant proposed to become bail, a conversation took place, in the presence of the defendant, in course of which Pugh's name was several times mentioned as the holder of the bill in question. This was at a time when the bill had several months to run, and some time before the filing of the schedule.

Bompas, Serjt., for the plaintiff, submitted that, as the defendant once knew the fact, he ought not to have neglected to insert it at the proper time. He \*377] contended, \*also, that the defendant was bound to give some evidence to show that he was not aware of the plaintiff's being the holder of the

bill at the time when he made out his schedule.

TINDAL, C. J., said he would reserve the point as to whether the defendant was bound to give affirmative evidence; but added, that, in his opinion, if it was proved that he knew at one time that the plaintiff was the holder of the bill, he ought to have inserted his name in the schedule.

Andrews, Serjt., for the defendant. Although the bill was once in Pugh's hands, yet it had some months to run, and there was no knowing into whose hands it might get before it came to maturity. I submit that it could not be

(a) 7 Geo. 4, c. 57; that section declares, inter alia, that a prisoner shall be discharged, as to the debts of creditors named in the schedule, and as to the claims of all other persons not known to such prisoner at the time of adjudication, who may be indorses, or holders for value of any negotiable security set forth in his schedule.

the intention of the legislature that a man in prison should be obliged to make inquiries after a bill. The only object was to procure an insertion of the name of the person who was the creditor at the time of filing the schedule. The 40th section requires, that the prisoner shall give a list of such creditors as were within his knowledge at the time he filed his petition. (a) But the 46th section seems to provide expressly for this very case, as the bill may have passed through many hands after the time when it was known to be in the hands of the plaintiff. There is no fraud in this case on the part of the defendant.

TINDAL, C. J., (to the jury.) The only question for you is, whether the defendant has given that notice which, by the Insolvent Debtors' Act, he was required to give? It seems to me that the whole scheme of the Insolvent \*Debtors' Act is, that notice should be given to the parties, and the world, of the names of the creditors, and the amounts of the debts. But there are cases of outstanding securities, as to which a party may not know in whose hands they are. The 46th section says, "shall be discharged as to the claims of all other persons not known to such prisoner," &c. The question is, whether the defendant knew at the time that Pugh was an indorsee of the bill? If he did, then he was bound to give notice to him.

Andrews, Serjt., submitted, that the 46th section must be referable to the

holder at the time when the schedule was filed.

TINDAL, C. J. On the construction of that section, I think, that, if a man knows, at the time of filing his schedule, that a bill has been indorsed to a particular person, he is bound to give notice to that person, although he cannot tell whether he continues to be the holder at the time of the filing of the schedule. This appears to me to be the proper construction of the act.

Verdict for the plaintiff.

F\*379

Bompas, Serjt., and Manning, for the plaintiff. Andrews, Serjt., and Hutchinson, for the defendant.

[Attorneys-Dover & L., and Walls.]

See the case of Nias v. Nicholson, Vol. 2 of these Reports, p. 120, and the cases there referred to.

Adjourned Sittings at Westminster after Trinity Term, 1832.

BRFORE LORD CHIEF JUSTICE TINDAL.

\*BENNETT v. ROBINS. June 20.

A receiver, appointed by the Court of Chancery, has a right to distrain for rent, without any special authority from the Court for that purpose.

REPLEVIN.—The defendant made cognizance, as the bailiff of a person named Broom, who was a receiver appointed by the Court of Chancery.

Bompas, Serjt., for the defendant, objected that, without special authority from the Court of Chancery, a receiver had no right to distrain for rent.

Wilde, Serjt. There is a case in Atkins which decides that he may.(b)

(a) The words are—"a full and true description of all debts due, or growing due, from such prisoner, at the time of filing such petition; and of all and every person and persons to whom such prisoner shall be indebted, or who to his or her knowledge or belief shall claim to be his or her creditors."

(b) Pitt v. Snowden, 3 Atk. 750. In that case Lord Hardwicke said, that receivers have a power, where they see it necessary, to distrain for rent, and need not apply first

Verdict for the defendant:

TINDAL, C. J. I think there is no foundation for this objection. I think that a receiver, appointed by the Court of Chancery, must be considered, in point of law, as having a right of distress; otherwise the right to receive would \*380] be a perfect mockery; for, when the Court was not \*sitting, and no order could be made, a tenant might remove his goods, and the rent could not be receivered. And, if this be so, then the allegation on this record is, that the rent was due to Broom, which is admitted, and he, being the receiver, and having the right to appoint a bailiff to distrain, has appointed the defendant Robins to recover the rent for him. I think, therefore, the plea is made out.

Bompas, Serjt., and Tomlinson, for the plaintiff. Wilde. Serit., and Blackburn, for the defendant.

[Attorneys-Harmer and Patter & Son.]

Adjourned Sittings, in London, after Trinity Term, 1832.

BEFORE MR. JUSTICE GASELEE,
(Who sat for the Lord Chief Justice.)

COLEPEPPER v. GOOD. June 30.

If a carrier directs goods to be sent to a particular booking office, he is answerable for the negligence of the booking office keeper.

In an action against the carrier, the person at the booking office who delivered the goods to the carrier, is a competent witness to prove the state in which they were delivered.

Action to recover damages for the loss of a chest, containing clothes, &c., and a hammock which was fastened outside. The plaintiff was second mate of the Sir Charles Forbes, East Indiaman, and on his arrival in London, his seachest was taken from the custom-house to the White Hart public-house, Towerstreet, and booked there. There was a direction on a card fastened securely to the chest with a piece of string. It was, "Mr. F. Colepepper, Bromley Hall Cottages, Bromley, near Bow." The plaintiff's \*father, who proved these facts, stated that the chest never arrived. The person at the booking office was called to shew that he had delivered the chest to the carrier.

Bompas, Scrjt., for the defendant, objected that the witness was interested, and could not be examined without a release. The verdict would be evidence against him, if the loss was occasioned by his negligence and not that of the defendant.

Wilde, Serjt. He is a witness of necessity. It is similar to the case of clerks receiving money for their employers, and sub-agents, who are always admitted without a release. He is the defendant's agent.

GASELEE, J. I think he is a good witness.

The witness then proved the delivery of the chest to the defendant's man;

to the Court of Chancery for a particular order for that purpose; and that he had often wondered at their doing it, as it gave the tenant an opportunity of conveying his goods off the premises in the mean time; for the Court never makes an immediate order for a distress, but allows, on such applications, a future day for the tenant to pay. His Lordship added, that, if there should be any doubt who had a legal right to the rent, then the receiver, as he must distrain in the name of the person who has that right, would, very properly, make an application to the Court for an order.

and it was also proved that the defendant had said he was very sorry for the loss; that he was with his man in the cart at the time; and that he had delivered the chest at the Three Mackerel, in the Mile-end Road. It appeared that at the booking-office parcels were received to go by various carriers, and they were all entered in one book.

Bompas, Serjt., for the defendant, contended that the booking-office keeper. taking in goods for a variety of places, and keeping but one book for all, was not the servant of the carrier; and the carrier was not answerable for any negligence occurring at the booking office. But if he delivered the goods according to the direction, he did all that the law required of him.

He called, on the part of the defendant, the man that was with the cart; who stated that he had been the \*servant of the defendant for seven years, during which time the cart had been in the habit of calling daily at the booking office; that he took up the chest there, and put it on what is called the tail ladder of the cart; that he looked at the direction and read it. It was, "Mr. Chaplin, to be left at the Three Mackerel, Mile-end Road, till called for;" that he took it off and put it in his pocket, for fear it should be torn off, as the chest was on the outside of the cart; that he delivered the chest at the Three Mackerel to the landlord, with the direction, and had never seen or heard of it since. On his cross-examination, he admitted that he had been charged with stealing it, and had been tried for it, but was acquitted.

The landlord of the Three Mackerel proved, that, before the arrival of the cart, two men came into the house and called for a pint of porter; one of them, pointing to the other, said, "My brother is just come from sea, and there is a chest and hammock left at the White Hart, in Tower-street, to be brought here, directed in the name of Chaplin." They gave the landlord half-a-crown to pay the carriage, and said they should be much obliged to him if he would take in the chest when it came, and they would call for it. He accordingly received it with the direction from the defendant's man. The direction he received, was "Mr. Chaplin, to be left at the Three Mackerel, Mile-end Road, till called

The person from the booking office was called up, and, in answer to a question from the jury, swore distinctly that he told the carrier's man that there was a chest for Mr. Colepepper, at Bromley Hall Cottages.

On the part of the defendant, the case of Dover v. Mills, ante, p. 175, was referred to as an authority to shew that the booking-office keeper was answerable for negligence occurring while the goods were in his custody; and \*therefore that he could not be considered as the agent or servant of the [\*383] carrier.

Wilde, Serjt., for the plaintiff. There is no doubt that the booking-office keeper is, in law, the agent of the carrier; and where the carrier (as in this case) has been in the habit of using the same house for several years, it must be taken that in fact he was so. The public would be in a very bad situation The booking office is the warehouse of if a contrary doctrine was maintained.

the carrier, as he appoints things to be taken in there.

GASELEE, J. (in summing up), said—There are two questions, in my opinion, in this case for your consideration. The first question is, whether the booking office keeper was or was not the agent or servant of the defendant; for, if he was, then the defendant will be liable to answer for his negligence: but, if he was not, there might be some question as to whether he is or is not liable in point of law. But, whether he was the agent or not, there is another and most material question, viz. whether the direction was altered before the goods were delivered to the carrier's man, or not. On the first question, as to the agency, it is important to consider that neither party has produced any card of the carrier's. It is not possible to say, whether the plaintiff could easily produce the defendant's card or not; but it is clear that the defendant could easily have produced his own card: but it seems that the defendant's cart has been in the

habit of calling for goods at the house in question. If a carrier has directed goods to be sent to a particular place, I think that the party sending them has, in point of law, a remedy against him for any misconduct on the part of the booking office keeper. And it will be for you to say, whether in this case the course of conduct of the carrier, calling from day to day for seven years, does or does not satisfy your minds, that the booking office keeper was his agent. If you \*think it does satisfy your minds, then there is an end of this case, so far as the verdict is concerned. With respect to the case cited, I agree, that where a booking office keeper has misconducted himself, the party injured may maintain an action against him; but it does not follow that he may not also maintain an action against the carrier.

The jury said, that they thought the booking office keeper was the agent of the defendant; and also that the direction was right when the chest was delivered to the carrier, and found a—

Verdict for the plaintiff.—Damages, £89.

Wilde, Serjt., and Cottingham, for the plaintiff. Bompas, Serjt., and Payne, for the defendant.

[Attorneys-Baddeleys and Harmer.]

See, in addition to the case cited, those of Newborn v. Just, Vol. 2 of these Reports, p. 76; Upston v. Slark, Id. p. 598; and Butler v. Basing, Id. p. 613. See also the stat. 11 Geo. 4 & 1 Will. 4, c. 68, s. 5, set forth ante, p. 245.

\*3857

#### \*BEFORE LORD CHIEF JUSTICE TINDAL.

## ELTON v. LARKINS. July 12.

In a question of marine insurance, a material concealment is a concealment of facts which, if communicated to the underwriter, would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium; and a letter containing facts, which, if communicated, would lead to inquiry, which would produce important information, ought to be shewn by the assured to the underwriter.

A party is not bound, at the time of effecting a policy, to communicate the time of sailing of the ship, unless at that time it is a missing ship; neither is he bound to communicate any knowledge he may have of the time of sailing of another vessel from the same place, either before or at the same time as his own, unless he knows of something particular having happened to such other vessel, which might affect the insurance of his own.

A witness cannot be called to contradict another who denies having made a particular statement, if such statement was not of a fact, but only of a matter of opinion; as such statement of opinion does not come within the rule which confines contradictions to

matters directly connected with the issue in the cause.

Written admissions made for the purpose of a former trial may be used on a new trial. If the party who made them wishes to withdraw them, he should take out a summons

before a Judge, in order to obtain his permission.

Where material facts are known to the assured at the time of effecting a policy, he is bound to communicate them; and the circumstance of their being contained in what are called Lloyd's Lists, which the underwriter has the power of inspecting, will not dispense with the necessity of such communication.

Assumpsit on a policy of insurance on the ship Fanny. This was a new trial on the case reported, ante, p. 86. The main question on both occasions was, whether or no there had been a concealment, at the time of effecting the insurance, of material facts in the knowledge of the assured. This depended upon whether the Fanny at the time was a missing ship.(a)

(a) The rule for a new trial was made absolute, on the ground that it was uncertain whether the jury founded their verdict upon an opinion that the facts withheld were

On the part of the plaintiff, in addition to similar evidence as on the last trial, ten witnesses acquainted with the trade with Cadix stated that they should not have considered the Fanny, under the circumstances, as a missing \*ship on the 29th of December, 1828, when the insurance was effected; because the wind was so variable, that a vessel starting early might get driven out of its course, and not get in again for some time, while a vessel that sailed late might pursue its course direct, and so arrive in England first.

To prove some of the facts of the plaintiff's case, certain written admissions, which had been made for the purposes of the former trial, were tendered in evi-

dence, and objected to on the part of the defendant.

TINDAL, C. J. If a defendant desires that admissions made on a former should not be used on a new trial, he should take out a summons before a Judge to obtain permission to withdraw them; for the former trial is deemed as no trial, and the new trial, being of the same cause, is therefore, unless such course is pursued, subject to the same admissions.

Spankie, Serjt., for the defendant. An underwriter making a contract, is entitled especially in cases where the voyage is uncertain, to have all the information which the party making the insurance is in possession of at the time, and it is not necessary for him to ask questions in order to obtain it. question is, whether the facts in the knowledge of the plaintiff, from the letter he received from his captain, would, if communicated, have prevented the defendant, or any other underwriter, from insuring at the rate in question. If the letter had been communicated, attention would have been directed to the Traveller, about which accounts had been received at Lloyd's—its communication would have given rise to inquiry. The underwriter would not then have speculated on bare probabilities. It does not follow that he would have declined the insurance, but he would have required a larger premium. This shews that the contents of the letter were material. The fact also, that the plaintiff kept the letter in his pocket for twenty days, shews that he was \*endeavouring to bear his own insurance, and only sought to get a policy effected when he began to think that there was danger. He had no right after this to treat it as a common case of ordinary risk. The case of Bridges v. Hunter, 1 Mau. & Selw. 15, shews what was considered material. In that case the policy was effected on the 12th of November, and two letters received on the 31st of October were not communicated: one of them was dated the 11th of October, and contained the words, "who pretends to sail after to-morrow;" the other was dated the 18th, and inclosed the bills of lading, which contained the words, "with convoy." Lord Ellenborough told the jury, "that the question was, whether a disclosure of these letters would probably have varied the judgment of the underwriter so as to have induced him either to decline subscribing the policy or to demand a higher premium." The jury found for the plaintiffs, but a new trial was granted, and Lord Ellenborough, in his judgment on the motion, said that if the letter of the 13th had been communicated, the defendant would have learned that the ship was to sail with convoy, and "he might then have referred to the convoy list at Lloyd's, and would have there found that the convoy had arrived without her." And so in this case, I contend, that, if the letter in question had been communicated, the defendant would have referred to Lloyd's, and would there have discovered material and important information. Kirby v. Smith(a) and Richards v. Murdock, 10 Barn. & Cress.

not material, or upon an opinion that they were material, but that the defendant might have discovered them himself by examining the books at Lloyd's, and, therefore, the communication of them was unnecessary. The Court said, that they would not have disturbed the verdict could they have been sure that it was founded upon the first ground, but were dissatisfied with it if it proceeded upon the second. See 1 Moore & Scott, 323, reported also in 8 Bing. 198.

(a) 1 Barn. & Ad. 672. That case decides, that, where a ship had sailed from Elsineur on her voyage home six hours before the owner, who followed in another vessel on the

5-10, are also cases in point, as tending to show that circumstances are material \*388] which, if communicated, would lead to inquiry. It is said, on the \*other side (in addition to the evidence of the ship's not being considered out of time), that the defendant might have looked at Lloyd's lists. But the underwriters only look at Lloyd's books, and the lists are merely the raw materials from which the books are made up. An underwriter could not carry on his business if he were bound to look at the lists for ships, without any clue being furnished him as to a particular ship. I submit that an underwriter is not bound to look at Lloyd's for information which the party making the insurance is in a situation to communicate. It would lead to the foulest frauds if it were otherwise.

On the part of the defendant in addition to the evidence of the broker, and the entries in the books at Lloyd's, (a) it was proved that the wind was favourable from the 21st of November to the 23rd of December.

Witnesses were also called with reference to the materiality of the letter, and

the practice at Lloyd's with reference to the books and lists.

The first was named Secretan, he said—"There is a book at Lloyd's containing an account of accidents, arrivals, &c., and there are also lists containing other information. I should not search the lists for ships in which I was not interested. When you have a ship it is usual to consult the lists, but not otherwise."

Spankie, Serjt., read to him the letter from the captain of the Fanny to the plaintiff, (b) and asked him, whether, if an insurance had been offered him on the 29th of December, he should have considered the letter material to be communicated \*at that time. He replied—"If I knew that the Traveller had been towed into Kinsale on the 15th, I would not have written the policy at all. If I had known that the letter had been received on the 9th of December, I should have thought on that ground it was material to be communicated on the 29th. After a communication kept back for twenty days I would not have done the insurance at all."

Another witness, named Brown, a director of the Royal Exchange Assurance Company, said that he was in the habit of frequenting Lloyd's daily; that he considered the letter material; that, if he had been told that the Traveller was in distress, he would not, on the 29th, have written the Fanny at 30s.; and that, after the concealment of the letter he would not have taken the risk at any premium. He added—"It is not usual to examine Lloyd's books unless some fact is brought to the underwriter's notice which makes it material that he should examine them." On his cross-examination he said—"If the letter had been shewn me on the 10th, and not kept back, the circumstance of the Traveller having sailed on the same day being in the letter, would not have induced me to make any search about it. If the towing into Kinsale had been mentioned in the letter, I should have inquired further."

Another witness named Ellice, said—"It is only the practice to refer to the lists if there is any thing peculiar. If nothing was said about the time of sailing, I should ask an ordinary premium, on the supposition that nothing was known about it; but, if I had been told what the time of sailing was, I would not have taken it."

Another witness, named Robinson, a merchant and underwriter, said-"I

same day, and, having met with rough weather on his passage, arrived first, and then caused an insurance to be effected on his own ship, these circumstances were material to be communicated to the underwriter; and that it was not sufficient to state merely that the ship insured was "all well at Elsineur" on the day of her sailing.

(a) See ante, p. 86, in the report of the former trial.
(b) The material part of the letter was, "I have now to inform you, that the last boat from —— & Son is now alongside, which completes the cargo; and I am in great hopes to sail from here to-morrow, or Sunday morning, the 23d. One vessel sails to-

morrow direct for London, the schooner Traveller, having been detained thirty days."

think the letter should have been communicated, from the circumstance of its being received so long before the insurance. If it had not been kept back I should hardly think it was material. Most probably I should not have effected the insurance, I should have said the party has been running his own insurance, and should, \*at all events, have asked some explanation. I should have [\*390 asked what had become of the Traveller."

Mr. Willis, who was at the time foreman of the Special Jury in a cause in the King's Bench, was allowed by Lord Tenterden, C. J., to leave the jury box, and come into the Common Pleas to be examined. He said—"If attention is directed to the lists, it is usual to make inquiry, otherwise not. Some do, by way of curiosity. If a letter had been received on the 9th, it would, if I knew it on the 29th, have influenced me. I undoubtedly think the letter in question was material. It is my practice, in an extensive connection as broker, to communicate all information as to the time of sailing."

The broker, who swore that he had not told the defendant the time of sailing of the Fanny, had been asked whether he had not said, some time after the policy was effected, that the underwriters had not a leg to stand on. He denied

it, and-

Wilde, Serjt., proposed to call a witness to prove that he had so said.

Spankie, Serjt., objected. This is to a collateral matter.

Wilde, Serjt. It is direct to the issue. The broker's declarations, as to his opinion of the claim of the underwriters, may be important to shew what facts he communicated or kept back from them, that being the real question in the cause.

Spankie, Serjt. The inquiry touching what the broker said at a time long after the risk, cannot be material to the issue. The broker's answer must be taken, and he cannot be contradicted.

TINDAL, C. J. It seems to me hardly to come within the rule relating to a matter directly connected with the \*issue. If there had been any contradiction of the broker's assertion of a matter of fact, as to whether he had not made the communication, it might have been received. But this is only a contradiction on a matter of judgment, and I think it is not receivable.

Wilde, Serjt., in reply. Lord Mansfield's objection to the evidence of underwriters as to materiality, viz. that it is matter of judgment founded upon the same facts upon which the Judge and jury are to give their judgment, still exists, though the evidence has somehow or other crept in, and is now allowed to be received. The assured is not bound to communicate the time of sailing of the ship, unless it is what is technically called out of time, that is, beyond the period during which the voyage is performed, not taking any extraordinary voyage. Nor is he bound to communicate any thing not connected with the subjectmatter of the insurance. The plaintiff would read of the Traveller as he would of Noah's Ark. And he knew nothing at all about the William. The rule as to a missing ship is not taken from the average length of the voyage, but a missing ship is one not heard of after the longest ordinary safe time in which the voyage is performed. The plaintiff's witnesses all deny, that, under the circumstances, the Fanny could be considered a missing ship. Increase of risk and increase of premium would not be considered or required, unless the ship was out of time. Bridges v. Hunter shews that the time of sailing is not material, unless the ship was a missing ship. As to the other cases cited, the one where a letter was kept back was a case of deliberate waiting on a previous arrangement. And in the other, the words were, "all safe at Elsineur on the 26th," when in fact the ship left before, and the assured must have known something It is clear that the broker knew the time of sailing: did he or did he not conceal it from the underwriter? Why should he not communicate it? \*It is very hard if underwriters are to object without making inquiries. [\*392 We cannot suppose that they would not make them, and, therefore, may assume that the facts were communicated. The circumstance of the facts being contained in Lloyd's lists rebuts all idea of an intention to conceal. The question is, whether a ship from Cadiz, after thirty-three days, is out of time. If

not, then the letter was not material at all.

TINDAL, C. J., in summing up, said—The question is, whether there has been a material concealment of facts which the plaintiff knew, and which the underwriter would require to enable him to decide. A material concealment is a concealment of facts, which, if communicated to the party who underwrites, would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium. The question, therefore, is, whether this letter was one that contained facts which were material and important in order to enable the underwriter to form his conclusion on the subject.

On the part of the defendant, it is said, that there are three reasons why it is material—first, that it mentions the time of sailing of the Fanny—secondly, that it mentions also the time of sailing of the Traveller. It is said that it would have induced the underwriter to look into the books at Lloyd's, where he would have found that the Traveller, on the 15th of December, had been towed into Kinsale. The third ground is, that the bare keeping the letter so long without communicating it, was of itself sufficient to render it important to the un-But it seems to me that the third ground depends upon the first, whether it was a material letter or not, and that it is only reasoning in a The law clearly is, that a party is not bound to communicate the time of sailing of a ship, unless at the time of effecting the policy the ship is what is called a \*missing ship. If the underwriter inquires, and a false answer is given, that will vitiate the policy, but it is not generally necessary a priori that the assured should communicate the time of sailing. It is a question entirely for your consideration, whether this ship, the Fanny, on the 29th of December was what could be fairly called a missing ship; had she been so long on the voyage that the owner had reason to suspect that she was out of time? As to the objection on the ground of the Traveller, it seems to me that the plaintiff was not bound to communicate the time of sailing of the Traveller, unless there was some fact within his knowledge of something having happened to that ship. There is no evidence that the plaintiff knew of the fact of the Traveller's having been towed into Kinsale at the time when he effected the insurance. It seems to me, therefore, that it comes round to this single and simple question-Whether the Fanny was a missing ship or not.

Verdict for the plaintiff—Damages 100%.

Wilde, Serjt., and Maule, for the plaintiff.

Spankie, Serjt., and Barnewall, for the defendant.

[Attorneys-Oliverson & Co. and Blunt & Co.]

\*394]

# \*COURT OF EXCHEQUER.

Third Sitting in London in Easter Term, 1832.

BEFORE MR. BARON GURNEY.

HOUSEMAN v. FELICIA ROBERTS. April 30.

A notice to produce served on a defendant in London on a Saturday, the cause being tried on the following Monday, is too late.

Notices to produce ought to be served on the attorney, if there be one.

USE and occupation. Plea-General issue.

This was an undefended cause, and it appeared that notice to produce a receipt had been served on the defendant, at her lodgings in Berners-street, on Saturday the 28th of April, the cause coming on for trial on Monday the 30th.

Mr. Baron Gurney. This notice is not sufficient. It is too late; and, besides, notice to produce ought to be served on the attorney, if there be one.

The plaintiff proved his case by other evidence.

Verdict for the plaintiff.

Chilton, for the plaintiff.

[Attorneys-Ness and George.]

See the case of Hargest v. Fothergill, ante, p. 303.

\*First Sitting in London in Trinity Term, 1832. [\*395

BEFORE MR. BARON GURNEY.

#### NICHOLSON and Another v. PAGET. June 1.

A person gave a guarantie in these words, "I hereby agree to be answerable for the payment of 50l., for T. L. In case T. L. does not pay for the gin, &c., he receives from you, I will pay you for the amount:"—Held, that it was not a continuing guarantie.

Assumpsit on the following guarantie:—

"184, Piccadilly, 25th May, 1830.

"Mr. Nicholson;

"Sir,—I hereby agree to be answerable for the payment of 50l. for Thomas Lerigo. In case Thomas Lerigo does not pay for the gin, &c. he receives from you, I will pay you the amount. I am, Sir, your most obedient servant,

"Richard Paget."

It appeared that the plaintiffs, who were spirit-merchants, had supplied Lerigo, between the 26th of May, 1830, and the month of June, 1831, with spirits to the amount altogether of 270l. 10s., but not in any one supply to the amount of 50l., and that 31l. 18s. was the balance remaining unpaid. It was proved that the defendant came to the plaintiff's counting house, after application had been made to him for the money, and said that it was a hard case, and that somebody had called from the plaintiffs and offered to take 15l.; upon which one of the plaintiffs told him that no person had any authority of that kind, but that he was willing to take 25l.

GURNEY, B. You cannot explain the written agreement by a verbal conver-

sation.

Lloyd, for the defendant, applied for a nonsuit, \*contending, that it was not a continuing guarantie. He cited Melville v. Hayden, 3 Barn. & Ald. 593.

Godson, for the plaintiff. It is a continuing guarantie. In Mason v. Pritchard, 12 East, 227, the Court say that the words are to be taken as strongly against the party using them as their meaning will warrant. And it is just that a man should be held liable, unless in words he expressly limits his responsibility.

Lloyd. Melville v. Hayden goes to shew that it is not incumbent on the party to limit his liability by express terms. It was held there to be no con-

tinuing guarantie as in Mason v. Pritchard.

GUENEY, B. I am of opinion that this is not a continuing guarantie; I think that the whole must be taken together, and I do not consider it correct to take

the two sentences separately. And if it is not a continuing gurrantie, then I think that the defendant's understanding on the subject arising from the conversation will not alter it. I shall, therefore, nonsuit the plaintiffs, giving leave for a motion to enter a verdict for them, if the Court shall think that I am wrong in my decision.

Ludlow, Serjt., for the plaintiffs, submitted, that the defendant's offer to pay should go to the jury, to be found by them as a fact which might be in aid of the construction contended for, as shewing that he knew that goods had been

supplied since and had offered to pay some money.

GURNEY, B. You cannot construe an instrument made in one year by a conversation occurring in another year.

Nonsuit, with leave, &c.

\*397] \*Ludlow, Serjt., and Godson, for the plaintiffs. J. H. Lloyd, for the defendant.

[Attorneys-Scargill and Smith.]

In the course of the term, a rule nisi was obtained, which came on to be argued in the following Michaelmas Term, and was then— Discharged.(a)

Adjourned Sittings at Westminster, after Trinity Term, 1832.

BEFORE LORD LYNDHURST, C. B.

## BLEW v. WYATT, and Another. June 20.

A clerk in a house lent money to the partnership composing it, two of them signed an acknowledgment for it, agreeing to pay 5l. per cent. interest. Various changes took place in the house, in the course of which one of the parties who signed the acknowledgment retired from it. The interest was paid from time to time by the different firms, till the last became bankrupt. The clerk continued to serve all the different firms, and was cognizant of the different changes:—Held, that he might, notwithstanding, recover the money he had advanced from the two persons who signed the acknowledgment.

Assumpsit on the following instrument, signed by the two defendants, John Wyatt and Henry Early Wyatt:—

"London, December 26, 1827.

"We acknowledge to have received from Mr. Blew the sum of 500l. on the day of —, and the sum of 150l. on the day of —, making together 650l., for which we agree to allow 5l. per cent."

\*398] \*It appeared that the plaintiff was, at the time when the money was lent and the instrument signed, a clerk in the house of Henry Wyatt and Sons, ale brewers in Portpool Lane, in which house the defendants were partners; that between that time and the commencement of the action several changes had taken place in the firm, among which was the retirement of the defendant Henry Early Wyatt. The plaintiff continued to be a clerk in the concern under the different firms, and was cognizant of the changes, and received the

<sup>(</sup>a) See 1 Crompton & Meeson, 48. See also the cases of Merle v. Wells, 2 Camp. 413; Warrington v. Furber, 6 Esp. 89, and 8 East, 242; Rains v. Storry, Vol. 3 of these Reports, p. 130; Walton v. Dodson, Id. 162; Newbery v. Armstrong, Vol. 4, p. 59; and Kay v. Groves, Id. 72.

interest from the funds of the house. The firm in November, 1831, was Wyatt

& Thompson, and at that time the concern became bankrupt.

Comyn, for the defendants, contended, that the plaintiff had absolved them, as he knew of the different changes in the house, and must be taken, under the circumstances, to have shifted the credit from time to time from one firm to another.

LOT LYNDHURST, C. B. I am of opinion that the instrument is still binding upon both defendants, unless an agreement was made between the parties, by which the plaintiff agreed to discharge the first firm and substitute others. I think that mere knowledge of the changes will not be sufficient; there must be some agreement shown between the parties.

Verdict for the plaintiff.

Jervis and Ball, for the plaintiff.

Comyn, for the defendants.

[Attorneys-Knight, and Wright & Co.]

See the case of David v. Ellis and Another, Vol. 1 of these Reports, p. 368.

\*First Sitting at Westminster, in Michaelmas Term, 1832. [\*399

BEFORE MR. BARON VAUGHAN.

AYLING and Another, Assignee of COWLING, an Insolvent v. WILLIAMS. Nov. 8.

A. received from B., an insolvent, the pawnbroker's duplicate of a harp, which was an andue preference under sect. 32 of the Insolvent Act, 7 Geo. 4, c. 57. A. took the harp out of pawn:—Held, that, as against the assignees, A. had no lien on the harp for the sum he paid to take it out of pawn.

Semble, that where a party claims to hold goods for his general balance, he cannot object that a smaller sum for which he really has a lien, has not been tendered to him.

TROVER for a harp. Plea-General issue.

It appeared that Miss Cowling, the insolvent, had been arrested on the 28th of July, 1831, and that she had filed her petition in the Insolvent Debtors Court on the 31st of August following. It also appeared from the statement of the defendant, when he was examined in the Insolvent Debtors' Court, that Mis-Cowling owed him 351. or 361. for money lent, and that he told her that she ought to secure him; however, it did not appear that he had threatened any legal proceeding. It further appeared that Miss Cowling, having pawned the harp with a pawnbroker named Dry, had, while in the lock-up house, sent the pawnbroker's duplicate to the defendant, who had obtained possession of the harp on paying Mr. Dry a sum of 211. 6s. 3d., which was the amount for which the harp had been pawned, and the interest. The plaintiff's attorney gave evidence as follows-"I went with Mr. Ayling, one of the plaintiffs, to call on the defendant in the month of May, 1832. I produced the assignment by which the plaintiff was appointed one of the assignees of Miss Cowling, and demanded the harp. I said that the assignees were willing to pay his charge upon it. He said he would make out his account. I told him I meant the sum of 201, and interest, and any expenses he might have incurred in taking the harp out of pawn, he said—'If that is what you mean I shall not deliver it up at all; and unless the whole of my account is paid, I will not give the \*harp up.'" [\*400 On his cross-examination, the plaintiff's attorney said—" No money was

produced, and I did not take any with me for the purpose of this tender. I believe Mr. Ayling had the money, though I certainly did not see it."

Thesiger, for the defendant. I submit that this is no tender at all.

Mr. Baron Vaughan. This is a very doubtful tender, there was no money produced, and the witness who was the spokesman certainly had it not. If there had been proof that the parties had had the money with them, I think it would have been sufficient, because the defendant clearly dispensed with the production of it.

Erle, for the plaintiffs. There is a great difference between tendering for a lien and tendering for a debt, because, in the former case, you ascertain whether the party claims to hold in respect of the lien or on any other account. I submit, that the defendant had no lien even for the 201., because, if a wrongdoer pays money to get goods into his possession, he thereby acquires no lien upon them against the person who is entitled to them. That was decided in the case of Lempriere v. Pasley,(a) and the defendant here was clearly a wrongdoer, as Miss Cowling's giving him the duplicate was a preference within the 32d section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57.(b)

\*Mr. Baron VAUGHAN. It appears to me, that the defendant obtained \*401] this harp in direct contravention of the provisions of the Insolvent Debtors' Act, and that, therefore, he is not in the same situation as the pawnbroker, who would certainly have been entitled to be paid before he gave the harp up. If it had turned on the question of tender, I would have given you leave to move, although the inclination of my opinion is, that, as the defendant claimed a lien for his general balance, he could not insist on a tender of the smaller Verdict for the plaintiffs—Damages 60%.

Erle and Cooke, for the plaintiffs.

Thesiger and G. T. White, for the defendant.

[Attorneys-Torkington and Williams.]

# Sitting in London after Michaelmas Term, 1832.

BEFORE MR. BARON BOLLAND,

(Who sat for the Lord Chief Baron.)

\*402]

#### \*CRANBROOK v. DADD.

A bond was executed by a person who could not write:—Held, that if there was no other

(a) 2 T. R. 485. In that case it was held, that goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be detained for those expenses against the rightful owner.

b) By which it is enacted, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act.

plea besides non est factum, the defendant's counsel could not ask whether the bond was read over to the defendant before he signed it, nor what was the transaction respecting which it was given.

DEBT on bond. Plea-Non est factum.

The bond was signed by the mark of the defendant. The attesting witness was called, and he proved the execution of the bond by the defendant.

Hutchinson, for the defendant, proposed to ask, in cross-examination, as to

the nature of the transaction which formed the subject of the bond.

Mr. Baron BOLLAND. I think you cannot ask that.

Hutchinson then proposed to ask the witness whether the bond was read over to the defendant before he put his mark to it.

Mr. Baron Bolland. You cannot go into that upon this form of pleading.

The question was not put.

Verdict for the plaintiff.

Chilton, for the plaintiff. Hutchinson, for the defendant.

### [Attorneys-Jeyes and Hall & B.]

In the case of Edwards v. Brown, 1 Cromp. & J. 307, it was held, that where a party who executes a bond is at the time competent to execute it, he cannot, under the plea of non est factum, shew that he was misled as to the legal effect of the bond. In the judgment of Mr. Baron Bayley in that case, the previous authorities are referred to and

See the cases of Ball v. Taylor, ante, Vol. 1, p. 417; Loyd v. Freshfield, ante, Vol. 2. p. 325; Tod v. Earl of Winchelsea, Id. p. 488.

# Adjourned Sittings at Westminster, after Michaelmas Term, 1832.

BEFORE MR. BARON VAUGHAN, (Who sat for the Lord Chief Baron.)

#### \*VYSE v. CLARKE. Dec. 1.

[\*403

The traveller of a tradesman in London called on his employer's debtor in the country, and being unable to obtain cash, consented, at the request of the debtor, to take an acceptance for the amount, and wrote the whole form of a bill except the name of the drawer, and sent it up to his employer, telling the debtor that he did not think it would be satisfactory. The employer kept the bill, but did not put his name to it as drawer. The traveller had no authority to sign bills, but was in the habit of sending them up without a drawer's name to prevent risk by loss:—Held, that these facts did not amount to proof of the drawing of a bill so as to prevent the creditor from recovering for his original demand before the instrument purporting to be a bill became due.

Assumpsit for goods sold and delivered. There was no plea of the general issue, but a special plea, in which the defendant stated in substance that he did not owe any greater part of the damages laid in the declaration, than the sum of 291. 11s. 6d., and that for that sum the plaintiff drew a bill on him, which he accepted. The plaintiff replied that he did not claim more than the 294. 11s. 6d., but that no such bill was drawn and accepted as the defendant in his plea alleged. Upon this issue was taken.

It appeared that the plaintiff was a straw-bonnet maker in London, and the defendant was in the same way of business at Kirby Moorside, in Yorkshirethat in January, 1831, the plaintiff's traveller called upon the defendant, when the following statement of the account was made between them:-

"Mr. Clarke Dr. to Thos. Vyse. Goods £18 12 0 10 19 6 Do.

£29 11 6

1831. January. By bill at two months £29 11s. 6d"

The traveller stated that the account was overdue nearly three journeys, and that he went expecting to receive cash. The defendant offered him a bill, but he told \*him that it was unreasonable to expect Mr. Vyse to take a bill, and he did not think he would be satisfied with it; but after several unsuccessful attempts to obtain cash, either for the whole or a part, the traveller consented to take an acceptance from the defendant, and accordingly wrote out the form of a bill of exchange, but did not put any name to it as drawer. The defendant wrote his name on it as acceptor, and it was sent up that same evening to the plaintiff. The traveller said, that he had not any authority to sign bills, but, when on a journey, was in the habit, to prevent risk from loss, of sending them up to the plaintiff, who, if he pleased, put his name to them He added, that he did not suppose the defendant knew that he had not signed the bill, but that he told him, after it was accepted, that he should send it up to the plaintiff, but did not think that he would be satisfied with it.

The bill was kept by the plaintiff, and produced at the trial in the same state as when the traveller sent it up. The defendant was arrested almost immediately after the acceptance had been given, in consequence of intimation received

by the traveller that he was likely to run away.

C. Cresswell, for the defendant, contended, that, as the plaintiff's reason for not allowing the traveller to put the name in the country was merely for security, it was not a denial of an authority to draw, and, therefore, the bill was, in point of law, a complete bill as between the parties; and, 2ndly, that if it were not a complete bill at first, yet that the defendant, by not returning it, had prevented himself from suing for the debt for which it was given.

Follett, for the plaintiff. It was no bill of exchange, as the drawer's name was not there. The paper was sent up to the plaintiff, and he might or might not make it a bill. It is a paper which will be very good evidence of the debt, but it is clearly not a bill of exchange.

\*VAUGHAN, B. The only question upon this issue is, whether the \*405] plaintiff drew his bill. It appears to me, that the defendant has failed to make out the issue—the affirmative of which is upon him—I think that the having no authority to sign is tantamount to having no authority to make. think if the traveller had no authority to sign the bill, and the plaintiff did not adopt the bill afterwards, it is no bill drawn by the plaintiff. There must be a drawer to a bill-I do not say that a person may not so deal with such an instrument as to make it a bill—but in this case I do not think that the facts warrant the conclusion that any bill was drawn.

Verdict for the plaintiff, 29l. 11s. 6d.

C. Cresswell applied for leave to move. VAUGHAN, B., said, that he had not any doubt upon the point; but that the defendant might move, if he would bring the money into Court.

No motion was made.

Follett and Cowling, for the plaintiff. C. Cresswell, for the defendant.

## \*COURT OF KING'S BENCH.

# Adjourned Sittings at Westminster after Michaelmas Term, 1832.

#### BEFORE LORD CHIEF JUSTICE DENMAN.

## STANDAGE and Another v. CREIGHTON. Nov. 29.

If the clerk of an attorney has the management of a cause, what he says is receivable in evidence, the same as if it had been said by the attorney himself.

An offer on the part of the indorser of a bill to pay part of the amount, and the costs, and to give a warrant of attorney for the residue, will not dispense with the proof of notice of dishonour.

Assumpsit by the plaintiffs, as the indorsees, against the defendant, as third indorser of a bill of exchange for 100l.

Evidence was given that notice of the dishonour of the bill had been sent, addressed to the defendant, at two different places, but there was no evidence that he resided or carried on business at either.

Mr. Lumley, the plaintiff's attorney, was called to prove a conversation that

he had had with the managing clerk of the defendant's attorney.

Hutchinson, for the defendant. I submit that what the managing clerk says is not receivable in evidence.

DENMAN, C. J. If the clerk had the management of this cause I think that

what he says is receivable.

Mr. Lumley said that the managing clerk of the defendant's attorney had offered to pay down 30% and the costs, and to secure the residue by a warrant of attorney.

DENMAN, C. J. I think that that is not sufficient to dispense with proof of the notice of dishonour. The defendant might, if time had been given him, have been \*willing to have waived any objection with respect to the notice of dishonour.

[\*407]

Steer, for the plaintiffs.

Hutchinson, for the defendant.

#### [Attorneys-Lumley and Fraser.]

In the ensuing term a rule nisi for setting aside the nonsuit was granted, upon affidavits.

See the case of Taylor v. Forster, ante, Vol. 2, p. 195, and the cases there cited. See also Dixon v. Hill, post.

# Adjourned Sittings in London after Michaelmas Term, 1832.

#### REFORE LORD CHIEF JUSTICE DENMAN.

#### BOSS v. LITTON. Dec. 13.

A foot passenger, though he may be infirm from disease, has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it.

TRESPASS for injuring the plaintiff, by driving a cart against him. Plea-

Not guilty.

It appeared that the plaintiff was walking in the carriage way in the neighbourhood of Islington, about ten o'clock in the evening, when the defendant, who was driving a taxed cart, turned out from behind a post chaise and drove against the plaintiff, and knocked him down. A policeman, who was called as a witness, stated, that he never walked upon the footpath, it was in so bad a state.

Comyn, for the plaintiff, called another witness, and was questioning him as

to the state of the footpath, when-

\*408] \*Denman, C. J., observed, I do not think that any more evidence need be given on that subject. The policeman has proved the state of the path. A man has a right to walk in the road if he pleases. It is a way for foot-passengers as well as carriages. But he had better not, especially at night, when carriages are passing along. (See the case of Pluckwell v. Wilson, Bart., ante. p. 375.)

Thesiger, for the defendant, said that he was in a condition to prove that the

injury arose from accident.

Comyn, for the plaintiff, replied, that, as it was an action of trespass, with only the general issue pleaded, such evidence could not be received. He cited Knapp v. Salsbury, 2 Camp. 500, (see also Milman v. Dolwell, Id. 378,) in which Lord Ellenborough said—"This is an action of trespass; if what happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure the defendant is not liable; but as he in fact did run against the chaise and kill the horse, he committed the acts stated in the declaration, and he ought to have put upon the record any justification he may have had for doing so."

Thesinger referred to a case of Vanderplank v. Miller, 1 M. & M. 169, as an

authority in his favour.

But it turned out on reference that that was an action on the case, and DEN-MAN, C. J., said—"I take Mr. Comyn's law to be quite correct, that the only question is, did the defendant strike the plaintiff by driving his cart against him?"

Thesiger then referred to the case of Gibbon v. Pepper, 2 Salk. 637,(a) in which a special plea was demurred to, and the \*Court held that it was bad for want of a confession, but said that the defendant might have

proved the facts it contained under the general issue.

DENMAN, C. J. I do not see that that case is at variance with the case cited for the plaintiff of Knapp v. Salsbury, as the facts pleaded went to shew that the horse ran away with the defendant, and therefore it would not be his act which produced the injury. (See the next case of Goodman v. Taylor.) I think, upon the evidence produced, which it seems impossible to contradict, that there is no defence on the general issue. But I think that you may give in evidence in mitigation of damages any thing that does not amount to a defence.

The siger then addressed the jury, and contended that the plaintiff ought to have avoided the foot-path, so that he might have avoided any carriage passing;

and if he had done so, the injury would not have been sustained.

Witnesses were called to shew that the plaintiff previous to the injury, had had a paralytic stroke.

<sup>(</sup>a) 2 Salk. 637. In trespass and assault, &c., the defendant pleaded, that he was riding a horse on the king's highway, and that his horse, being frightened, ran away with him, and that the plaintiff and others were called to to go out of the way, and did not, and the horse ran upon the plaintiff against his will, &c.; the plaintiff demurred, and had judgment: not but if the defendant had pleaded not guilty this matter might have acquitted him upon evidence; but the reason of the judgment was because the defendant justified a trespass, and did not confess it, for if A. beats my horse, by which he runs on another, A. is the trespasser, and the rider is not.

DENMAN, C. J., in summing up, said—That all persons, paralytic as well as others, had a right to walk in the road, and were entitled to the exercise of resonable care on the part of persons driving carriages along it.

Verdict for the plaintiff—Damages 20%

\*Comyn and Kelly, for the plaintiff.

Theriger and Milner, for the defendant.

[\*410

[Attorneys—C. Woolly and Walker.]

# GOODMAN v. TAYLOR. Dec. 13.

In an action of trespass for injury done to a horse by a pony and chaise running against it, it was sworn, on the part of the defendant, that his wife was holding the pony by the bridle, and a showman came by and frightened the pony, who ran off with the chaise:— Held, that if true, this was a good defence on a plea of not guilty.

TRESPASS for an injury to the plaintiff's horse by a pony and chaise belong-

ing to the defendant. Plea-Not guilty.

Two witnesses for the plaintiff swore, that for half an hour before the accident they saw the pony and chaise standing in the street without any person to take care of them, and also that they afterwards saw the pony running away with the chaise, and were present when it ran against the plaintiff's horse, but they did not know the cause of the pony's starting.

On the part of the defendant, witnesses were called who said that the defendant's wife stood by the head of the pony, holding it by the rein, when a Punch and Judy show coming by frightened the pony, and he ran away, and almost pulled the defendant's wife down while she tried to hold him in, and she was at length obliged to let go the rein.

Chambers, for the defendant, contended, that, under these circumstances, the

defendant was entitled to the verdict.

Comys, for the plaintiff, only observed on the contradictory evidence, and

submitted that the plaintiff's witnesses were most entitled to credit.

DENMAN, C. J., in summing up, (inter alia), said—If \*the facts are true as suggested for the defence, I very much think you would be dispussed to consider this as an inevitable accident, one which the defendant could not prevent. Indeed the learned counsel for the plaintiff seems to admit that, for he does not contend that the defendant's wife was not a proper person to have the care of the pony, but he puts the case upon the contradiction between the testimony of the witnesses. His lordship read the evidence, and left the case to the jury, who found a

Verdict for the plaintiff—Damages 191. 5s.

Comyn, for the plaintiff.
('hambers, for the defendant.

[Attorneys—Garry and Person.]

See the case of Boss v. Litton, ante, p. 408, and Gibbon v. Pepper, cited therein.

# HOME WINTER CIRCUIT,

1832.

## MAIDSTONE ASSIZES.

#### BEFORE MR. BARON GURNEY.

#### \*REX v. JOHN PENSON. Dec. 12.

On an indictment against a man for bigamy, it appeared that, for the purpose of concealment, the second wife was married by a name by which she had never been known:—
Held, that this was no anwer to the charge, although if the first marriage had taken place under such circumstances that would have been thereby rendered void.

THE prisoner was indicted for bigamy.

It appeared that the prisoner, in 1828, had married Anne Wootton; and, during her lifetime, in 1832, he married Eliza Brown, by the name of Eliza Thick.

The second wife swore, that she had never gone by, or been known by, the name of *Thick*, and she had assumed it when the banns were published, that

her neighbours might not know that she was the person intended.

J. Espinasse, for the prisoner. I submit that, upon this evidence, the indictment cannot be supported. In order to constitute the offence of bigamy, the second marriage should possess all the requisites for a valid one, except the ability of the party to contract it by having a former wife or husband living. To constitute a valid marriage, it is necessary that the parties should be married in their right names, or by such as they were commonly known by;(a) and that is not so here, as the second \*wife has stated that she had never passed by the name in which she was married. This marriage, therefore, was void ab initio, and there being then no second marriage, the offence of bigamy has not been committed.

Gunney, B. That applies only to the first marriage; and I am of opinion, that parties cannot be allowed to evade the punishment for an offence, by contracting a concertedly invalid marriage. (b)

Verdict—Guilty.

(a) In the case of Rex v. Inhabitants of Tibshelf, 1 B. & Ad. 190, Lord Tenterden, C. J., says that, with respect to marriages, the following rules are fully established by a series of decisions:—"First, that if there be a total variation of a name or names, that is if the banns are published in a name or names totally different from those which the parties or one of them ever used, or by which they were ever known, the marriage in pursuance of that publication is invalid; and it is immaterial in such cases whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not.—But, secondly, if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names have been such as the parties have used and been known by at one time and not at another; in such cases the publication may or may not be void: the supposed misdescription may be explained, and it becomes a most important part of the inquiry, whether it was consistent with honesty of purpose or arose from a fraudulent intention. It is in this class of cases only that it is material to inquire into the motives of the parties."

of cases only that it is material to inquire into the motives of the parties."

(b) In the case of Rex v. Allison, R. & R. C. C. R. 109. The indictment was against the prisoner for marrying Anna Timson, while he had a wife living. The second marriage was by banns, and it appeared that the prisoner wrote the note for the publication of the banns, in which the woman was called Anna, and that she was married by that name, but her real name was Susannah. On a case reserved, the Judges held unanimously that the second marriage was sufficient to constitute the offence, and that after having called the woman Anna in the note he gave in, it did not lie in the prisoner's mouth to say that

# \*COURT OF KING'S BENCH.

# First Sitting at Westminster in Hilary Term, 1833.

BEFORE MR. JUSTICE J. PARKE.

#### ORR and Others v. BROWNE. Jan. 12.

Where parties have become bankrupt in France, but have been reinstated in their affairs by a concordat; it is not necessary in an action brought by them for money due to them before their bankruptcy, to prove that they have performed their part of the concordat, but they should shew that the action is brought with the assent of the commissioners named therein.

This was an action for money lent-brought in the names of the three plain-

tiffs, Messis. Orr, Goldsmid, and Fladgate. Plea—the general issue.

It appeared that the plaintiffs, who had carried on the business of bankers at Paris, had advanced a sum of 34l. to a person named Wynch, at the instance of the defendant, and that the plaintiffs had afterwards become bankrupt. It further appeared that, on the 1st of July, 1831, a concordat had been signed by the creditors of the plaintiffs.(a) This concordat stated that two of the plaintiffs, \*Messrs. Orr and Fladgate, had agreed to make certain payments to the creditors and also to give them the benefit of the result of a litigated claim, which belonged to Mr. Orr, and then stated as follows:—

she was not known as well by the name of Anna as by that of Susannah; or that she was not rightly called by the name of Anna in the indictment.

(a) On the subject of concordats, it is by the Code de Commerce, chap. 8, sect. 2.

ordained as follows:---

519. Il ne pourra être consenti de traité entre les créanciers délibérans et le debiteur

failli qu'apres l'accomplissement des formalités ci-dessous prescrits:-

Ce traité ne s'établira que par le concours d'un nombre des créanciers formant la majorité et représentant en outre par leurs titres de créances vérifiées les trois quarts de la totalité des sommes dues, selon l'état des créances vérifiées et enregistrées, conformément à la section IV, du chapitre VII; le tout à peine de nullité.

520. Les creanciers hypothécaires inscrits, et ceux nantis d'un gage n'auront point de

voix dans les délibérations relatives au concordat.

521. Si l'examen des actes, livres et papiers du failli, donne quelque présomption de banqueroute, il ne pourra être fait aucun traité entre le failli et les créanciers, à peine de nullité: le commissaire veillera à l'exécution de la présente disposition.

522. Le concordat, s'il est consenti, sera, a peine de nullité, sigué séance tenante: si la majorité des créanciers presens consent au concordat, mais ne forme pas les trois quarts

en somme, la délibération sera remise à huitaine pour tout délai.

523. Les créanciers opposans au concordat seront tenus de faire signifier leus oppositions

aux syndics et au failli dans huitaine POUR TOUT DELAI.

524. Le traité sera homologué dans la huitaine du jugement sur les oppositions. L'homologation le rendra obligatoire pour tous les créanciers, et conservera l'hypothéque a chacun d'eux sur les immeubles du failli: a cet effet, les syndics seront tenus de faire inscrire aux hypothéques le jugement d'homologation, a moins qu'il n'y ait été dérogé par le concordat.

525. L'homologation étant signifiée aux syndics provisoires ceuxci rendront leur compte définitif au failli en présence du commissaire, ce compte sera débattu et arrêté. En cas de contestation le tribunal de commerce prononcera: les syndics remettront ensuite au failli l'universalité de ses biens, ses livres, papiers effets. Le failli donnera décharge les fonctions du commissaire et des syndics cesseront, et il sera dressé du tout procès-verbal par le commissaire.

526. Le tribunal de commerce pourra pour cause d'inconduite ou de fraude refuser homologation du concordat, et dans ce cas le failli sera en prevention de banqueroute et renvoyé de droit devant le magistrat de sureté qui sera tenu de poursuivre d'office. S'il accorde l'homologation le tribunal déclarera le failli excusable et susceptible d'être

rehabilité aux conditions exprimées au titre ciaprès de la rehabilitation.

Article 3.—The creditors accept the engagements and transfers resulting from the aforesaid articles, and by means of which they make a surrender pure and simple, definitive and entire to the hands of Orr, Goldsmid, and Company, of all

that may remain due to them in principal, interest, and charges.

Article 4.—This remittance is consented to, with the condition that Messrs. Orr and Fladgate shall be charged collectively or separately, in the case that the one \*of them shall refuse to concur in it, to follow the liquidations \*416] of the firm of Orr, Goldsmid, and Company, with the concurrence and under the inspection of two commissioners hereinafter mentioned. Wright Truffait, and Sloper, are named commissioners, in order to concur in the liquidation in question.

In default of the house of Orr, Goldsmid, and Company, execut-Article 5. ing faithfully the present concordat in its different parts, it shall be deprived of the benefit that results therefrom; and, after a declaration of their default, the creditors shall re-enter into their full rights, and that which they shall have

been paid shall be considered as simply on account.

Article 7. Under the faith of the execution of the present concordat, in its several parts, the creditors re-instate the members of the firm of Orr, Goldsmid. and Company, in the administration of their goods, in whatever country that administration may be exercised. They make null, in every necessary case, all acts, which be opposed to the said administration.

This concordat had been confirmed by the Cour de Commerce of the depart-

mont of the Seine in France.

There was no dispute respecting the advance of the money, and a copy of the confirmation of the concordat was read in evidence by consent.

It was proved by M. Colin, an advocate at the French bar, that two parties

may contract for a third, if it be for his benefit.(a)

Kelly, for the defendant. I submit that the plaintiffs cannot maintain this action without proving the assent of the commissioners named in the concordat.

\*To shew this, the following letter, written by the commissioners to \*417] the plaintiff's attorney, was given in evidence:—

"11 Rue Lafitte, Paris, 23 Nov. 1832.

"In the Matter of Orr and Co. versus Browne.

"Sir,-We enclose you the original office-copy of the judgment, ratifying and confirming the concordat of Messrs. Orr, Goldsmid, and Co. We do not know what degree of importance may be attached to our assurance, should Mr. Browne persist in his defence and go into court; but we think it proper to send you with this document our assurance as to its correctness and authenticity. We trust you will continue to give the affair your best attention, and that the measures which you have taken will soon succeed in realizing the just claim of the three against Mr. Browne. We are, Sir, yours obed.,

"George Wright H. Truffait,

"Robert Sloper."

"It may be added that the commissioners would not sanction any settlement that Browne could make with Orr, unless Mr. Fladgate consented thereto."

Kelly.—I submit that the plaintiffs should shew, that they have performed

their part of the agreement contained in the concordat.

Mr. Justice J. PARKE.—By the concordat, the plaintiffs are reinstated, and they can only be ousted after a declaration of their default. The plaintiffs have Verdict for the plaintiffs. made out their case.

<sup>(</sup>a) Code Civile, art. 1121, "On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'une stipulation que l'on fait pour soimeme ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la revoquer si le tiers a déclaré vouloir en profiter."

Sir J. Scarlett and Curvood, for the plaintiffs. Kelly, for the defendant.

[Attorneys-W. Fladgate and Browne.]

#### \*SHEPHERD v. CAFE. Jan. 14.

F\*418

The carriage of A. being on the premises of B., was seized by C. for rent due by B. to his landlord, D. In an action of trover brought by A. against C., a witness proved that B. had held the premises of D. for more than a year, but that he had a lease of them:—Held, that the lease must be produced and given in evidence, and that B.'s acquiescence in the distress would not dispense with such proof.

CASE.—The first count of the declaration stated, that the plaintiff had sent a chaise to a person named Portlock, to be repaired; and that, while it was so in the possession of Portlock, the defendant had seized and sold it. There was

also a count in trover. Plea-General issue.

It appeared that the plaintiff had originally sent the chaise to Mr. Portlock, who was a coachmaker, for the purpose of having it repaired; but that, after the repairs were completed, the plaintiff took it away, and subsequently sent it back to Mr. Portlock's, "on standing" for the purpose of its being sold, if a sum of 40 or 45 guineas could be obtained for it. While it remained so "on standing," it was seized and sold by the defendant. It was proved to be usual for coachmakers to have carriages on standing, for the purpose of sale; and that they charged a certain sum per week while a carriage so remained, and also a per centage on the price when the carriage was sold.

The defence was, that Mr. Portlock owed rent to his landlord, Mr. Peake,

and that the defendant seized the chaise under a distress for rent.

A witness stated, that Mr. Portlock was the tenant of Mr. Peake, and had occupied the premises for more than a year; but that he held the premises under a lease.

Mr. Justice J. PARKE. The lease must be put in.

F. Pollock, for the defendant. I submit, that if I prove that Mr. Portlock acquiesced in the distress, that will be sufficient, without proof of the lease.

Mr. Justice J. PARKE. I think that, as there is a lease, you must put it in

and prove it in the regular way. The plaintiff is entitled to a verdict.

Verdict for the plaintiff—Damages 38%.

\*Thesiger, for the plaintiff.

F. Pollock and Comyn, for the defendant.

**[\*4**19

## [Attorneys-Woodhouse and J. Hamilton.]

# FOREMAN and Another, Executor and Executrix of PHILADELPHUS JEYES v. FREDERICUS JEYES. Jan. 14.

A bond conditioned to pay 1,000*l.* on a day five years from the date, and to pay interest, half yearly, in the mean time, only requires a stamp for the amount of the principal sum of 1,000*l*.

DEBT on bond, with counts upon two promissory notes. Pleas to the first count—Non est factum, solvit ad diem, and solvit post diem. Pleas to the other counts—Nil debet, and to the whole declaration, a set-off.

The bond was put in. It was dated August 2, 1818, and was in the penal sum of 2,000t., and upon the following condition:—"The condition of the

above-written obligation is such, that, if the above bounden Fredericus Jeyes, his heirs, executors, or administrators, do and shall well and truly pay to the said Philadelphus Jeyes, his executors, administrators, or assigns, the full sum of 1,000% of good and lawful money of Great Britain, and interest, on the 2d day of August, which will be in the year of our Lord, 1828; and also do and shall well and truly pay or cause to be paid, half yearly, the interest to accrue due on the said 1,000l., after the rate of five pounds by the hundred by the year, that is to say, on the 2d day of February and the 2d day of August, in each and every year, or within fourteen days then next following; the first payment thereof to be made on the 2d of February next, or within fourteen days then next following, then the above written obligation to be void."

The bond was on a 51. stamp.

Miller, for the defendant. I submit that this bond is not properly stamped. It is a bond to pay 1,000% on a certain day, and to pay certain sums more as interest, on \*other certain days. This stamp is only sufficient for a bond of 1,000l., and not so for a bond for 1,250l., which this bond really is. By the stamp act, 55 Geo. 4, c. 184, "a bond given as a security for the payment of any definite and certain sum of money," is where the sum exceeds 500l. and does not exceed 1,000l., to bear a stamp of 5l.; but where the sum exceeds 1,000l. and does not exceed 2,000l., the stamp ought to be six pounds; and in the same statute, bonds "given as a security for the payment of any annuity, or of any sum or sums of money at stated periods (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack,") are made liable to a different duty.

Mr. Justice J. PARKE. This latter enactment may either mean that interest is not to be reckoned in calculating the stamp duty, or that it is to be charged at a different rate. I know it has been decided, that a bill given for a certain sum and interest, only requires a stamp for the amount of the principal.

Miller.—This is not the case of an ordinary bond to pay a certain sum on or before a particular day, when, by paying the principal at once, the party would not be liable to interest; but here the principal is to be paid on the 2nd of August, 1823, and the other sums must also be paid for interest at all events; therefore, nothing can be more definite and certain than the amount to be paid. In the case of Attree v. Anscomb and Others, (a) it was held that a bond conditioned for the payment, by quarterly payments, of an annual rent of 8651. for the tolls of Brighton Market was a bond within that branch of the stamp act which imposes a duty on bonds given as a security for the payment of any definite and certain sum of money.

\*Campbell, S. G., for the plaintiff. The amount of the tax is meant \*421] to be in the sum lent, and not the interest to be paid upon it.

Mr. Justice J. PARKE. I think the stamp is sufficient, and therefore the bond may be read.(b)

The cause was referred.

The bond was read. Campbell, S. G., and Kelly, for the plaintiffs.

Miller, for the defendant.

## [Attorneys—H. Watson and F. Jeyes.]

(a) 2 M. & S. 88. That case was decided on the stamp act, 48 Geo. 3, c. 149; but the two statutes are worded exactly alike, so far as regards this point.

(b) In the case of Dearden v. Binns, 1 M. & R. 130, a bond had been given for the payment of 200l., with lawful interest, by the payment of instalments of 2l. 8s. per month, "until the sum of 200l., and interest upon the whole sum throughout the time aforesaid shall be fully paid and satisfied." This bond bore a 2l. stamp, which was the proper stamp on 200l., and it was held to be sufficient. See also Dixon v. Robinson, ante, p. 96, and the cases there cited.

# Sitting in London after Hilary Term, 1833.

#### BEFORE LORD CHIEF JUSTICE DENMAN.

## LUXFORD v. LARGE. Feb. 3.

In an action against the captain of a steam vessel for swamping a loaded wherry on the river by a swell produced by a too rapid rate of passage, the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell alone: and if they think it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained by his own improper conduct, either in mismanaging or overloading the boat, they must find their verdict for the defendant.

THE declaration stated, that the plaintiff, before and at the time &c., was lawfully possessed of a certain boat or \*vessel of great value, then lawfully being in the river Thames, &c., and the defendant was then the captain and commander of a certain steam boat or vessel, then also being in the river Thames, &c., and then and there had the care, management, and government of the same; yet the defendant, not regarding his duty, &c., whilst the said boat or vessel of the said plaintiff was so in the river Thames, &c., so carelessly, negligently, and improperly behaved and conducted himself, in and about the management and government of the said steam boat or vessel, and so carelessly, negligently, and improperly managed and governed the same, that by means and in consequence of the carelessness, negligence, and improper conduct, of the defendant in that behalf, the said steam boat then and there wrongfully, negligently, and improperly was propelled, and did sail and go in the said river Thames so rapidly, quickly, and improperly, that by means and in consequence thereof, the said steam boat or vessel then and there caused and occasioned the waters of a certain part of the said river Thames to become, and the same thereby then and there did become, and were, so agitated, rough, uneven, and dangerous, and thereby the said boat or vessel of the said plaintiff, then being in the said part of the said river Thames where the waters thereof were so agitated and dangerous, as aforesaid, then and there became, and was filled with water, swamped, and sunk, &c.; and by means of the premises, the plaintiff being in his said boat when the same was filled with water as aforesaid, was greatly wetted, and in great danger of being drowned, and, in being saved and escaping from drowning, became, and was, greatly bruised, wounded, and injured; and also, by means of the premises, divers goods, &c., to wit, ten quarters of osts, of great value, &c., being in the said boat or vessel of the said plaintiff, when the same was sunk as aforesaid, then and there became and were greatly damaged and spoiled; and also, by means of the premises, not only the said boat or vessel of the said plaintiff \*became and was greatly damaged and injured, and the said plaintiff was put to a great expense, &c. in and about repairing of the damage done to the same; but, also, by means of the premises, he the said plaintiff lost and was deprived of all the profits and advantages which might and would have arisen and accrued to him from the use of his said boat or vessel, if the same had not been sunk and injured as aforesaid, &c. Pleathe general issue.

According to the evidence on the part of the plaintiff, it appeared, that on the evening of Friday, the 28th of October, 1831, the plaintiff was going in a boat with ten quarters of oats in it down the river towards Greenwich; that the tide being against him, he kept close to the south shore; that about six o'clock, when he was at Rotherhithe, two steam boats, one called the Kesex and the other the Yorkshireman, came by him up the river, at intervals of about five minutes; that both, on being hailed, eased their steam, and passed without any

injury to the plaintiff's boat; that a few minutes after, the Albion, commanded by the defendant, came along, about the middle of the river, at the rate of eleven or twelve miles an hour; that she was hailed, but did not stop, and that, by means of the swell occasioned by her rapid progress, the plaintiff's boat was swamped and sunk, the plaintiff himself immersed in the water up to his shoulders, and the sacks of oats set floating about the river; that the plaintiff was picked up, and the boat raised, and more than half the corn taken down by him to Greenwich in it the same evening; that the remainder was taken down in another boat the next morning; and that the plaintiff was confined to his house for about a week. No evidence was given on the subject of damage to the boat, and the witness called to prove the damage to the oats failed in making it out The plaintiff's witnesses said that the boat was eight or nine inches out of the water at midships, and about a foot out at the bows. They added, that the \*424] plaintiff turned her head to \*the swell, but she had not power to lift her-self over it; and the water, in consequence, came right over her bows.

On the part of the defendant, it was proved, that, on the following day, a letter was written by some one in the name and by the authority of the plaintiff to the secretary of the Steam Company—it was as follows:—

"Greenwich, October 29th, 1831.

"To J. Miller, Esq.

"Sir,—Coming down the Pool last evening with ten quarters of cats in my charge belonging to Messrs. Couldrys, butchers of Greenwich, I was met by the Albion steam packet going up the Pool, the swell from which sunk my boat, containing the above-mentioned corn. In consequence I was subjected to 10s. expenses for the assistence of watermen to get up the same, and bring it down to Greenwich; and I have likewise been subjected to a liability of making good the damage done to the corn, which the proprietor states to be 4s. per quarter worse by the accident. By giving me a remuneration equivalent to the above expenses, I shall feel myself satisfied, otherwise I shall be under the necessity of seeking redress in another quarter. I am, Sir, yours, &c.

"Robert Luxford, Waterman."

In consequence of this the secretary communicated with the captain, the defendant, and requested the plaintiff to attend and explain the transaction, which he did in the course of two or three days; and, in course of conversation on the subject, he said that he knew the Albion by her length, and saw her about passing him when his boat was swamped. Shortly after the interview, at which nothing was said about any personal injury, the following letter was received by the defendant from the plaintiff's attorney:—

"Furnival's Inn, 2nd November, 1831.

\*125] "Sir,—I am directed by Robert Luxford to apply to \*you for a compensation for the very serious injury he has sustained by being swamped by the Albion Steam Boat on Friday last; I will, therefore, thank you to inform me of the name of your attorney, to whom I may send process. I am, Sir, your obedient servant,

Thomas Flower."

It was also proved by several of the crew of the Albion, that at Greenwich she was put on half speed, and went only at the rate of about four miles and a half an hour, in addition to the tide, which was running about two miles and three quarters or three miles an hour; that the Yorkshireman was about a quarter of a mile a-head of the Albion at the time in question; and that it would be about that distance off when its swell would reach the shore. It was further proved, that the plaintiff had only borrowed the boat for the occasion, and returned it uninjured the same evening; and the person for whom it was built proved that he had once loaded it with potatoes, which weighed four hundred weight less than the ten quarters of oats, and it had not then more than

three or four inches free board, and he considered it was not safe to carry even that weight, except in very fine weather. The person to whom the cats were delivered said, that he had not made any charge against the plaintiff in respect of the cats, nor had he said anything about their being 4s. a quarter worse; but, on the contrary, on the plaintiff's complaining of the accident the next morning, he paid him and the men who assisted him for their additional trouble.(a)

\*Platt, for the defendant, contended—First, that, if, as the plaintiff said, the Albion was about passing him at the time his boat was swamped, it could not have been the swell of the Albion that occasioned the swamping, as it would not reach the shore till some considerable time after—and Secondly, that supposing it was, yet the plaintiff, by his improper conduct in overloading his boat, must have brought the injury upon himself, and could not complain of the defendant.

DENMAN, C. J., in summing up, (inter alia), said—It seems to me in this case the plaintiff's claim must be confined to the personal injury he has sustained, as the boat was not his, and the corn was not his. And the question for you will be, whether he is entitled to look to this defendant for compensation. The defendant says—First, that the swell was not occasioned by the Albion—secondly, that the plaintiff's boat was improperly loaded; and, according to your opinion upon these points, you will find your verdict for the plaintiff or the defendant. If you think that the swell was not occasioned by the defendant's negligent management of the Albion, or that it was the plaintiff's own negligence in loading his boat as he did, which occasioned the injury, then you cannot find any verdict against the defendant. [His Lordship read the evidence and commented upon it, and concluded by saying.]-You must be satisfied that the Albion was going at too great speed, and thereby occasioned the swell; and you will have to say whether it was that swell alone which occasioned the injury, or whether it is doubtful that such was the case, for that will be enough to prevent the plaintiff's recovering. If you are satisfied that the defendant's vessel occasioned the injury by its improper speed, and that the plaintiff was not in fault and did not contribute to his misfortune by his improper management of his boat, then you will find for the plaintiff, and give him such damages as you consider him entitled to.

\*The jury consulted for some time and afterwards retired, and eventually found a— Verdict for the plaintiff—Damages 51.

Law, C. S., and Ryland, for the plaintiff. Platt and Payne, for the defendant.

## [Attorneys-Flower and J. R. Thomson.]

See the case of Vennall v. Garner, 1 Cromp. & Meeson, 21, which decides, that, "in case for running down a ship neither can recover when both are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided he was in no degree in fault in not endeavouring to prevent it." See also the cases of Wakeman r. Robinson, 8 J. B. Moore, 63; Chaplin v. Hawes, Vol. 3 of these Reports, p. 554; Lack r. Seward, Vol. 4, p. 106; and Pluckwell v. Wilson, Bart., ante, p. 375.

## BENNING v. DOVE. Feb. 2.

A. having printed a work, sold 300 copies to B., a bookseller, at 40s. a copy, binding him-

(a) It also appeared that the plaintiff, on being remonstrated with for going to law under such circumstances, said, that his attorney had undertaken to bring the action for him on the terms of "no purchase no pay." Upon this the Lord Chief Justice, with reference to the observations of counsel on both sides, said, that perhaps it might be difficult for a poor person to bring a cause into Court without some such assistance; but he could not say, that, upon the whole, it was a practice to be approved of.

self not to sell to others, in quires, under 48s., and in single copies under 50s. a copy, until B.'s 300 were sold, or his consent was obtained. In his letter, which constituted the agreement, he said to B. "I do not expect you to sell under 48s. and 50s., but do as you like."—When B. had sold a part of the 300 copies, he went into partnership with C., and transferred all his stock at the cost price. He also sold some copies at 45s. and 46s.—A., in contravention of his agreement, sold under the stipulated prices; but, on being threatened with proceedings by B., persuaded D., who had purchased the principal part, to consent to give them back, if it would satisfy B.—D. had an interview with B., and told him this. D. said, that he understood the arrangement was a settlement of the difference, and that B. went away from the interview perfectly satisfied:—Held, in an action by B. against A. for a breach of the agreement, that neither the underselling by B. nor the transfer of the stock to the partnership, were grounds of nonsuit; but that the arrangement with D. was an answer to the action, if the jury thought it made an end of the dispute between the parties. Held, also, that, on the question of damage, it might be considered whether B.'s own underselling had or had not contributed to affect the price of the work in the market.

THE first count of the declaration stated, that, on the 10th of December, 1827, it was agreed between the plaintiff and defendant in manner following, (that is to say,) "The said defendant then and there agreed to sell to the said plaintiff, and the said plaintiff then and there agreed to buy of the said defendant, divers, \*128] to wit, three hundred \*copies of a certain literary work, called Commentaries on the Laws of England, by the late Sir William Blackstone, a new edition, with practical notes, by Joseph Chitty, Esq., Barrister at Law, at and for a certain price or sum of money, to wit, the sum of 40s. per copy, amounting in the whole to a large sum of money, to wit, the sum of 600l., to be paid to the said defendant by the said plaintiff on the Monday following, the 1st day of December aforesaid, in the promissory notes of the said plaintiff, at three, six, nine, twelve, fifteen, eighteen, twenty-one, and twenty-four months date, in equal sums, the said defendant not to sell to others numbers of the said work in quires, under 48s. per copy, and single copies not less than 50s., and not to bring out a new edition of the said work till the three hundred copies of the said plaintiff were gone, or till he the said defendant got the consent of the said plaintiff." It then averred mutual promises on the part of the plaintiff and defendant to perform their respective parts of the agreement; and that the plaintiff bought the books and paid for them, and then continued :-- "Yet the said defendant contriving, and wrongfully and unjustly intending, to injure the said plaintiff, did not nor would perform the said agreement nor his said promises and undertaking, but thereby craftily and subtilly deceived the said plaintiff in this, to wit, that the said defendant afterwards, to wit, on the same day and year aforesaid, and on divers other days and times between that day and the commencement of this suit, and before the said three hundred copies of the said plaintiff were gone, wrongfully, and without the consent of the said plaintiff, did sell to others numbers of the said work in quires under 48s. per copy, and single copies less than 50s.; whereby the said three hundred copies, of the said plaintiff, of the said work, became and were much lessened in value and price, and the sale thereof greatly injured and decreased; and the said plaintiff hath now on on hand a large number, to wit, one hundred and fifty of the said copies unsold \*429] and undisposed \*of and hath thereby lost and been deprived of great of 2001., which he would and might otherwise have derived from the sale and disposition of the said last-mentioned copies, to wit," &c. The second count stated the agreement more briefly; and there was a count on an account stated. plea was non assumpsit.

It appeared that the defendant had printed an edition of Blackstone's Commentaries, by Mr. Chitty, the barrister, and, on the 1st of December, proposed to the plaintiff, who was then carrying on business as a law bookseller, to sell him three hundred copies, at 42s. a copy. The plaintiff objected to pay more than 40s., and to that price the defendant agreed. The material parts of the

plaintiff's letter were—"I will only sell to others at 48s. in quires, and single copies at 50s., until your three hundred copies are sold, or till I have your consent."——"I do not expect you to sell under 48s. and 50s.; but do as you like."

On the 10th of December, 1829, there was what is called a trade sale by auction, at the Albion, at which thirteen copies, as twelve, were purchased by Simpkin & Marshall, from the defendant's stock, at 40s. a copy; and at a similar sale in March, 1830, at which the defendant presided, twelve copies were purchased by Messrs. Whittaker, and one by Mr. Doyle, at 42s. a copy. In the month of February, 1829, the plaintiff entered into partnership with a Mr. Saunders, and the quantity on hand, viz., two hundred and four copies, was removed to the premises of the new firm. On the 1st of January, 1831, another sale took place, at which Mr. Henry Butterworth, a law-bookseller, purchased, in the first instance, twenty-six copies at 40s., and after as many as could be were sold to others, Mr. B. took the remainder, being fifty-one copies, at the same price. In the month of March, 1831, in consequence of an application made to him by the defendant, Mr. Butterworth \*had an interview with the plaintiff, who, at that time, had threatened to proceed against the Mr. B., in his evidence as to that interview, said—"I stated, that I had made arrangements to return all I had purchased at that sale, in consequence of the agreement between the plaintiff and defendant. (I had sold eight copies in the mean time, at the regular subscription price.) I did this to prevent litigation between the parties, at a sacrifice to myself. The plaintiff told me that the whole of his stock was taken at cost price as between him and Saunders. I understood the arrangement made by me between the plaintiff and defendant was a settlement of the difference. I should not have returned the books at my own loss, had it not been for the settlement between two parties, whom I respected. The plaintiff went away perfectly satisfied." It appeared further, that the plaintiff's sale of the work, from February to Christmas, 1829, was forty-one copies; in the year 1880, fifteen copies; in 1831, eighteen copies; and in 1832, twenty-four copies; some of them were sold at 45s. and 46s.; but others at two guineas and a half to the trade, and three guineas and a half to gentlemen. The quantity remaining on hand at Christmas, 1832, was one hundred and six copies.

Sir J. Scarlett, for the defendant, contended, 1st, that the plaintiff was bound by implication not to sell the work himself under the price at which the defendant was to sell, and that his selling at 45s. and 46s. was an answer to the action, as being against the good faith and honour of the contract, inasmuch as it would tend to prevent the defendant from selling his copies at all; 2ndly, that the contract was put an end to by the plaintiff's going into partnership in the month of February, 1829, with Mr. Saunders, and transferring his interest to the firm at 40s. a copy, because the undertaking of the defendant was only to continue in force till the three hundred copies were sold by the plaintiff, and his parting with them to a firm of which he was only \*a partner, was, in fact, a selling, just as much as it would be in the case of a joint-stock company; and, 3rdly, that the arrangement come to with Mr. Henry Butterworth was in the nature of an accord and satisfaction to the plaintiff. Mr. Butterworth told the plaintiff that he would give back his copies, which formed so large a portion that the rest must be comparatively unimportant, if it would satisfy him, and make an end of the dispute between the parties; to which the plaintiff replied, that it would be very satisfactory, and that, according to his, Mr. Butterworth's, understanding, it was to put an end to all differences, and the plaintiff went away perfectly satisfied. On these grounds the learned counsel submitted that the plaintiff should be called.

DENMAN, C. J. I think I cannot nonsuit upon the first ground, as the facts relied on do not appear to have been communicated to the defendant; and, with respect to the second, enough does not appear of the terms on which the part-

mership commenced, to justify me in deciding that there was a parting with the books by the plaintiff within the meaning of the agreement: with respect to the third ground, it does seem an answer to the action.

On the part of the defendant it was proposed that a juror should be withdrawn. This was objected to on the part of the plaintiff, and the case went to

the jury.

DENMAN, C. J., in summing up, after stating the pleadings and reading the letters, observed—It seems that the defendant left the plaintiff at liberty to sell as he pleased, and bound himself down not to sell under the prices stated, and this is an answer to some part of the argument urged in favour of the defendant. You will have to say, first, whether the agreement was made; of this, there does not seem any doubt; and then, whether it was broken; and if it was, you must spell out the damage as well as you can from the evidence. It is a very difficult thing to ascertain \*the amount of the damage. I think, in considering that object, you may reasonably consider, as damage must arise from the effect produced upon the price of the work in the market, by the defendant's having sold copies at a sum lower than the stipulated price, whether the plaintiff's own selling at 45s. and 46s. might not have contributed to that depreciation. If you are satisfied that the agreement was broken, then you will have to say to what extent the plaintiff has been injured; unless you should be of opinion that what took place between Mr. Butterworth and the plaintiff was a complete conciliation up to that time, and was not confined to Mr. Butterworth's individual transaction only. There is no distinct evidence that the plaintiff knew that the defendant had sold to others; but Mr. Butterworth says, that he understood it to be a complete settlement of the difference which existed between the parties, and that he would not have returned the books at a loss to himself if he had not wished to make an end of the disputes between them.

His Lordship left it the jury to say, in the first instance, whether they thought Mr. Butterworth made an end to the dispute between the parties altogether, telling them, that, if they did, they should find their verdict for the defendant; but, that, if they did not, he would read over to them the evidence upon the

subject of the damage.(a)

The jury said, they thought that the arrangement made by Mr. Butterworth satisfied the whole of the difference, as he said that the plaintiff went away perfectly satisfied.

Verdict for the defendant.

Grainger, for the plaintiff.

Sir J. Scarlett and Kelly, for the defendant.

[Attorneys-Owen & Dixon, and Molloy.]

#### \*4337

#### \*MILLER v. HAMILTON.

A baker delivered bread from week to week, and was paid many sums by the housekeeper of his customer, and received weekly bills for a period of time subsequent to a time for which the housekeeper had not paid him:—Held, in an action by him to recover from his customer the amount of the unpaid bills, that the question of negligence was not raised and that the plaintiff was entitled to the verdict, as the defendant did not prove that he had given the housekeeper money for the purpose of paying the bills in question.

ASSUMPSIT for goods sold and delivered.

The plaintiff was a baker, and sought to recover from the defendant a sum of

(a) It was at first thought that damages must be given for the sale of three copies after the settlement of the difference, but it turned out that they were sold after the action was commenced.

Vol. XXIV,-41

61. 15s. for bread delivered at his house from February 8th to March 22nd, and from April 3rd to May 24th, 1830. It appeared that weekly bills were made out and delivered every week to the defendant's housekeeper, and that the two weeks from the 22nd of March to the 3rd of April had been paid, as had also the whole of the bills from the 24th of May to the latter end of August, at which time the housekeeper left the defendant's service. A few days after she left, payment of the omitted weeks was, for the first time, demanded of the defendant by the plaintiff. It was sworn, on the part of the plaintiff, that the paid bills were all separately receipted, though sometimes three or four weeks were paid at one time.

Campbell, S. G., for the defendant. The action cannot be maintained. The plaintiff has trusted the housekeeper, and to her he must look. It was a weekly dealing; and as soon as the plaintiff found that some of the bills were not pain, he should have made application to the defendant, and complained of the nonpayment, but, instead of doing this, he continued to give receipts weekly from time to time afterwards. If the plaintiff had gone after the housekeeper's omission to pay the weekly bills and told the plaintiff of it, this would not have happened; and his not doing so, but continuing to give receipts afterwards, is

tantamount to an admission of his having trusted her.

It was proved, on the part of the defendant, that the plaintiff had said to his wife, after the housekeeper left-"The old woman has done us at last;"-and also, that he told the person who succeeded as housekeeper, that he \*did not think he could recover, as he had acted wrong in receipting the bills and leaving the back debt.

Goulburn, Scrit., for the plaintiff, in reply, (inter alia,) said—There is no proof that the defendant gave any money to the housekeeper for the purpose of paying these bills, and, without such proof, there is no defence to the action.

DENMAN, C. J., in summing up, said-The plaintiff claims of the defendant the amount of a baker's bill. The defendant says that he has paid it. Now it seems to me that the last observation made by the plaintiff's counsel decides the case; for it does not appear that the defendant ever gave any money to his housekeeper to make these payments with. The plaintiff thought that she had received the money when he said "the old woman has done us;" and perhaps we may think so too; but, as it is not proved, we cannot act upon it. It seems to me, therefore, that we need not go into the question of negligence, for there has been some negligence on both sides. Under these circumstances, it appears to me, that the verdict should be for the plaintiff.

Verdict for the plaintiff—Damages 61. 15s.

Goulbourn, Serjt., and R. Gurney, for the plaintiff.

Campbell, S. G., for the defendant.

[Attorneys-Ashley and Teesdale & Co.]

#### \*PROMOTIONS.

**[\***4[5

In the Vacation after Easter Term, J. T. Coleridge, Esq., Barrister at Law, was called to the degree of Scrjeant at Law.

In the same Vacation, John Gurney, Esq., one of his Majesty's counsel learned in the law, was appointed one of the Barons of the Exchequer, vice Sir W. Garrow, Knight, resigned.

In Trinity Term, Mr. Serjeant Taddy was appointed her Majesty's Attorney General, vice J. Williams, Esq.: and Mr. Serjeant Merewether was appointed

her Majesty's Solicitor-General, vice C. C. Pepys, Esq.
In the Vacation after Trinity Term, Mr. Serjeant Spankie was appointed one of his Majesty's Serjeants learned in the law.

In the same Vacation, Mr. Serjeant Merewether received a patient of precedence; and J. Beames, Esq., H. H. Joy, Esq., C. T. Swanston, Esq., and R. M. Rolfe, Esq., were appointed his Majesty's counsel learned in the law.

In Michaelmas Term, Sir Thomas Denman, Knight, was appointed Lord Chief Justice of England, vice Lord Tenterden, deceased; and Sir William Horne, Knight, was appointed his Majesty's Attorney-General, and John Campbell, Esq., his Majesty's Solicitor-General.

In Hilary Term, Thomas Noon Talfourd, Esq., was called to the degree of

Serjeant at Law.

# \*436] \*COURT OF COMMON PLEAS.

First Sitting at Nisi Prius in Michaelmas Term, 1832.

BEFORE MR. JUSTICE PARK.

## HILL and Another v. ELLIOTT. Nov. 14.

A debtor, being in prison, wrote to the town agents of his creditors' attorney, requesting them to send a confidential clerk to him, with whom he might communicate on the subject of his creditors' claim:—Held, in an action by the creditors to recover the claim, that what the debtor said to the person who went to him in consequence of his letter, was receivable in evidence, even though the subject-matter of the communication was an offer of 10s. in the pound.

Assumpsit for goods sold and delivered.

Instead of proving the delivery of the goods, R. Alexander, for the plaintiffs, put in a letter, written by the defendant when in prison to the town agents of the plaintiffs' solicitor, requesting that they would send to him a "confidential clerk," with whom he might communicate on the subject of the plaintiffs' claim. He then called the person who went to the defendant in consequence of that letter, and proposed to ask him what the defendant said.

Payne, for the defendant, objected to the evidence, on the ground that it would be a breach of faith. He submitted, that the words of the letter intimated the defendant's desire that the interview should be confidential: and, therefore, the party receiving it should have repudiated that part of it, if they intended to made use of the statements in evidence; (a) and if they had done so, most likely

the defendant would not have been so communicative as he was.

\*437] \*Mr. Justice PARK was of opinion that the objection was not sufficient to prevent the evidence from being given.

The evidence was admitted; from which it appeared, that, with a view to a composition of 10s. in the pound, the defendant admitted that the debt was 81l.

Upon this the objection was renewed, on the ground, that the statement was made with a view to a compromise.

(a) See the case of Cory v. Bretton, Vol. 4 of these Reports, 462. There, a letter sent by the defendant to the plaintiffs respecting the money claimed, contained in the introductory part, these words: "which is not to be used in prejudice of my rights now, or in any future arrangement that may be made or instituted." And Tindal, C. J., refused to receive it in evidence, saying, that if the plaintiffs did not like the letter with such a stipulation in it, they might have sent it back.

But it was overruled by the learned Judge, and there was a—

Verdict for the plaintiffs.

R. Alexander, for the plaintiffs. Payne, for the defendant.

[Attorneys-Johnson & W., and Sylvester & W.]

#### DIXON and Another v. ELLIOTT.

It was proved, in an action against the indorser of a bill of exchange, that, two months after it was due, it was produced to him, and inquiries were made as to the drawer and acceptor; upon which he said, that if the holder would take 10s. in the pound, he would secure it:—Held, sufficient to dispense with proof of notice of dishonour.

Assumpsit against the same defendant as in the foregoing case, as indorser of two bills of exchange. To dispense with proof of notice of dishonour, it was proved, on the part of the plaintiffs, that the bills were produced to the defendant about two months after they were due, and inquiries of him made as to the drawer and acceptor; upon which he said, that if the plaintiffs would take 10s. in the pound upon the bills he would secure it to them. (a)

On the part of the defendant it was submitted, that this was not sufficient to dispense with the usual proof, as it was not inconsistent with a doubt upon the question of notice, that an offer should be made to pay a limited sum.

But Mr. Justice PARK said, that he thought it was sufficient. And there being no defence, there was a— Verdict for the plaintiffs.

\*R. Alexander, for the plaintiffs. Payne, for the defendant.

**[\*4**38

[Attorneys-Johnson & W., and Sylvester & W.]

# Adjourned Sittings in London after Michaelmas Term, 1832.

#### BEFORE LORD CHIEF JUSTICE TINDAL.

#### PARKER v. SMITH and Others. Dec. 19.

That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises, is such as really makes them to a sensible degree less fit for the purposes of business or occupation.

CASE for darkening ancient lights, &c.

It appeared that the plaintiff was possessed of a house in Queen Street, in the city of London, and that the defendants, who were the owners of premises

(a) In Phillips on Evidence, Vol. 2, p. 24, it is said—"The proof of the presentment and of the notice of dishonour will be dispensed with, if the defendant, knowing of the default, has paid any part of the money, or promised to pay, after the note became due; for this is an admission on his part that the plaintiff had a right to resort to him upon the note, and that he himself had received no damage from the want of notice. But if the drawer or indorser, after being arrested, merely offers, by way of compromise, without acknowledging his liability, to give a bill for the sum demanded, this will not dispense with proof of notice of the dishonour. Such an offer is not a waiver of the objection." See also Standage v. Creighton, ante, p. 406.

situate very near, which had been injured by fire, had rebuilt them in such a way as to diminish, according to the plaintiff's opinion, the quantity of air and light which he enjoyed in the occupation of his house previous to such rebuilding. Several witnesses, on the part of the plaintiff, stated that, in their opinion, the quantity of sunlight and air was diminished, and the premises, in consequence, depreciated in value.

\*139] \*Bompas, Serjt., for the defendants, admitted that they had not built the new premises after the fire on precisely the same site as the former; but contended that the question was, whether as much air and light were enjoyed afterwards as before. A man is not bound to erect on the same space—"Sic utere tuo ut alienum non lædas" is the maxim; and if he does not depart

from that, an action is not maintainable against him.

Several witnesses, on the part of the defendants, stated that, in their opinion, the quantity of light and air was, on the whole, increased; and some added, that the comfort of the residence-part of the plaintiff's premises was increased also, and made more valuable as to rent.

Wilde, Serjt., in reply, did not controvert the law as laid down by Bompas, Serjt., but relied upon the proof for the plaintiff that injury was in fact sus-

tained.

TINDAL, C. J., in summing up, said—The question in this case is, whether the plaintiff has the same enjoyment now, which he used to have before, of light and air, in the occupation of his house; -whether the alteration by carrying forward the wall to the height of ten feet has or has not occasioned the injury which he complains of. It is not very possible, every speculative exclusion of light which is the ground of an action; but that which the law recognises, is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business. It appears that the defendants' premises had been injured by fire, and they re-erected them in a different manner. They have a right to re-erect in any way they please, with this single limitation, that the alteration which they make must not diminish the enjoyment by the plaintiff of light and air. It is contended by the defendants, that, on the whole, the light and air are increased. If, as matters now stand, upon \*140] the evidence you \*have heard, you think that this is a true proposition, then the plaintiff will have no ground of action. But if, on the contrary, you think that, in effect, these alterations (though they may separately be improvements,) upon the whole diminish the quantity of light and air, then you will find for the plaintiff with nominal damages; and your verdict will have no other effect, than that of a notice to the defendants, that they must pull down the building of which the plaintiff complains.

Verdict for the plaintiff—Damages 1s.

Wilde and Andrews, Serjts., and Chandless, for the plaintiff.

Bompas, Serjt., and Comyn, for the defendants.

## [Attorneys—Lawrence and Pickering.]

See the case of Shadwell v. Hutchinson, Vol. 4 of these Reports, p. 333, and the authorities there referred to.

[Rule as to the arrangement of Causes for the Sittings in and after Term. Jan. 25, 1833.

In the case of Latchford v. Cresswell, which was in the paper for trial at the second Sitting in London, Goulburn, Serjt., moved on affidavits to postpone the trial, and wished it to be put off till the Sittings after the Term.

GASELEE, J., said, that he could not put off the trial till the Sittings ofter the Term, as

it would interfere with the trial of other causes before the Lord Chief Justice. His Lordship added, that it had been arranged, for the benefit of suitors and counsel, that the causes standing over from the Sittings after one Term should not be made remanent to the Sittings in the next, but to the Sittings after; because some counsel did not profess to attend at Nisi Prius at the Sittings in Term, and they might have had briefs delivered in those causes. The cause was postponed to the First Sitting in Easter Term.]

#### \*HARTLEY v. COOK and Another. Dec.

[#41]

After the great fire of London, in 1666, the parish of St. Mary Colechurch, was united with that of St. Mildred the Virgin by stat. 22 Car. 2, c. 11. By custom in each of the parishes before their union, the right of appointment to the office of parish clerk. was in the rector and parishioners. In the year 1831, the parishioners of the united parishes. in vestry assembled, elected a parish clerk, but the rector at first refused to sanction the appointment, and himself appointed another person; afterwards, however, he appointed the person elected, with the assent of the parishioners. But the person whom he had previously appointed, one Sunday morning placed himself in the clerk's desk, in the church of the united parishes, and, refusing to retire upon request, was laid hold of by one of the churchwardens and the vestry clerk, and an attempt was made to remove him by force, but which was not successful. For the purpose of trying the right to the office, he brought an action of assault against those officers, who pleaded specially two sets of justifications; one set alleging the legal appointment of the person elected by the parishioners, to place whom in the desk they sought to remove the plaintiff; and the other set treating the plaintiff himself as an intruder. The jury were of opinion that the custom was for the rector to appoint with the assent of the parishioners, and found a verdict for the defendants. A rule was afterwards obtained for a new trial, which, after argument, and time taken to consider, was discharged; the Court being of opinion that the plaintiff was not lawful parish clerk, as he was appointed by the rector alone, without the concurrence of either of the parishes; but they did not decide whether the election by the united vestries was right or not, though they said that it appeared to be the natural mode.

In the course of the trial it was ruled that old entries in the vestry-books of the parishes were not evidence to shew the right of election, as it did not appear whether the incumbent was present at the meetings they related to. But extracts from the register of the bishop of the diocese were received in evidence to prove the same appointments, as were also several entries of vestry meetings, at which the rector was present.

TRESPASS.—The first count of the declaration stated, that the defendants, on the 15th January, 1832, assaulted the plaintiff, and laid hold of him, and struck him, and pulled him by his arms and legs, and endeavoured to force him out of a certain reading-desk in which he then was, and tore his clothes, &c. The second count was for a common assault, omitting the statement respecting the reading desk. The defendants pleaded—Not Guilty, and several pleas of justification.

The first plea stated, that, before and at the time when, &c. in the first count mentioned, the defendant Cook was one of the churchwardens of the parish of Saint Mary Colechurch, in London, united with the parish of Saint Mildred, Poultry, in London, duly appointed and elected; and that the plaintiff, on the day mentioned, being Sunday, wrongfully and improperly intruded himself into and took possession of the said reading-desk, such reading-desk then and there being in and part of the parish church of the said parishes so united, and being the place assigned and duly set apart for the parish clerk of the said parishes, for the performance by him of his duties as such clerk, in assisting in the celebration of divine service in the said church; and the said plaintiff thereby then and \*there hindered and prevented a certain person, to wit, one Thomas Samuel Bullard, who then and there was the parish clerk of and for the said united parishes, duly appointed and entitled to act in that behalf, from taking possession of the said reading-desk, as he was entitled and about to do, for the purpose of assisting in the celebration of divine service, and which service was about to commence, and was accordingly celebrated; and thereby also the plaintiff unlawfully and improperly hindered the due, proper, orderly, and

devout celebration of divine service in the said church, to the grant scandal of divers devout parishioners, &c.; whereupon the defendant Cook, so being such churchwarden as aforesaid, gently admonished him of the impropriety of his behaviour, and requested him to leave the said reading-desk, that the said Thomas Samuel Bullard might, as such clerk, take possession of it, and that divine service might not be interrupted or delayed, &c.; but the plaintiff refused, and wrongfully remained in possession of the said desk; whereupon the said defendant Cook, so being such churchwarden, and the other defendant, at his request, and in his aid and by his command, gently laid their hands upon the plaintiff, in order to remove him from the said desk, and prevent his further delaying the due celebration of divine service, &c.

The second special plea stated, that the plaintiff was in the church on Sunday, just previous to the commencement of divine service, and was illegally, irreverently, and improperly making a noise and disturbance therein, to the scandal of the congregation, and, being admonished by the churchwarden, refused

to cease, whereupon the defendants gently laid hands on him, &c.

The third special plea stated, that Bullard was the parish clerk of and for the said united parishes, and that the plaintiff, assuming and pretending that he had been appointed, intruded himself into the desk, whereupon Bullard requested him to withdraw, which he refused; and thereupon the defendants, at the request of Bullard, gently laid hands on him to remove him.

\*The fourth special plea was similar to the first, except that it stated

\*143] \*The fourth special plea was similar to the first, except that it stated that the plaintiff violently resisted the endeavours of the defendants to

remove him from the desk.

The fifth special plea was to the second count, and was similar in substance to the first, but more concise in form. (a)

(a) As there does not appear to be any form of plea in the books applicable to such a case as the present, we have thought it right to give as a precedent, the fourth special plea verbatim.—"And for a further plea as to the assaulting the said plaintiff, and the scizing and laying hold of the said plaintiff, and with their fists giving and striking the said plaintiff the said blows and strokes first mentioned; and the pulling the said plaintiff by his arms and legs, and endeavouring to force him from and out of the said readingdesk, and the shaking and pulling about him the said plaintiff, and casting and throwing him the said plaintiff down to and upon the ground, and giving him the said blows and strokes secondly mentioned; and the rending, tearing, and damaging the said clothes and wearing apparel in the said first count mentioned, and therein supposed to be done; the said defendants, by leave of the Court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say, that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say, that, before and at the said time when &c., in the said first count mentioned, he, the said defendant W. C., was one of the churchwardens of a certain church, to wit, the parish church of the united parishes of Saint Mildred, Poultry, and Saint Mary Colechurch, in London, duly appointed in that behalf: And that the said plaintiff, just before, and at the said time when &c. in the said first count mentioned, to wit, on the day in that count mentioned, being Sunday, wrongfully and improperly intruded himself into and took possession of the said reading-desk in the said first count mentioned, such reading-desk then and there being in and part of the said parish church of the said united parishes, and being the place assigned and duly set apart for the parish clerk of the said parishes, for the performance by him of his duties as such clerk, in assisting in the celebration of divine service in the said church, and which service, before and at the said time when &c. in the said first count mentioned, was about presently to commence, and was accordingly celebrated in the said church: And by the said conduct of the said plaintiff, the performance of such service in due and regular manner, with the assistance of the parish clerk of the said united parishes, was then and there likely to be obstructed and delayed, to the great scandal of divers devout parishioners of the said united parishes, then and there assembled for the purpose of such service: Whereupon the said defendant W. C., so being such churchwarden as aforesaid, then and there gently admonished the said plaintiff of the impropriety and indecency of such his behaviour, and requested him to come out of and from, and to leave the said reading-desk, in order that the performance of such service, in such due and regular manner as aforesaid, might not be obstructed or delayed; but the said plaintiff then and there neglected and refused so to do, and wrong fully remained in possession of the said reading-desk; whereupon the said defendant W.

\*The plaintiff joined issue upon the plea of not guilty, and, to the special pleas,

replied de injuria.

From the evidence in the case, it appeared, that, after the great fire of London, in 1666, the parishes of St. Mildred the Virgin and St. Mary Colechurch, the former being a rectory and the latter a perpetual curacy, were united by the statute of the 22 Car. 2, c. 11, s. 63, which enacts, that "the parish of St. Mildred, Poultry, and St. Mary Colechurch, shall be united into one parish, and the church heretofore belonging to the said parish of St. Mildred, Poultry, shall be the parish church of the said parishes so united." And, by section 68 of the same statute, it is \*provided, "that, notwithstanding such union as aforesaid, each and every of the parishes so united as to all rates, taxes, parochial rights, charges, and duties, and all other privileges, liberties, and respects whatsoever, other than what are hereinbefore mentioned and specified, shall continue and remain distinct, and as heretofore they were before the making of this present act." The remainder of the section provided, that the patrons should present by turns to the living. The facts out of which the assault complained of arose, were as follow:—

On the 13th of April, 1831, the parishioners of the united parishes, in vestry assembled, appointed a person named Bullard to fill the office of parish clerk, for which office the plaintiff Hartley was also a candidate. The rector, who was resident in the country, and therefore not present at the vestry, though he had notice, refused to confirm the appointment made by the parish; and on the 16th

of the same month gave Hartley the following appointment:-

"I, Richard Crawley, rector of the united parishes of St. Mildred, Poultry, with St. Mary Cole, in the city and diocese of London, do hereby nominate and appoint Mr. John Hartley to the clerkship of the said united parishes, now vacant by the death of Mr. J. Terry. Witness my hand, &c."

After considerable correspondence upon the subject, and in consequence of a recommendation from the Bishop of the diocese, the rector, on the 9th of Octo-

ber, wrote to the vestry clerk as follows:

"I wrote to Mr. South a few days ago, begging him (as I did not know Mr. Hartley's direction) that he would inform him that I should withdraw his nomination to the clerkship of the united parishes. I have now to beg you will have the goodness to insert in the vestry book, that I have appointed Mr. Bullard to that situation, with the \*consent and approbation of the parishioners in restry assembled."

After this, it was proposed to have a fresh election, which was agreed to by both Bullard and Hartley, but the parish did not consent. Thus matters stood till the morning of Sunday, the 15th January, 1832, when Hartley (who had previously officiated for the late parish clerk, but was informed by letter on the 11th January that he was not to officiate any more), placed himself in the desk, and, refusing to leave when desired, was by the defendants, one of whom was

C., so being such churchwarden as aforesaid, and the defendant W. P., in aid of the said W. C., and by his command, at the same time when &c. in the said first count mentioned gently laid hands upon the said plaintiff, for the purpose of removing him from the said reading-desk, and preventing his obstructing or delaying the performance of the said service in such due and regular manner as aforesaid, and because the said plaintiff thereupon violently resisted such their endeavour, and continued by force in possession of the said reading-desk as aforesaid, the said defendant W. C. being such churchwarden as aforesaid; and the said W. P., in aid of the said W. C. and by his command, at the said time when &c. in the said first count mentioned, did necessarily and unavoidably commit the residue of the said trespasses in the introductory part of this plea mentioned, as they lawfully might for the cause in that behalf aforesaid, doing no unnecessary disturbance on that occasion, which are the same trespasses in the introductory part of this plea mentioned: And this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them," &c.

churchwarden of St. Mary Cole, and the other vestry clerk of the united parishes, laid hold of, and an attempt was made to remove him by force; which not being successful at the time for commencing service, he was allowed to remain. For the purpose of trying the right to the office, Hartley commenced an action of assault. In order to shew that the right was jointly in the rector and parishioners, several ancient entries in the vestry-books of the separate parishes were offered in evidence for the defendants, but rejected on the ground that it did not appear that the incumbent was present at the meetings to which they related. Then several extracts from the registry of the diocese of London were produced, some on the part of the plaintiff, and some on the part of the defendants, the nature of which are sufficiently stated in the summing up; as also, several entries of vestry meetings at which the rector was present.

Jones, Serjt., on the part of the plaintiff, contended, that, under the circumstances, the plaintiff was entitled to a verdict, on the ground that Bullard was not duly appointed at the time of the assault, as the custom for the rector and parishioners of the united parishes to appoint jointly was not made out satis-

factorily.

Andrews, Serjt., contra, submitted, that the defendant had made out their

justification.

\*TINDAL, C. J., in summing up, said—The plaintiff in this case complains of an assault committed on his person by the two defendants. The answer which they give to the complaint is, that one of them was warden of the church of the united parishes of St. Mary Colechurch, and St. Mildred, in the Poultry; and that, on the day in question, which was a Sunday, the plaintiff wrongfully intruded himself into the reading-desk of the clerk, and that he, the churchwarden, was ordered to put into that desk one Bullard, who the defendants say had been duly and legally appointed parish clerk; that he first of all requested the plaintiff to come out, which he having refused, they laid their hands upon him for the purpose of putting him out of the reading-That fact has been proved on the part of the plaintiff, to raise the question (which is the material one for your consideration,) whether Bullard had been rightly and duly appointed parish clerk of these united parishes or not. If the defendants were taking up a person to put in the reading-desk, who had no authority to be there, a man who was as much a stranger as any man there, they could not justify themselves in displacing the plaintiff; the question, therefore, which I shall leave for your consideration is, whether, upon the evidence in the case, you are of opinion that Bullard (the person under whose right the defendants resist this action) was duly appointed parish clerk or not? Now, in point of law, the canon law, which forms part of the law of the land, the early canon law, gives the appointment of a parish clerk to the rector, as a person who, in all probability, could make the best selection of a man fit for the duties of that office, and who could have no interest in appointing an improper person. But there are agreements made between parishioners and clergymen upon this subject. Sometimes the clergyman elects one, and sometimes the election is by the parishioners alone, but the person is afterwards approved of by the clergyman. In this latter case, neither party could appoint a parish clerk, unless they so agreed that the same individual was fixed upon by both, there would be no \*parish clerk. But, if that practice is shewn to have existed from the earliest times, it may be a legal custom. And if you find in this case, that such a practice has existed as far back as there is any evidence before us, you may then infer that it has existed from that very remote period which constitutes what is called time of legal memory. It is never expected that evidence should be brought before a jury to carry a custom back to the remotest antiquity. All that can be done is, to carry it back as far as documents exist. The question is, whether you are satisfied that it appears to have been the custom in the two parishes before the union took place, and in the united parishes since the union, that the rector and parishioners should unite in the appointment of

the clerk; for, if such is your opinion, then I shall tell you that Bullard has been rightly and duly appointed, and in that case your verdict should be for the defendants. But if, on the other hand, you are not satisfied that such proof has been given as will justify you in finding that the custom has existed against the ordinary rule of law, then you will find your verdict for the plaintiff. tion is not brought to recover damages, but to establish the right of election; and therefore, if you find for the plaintiff, you will give nominal damages only. Now, with respect to the point, did the custom exist or did it not; it appears, that there were two parishes before the great fire of London, one called St. Mildred in the Poultry, the other, St. Mary Colechurch. After the fire had taken place, that happened with respect to these two parishes which did also to many others, it was agreed, to avoid expense in building many churches, that both parishes should be united together, and one church should serve for both. It appears to me, that, if this custom existed in each separate parish before the act of Car. 2, that will be ground enough to shew, that, in the united parishes, the law would authorize the same custom, and therefore, what you will have to do will be, to say, whether, before the parishes were united, this custom existed in each separately; \*and also, whether it has been continued from that [\*419 time down to the present. I do not mean without interruption at all, for, if there had been no interruption, we should not be here to try this question. Men do not raise questions in such cases; but it is where, in process of time, irregularities have taken place, so that sometimes the custom has been observed, and sometimes not, that questions arise between different parties. You must look at the preponderance of the evidence, to see whether, although the practice may have varied sometimes, the bulk of the evidence shows that the custom had The earliest transaction which has been given in evidence is of the year 1629; it relates to the parish of St. Mary Colechurch, and in calling your attention to this transaction, I do not advert to the vestry-book, for I think it is doubtful whether a vestry-book on such an occasion is admissible in evidence. as it does not appear whether the clergyman was present. I rely upon the license, which was a public act, to complete the title, not to give it, but to complete it by the approval of the ordinary. The license is to a person to be the bearer of water; it was at that time the office of the clerk to carry about the holy water to the different parishioners; that office, however, bears an analogy to the situation which the modern clerk fills; it is a license to the person to be the water-bearer, it begins thus:-"Whereas, the rector of the parish of St. Mary Colechurch, and the parishioners there, have rightly and duly chosen Thomas Letten to fill the office," &c. Now that is going back to a very carly time, two centuries ago, and there is not any earlier document which shews, or from which we may infer, that the appointment was in the rector alone at that time. There does not appear to have been any controversy in the Ecclesiastical Court, which there would have been if the right was disputed. The license purports to be signed by the rector, and it seems to recognize the right of the parish to have a voice in the appointment of the clerk. The next document is of the date of 1664, and \*applies to the same parish of St. Mary Cole-It appears that a person named William Wilson was appointed [\*450 to be assistant to Thomas Letten, and this was done by the choice of the parishioners and the clergyman. The document is signed "Thomas Horton." One would suppose that he was the rector at the time, from his name being first and the names of the churchwardens following it. This is all that applies to St. Mary Colechurch before the union of that parish with St. Mildred. As to the parish of St. Mildred, a license is produced, of the date of 1661, in which it is said: "These are to certify that John Leeson was chosen parish clerk of St. Mildred in the Poultry, by the general consent of the parish;" it is signed "Perrincheife, D. D." Here, therefore, is the assent of the clergyman shewn by his signing the certificate; and you have the act admitted to have taken place, viz. that the man was appointed in his (the clergyman's) presence. There is a

license also in 1663, and another in 1670, which latter is the very year in which the parishes were united. It is in these words: "We, whose names are hereunto subscribed, do recommend the appointment of William Wilson, the person who has been assisting the late parish clerk, to be the parish clerk, to be his successor." This document is signed by the parishioners, and Thomas Perrincheife, the rector. Now this, though not strictly an election by the parish, yet is an acknowledgment on the part of the rector, that the parish had a voice in the matter as well as himself. These are the only instances we have before the union, in 1670. One or two more of a subsequent date are put in. Then we come down to a more important entry, namely, that of the year 1787. It has been shewn that the rector at that time was Dr. Bromley. It was proved also, that he had made two, if not three, appointments, which it appears were resisted by the parish; and a meeting of the parishioners was called, and a report made by the vestry clerk, that, upon searching for precedents, it appeared, that the \*right was not in one alone, but in the rector, churchwardens, and parishioners. The entry in the vestry book of the 16th February, 1787, says, " for the prevention of disputes in time to come, it is resolved, that the right of choice, nomination, and appointment to the office of parish clerk for these united parishes is in the rector for the time being, with the consent and assent of the churchwardens, parishioners, and inhabitants of the same respectively." This, it appears, was signed by the rector, and it will be for you to say, whether it does or does not impress your mind with the intention of the parties on the subject. It is followed up by the rector's withdrawing one appointment and choosing another person. This is all the evidence on the part of the defendants. On the part of the plaintiff they say, that they will shew you instances in which a different course has been adopted. The first they put in is of the date of 1712. It is a certificate of the rector at the time that a particular person had been duly elected clerk. It seems to me to be rather an acknowledgment of the rector's having allowed the right of the parish to elect, than a proof of his standing on a separate right to appoint. The next they put in is of 1739, by which it appears that the rector of the day himself appointed the clerk. If that man ever acted as clerk, it is, as far as that instance goes, a proof that the rector was allowed to have the right of appointing alone. It should be observed, that one of the instances relied on by the defendants is an instance of an appointment by the churchwardens alone. We do not know whether their appointment was assented to, or how long the office remained under the separate appointment of one or the other. These different appointments shew that there was something of a contest going on, a difference of opinion between the rector and the parish, which made the agreement of 1787 necessary and proper. His lordship, after some further observations, told the jury, that, if the custom was established, the plaintiff's appointment would not be valid; \*and directed them, if \*452] they thought the custom was proved, to find a verdict for the defendants; but, if they thought it was not, then to find a verdict for the plaintiff, with nominal damages. Verdict for the defendants.

Jones, Serjt., and ———, for the plaintiff. Andrews and Stephen, Serjts., for the defendants.

[Attorneys-Richardson & Co., and Payne & Leachman.]

In the ensuing Hilary Term, Jones, Serjt., obtained a rule nisi, for a new trial, which came on for argument in the course of the same Term.

May 8.—The Court took time to consider, and on the last day of Easter

Term pronounced its judgment.

TINDAL, C. J., after stating the pleadings, said—It was urged that, by the union of the two parishes by statuet, the custom in each was destroyed, and the common law applies; and therefore, that the plaintiff, being nominated by the rector,

must be held to be the parish clerk. It seems to us sufficient to decide whether the plaintiff was lawful parish clerk, and the question whether Bullard was. is upon the pleadings immaterial. Hawe v. Planner, 1 Saund. Rep. 13. There is no doubt, that in each parish, before the union, the custom was to appoint by the rector and parishioners. The only question is on the effect of the statute of union. Bro. Abr. tit. "Appropriation, Union, and Consolidation," shews that churches may, in certain cases, be united at common law, but that such union does not affect the parishes as to tithes, rates, &c. 1 Lord \*Raymond, 196, shews, that, if this had been an union of the two churches [\*455] at common law, the church of St. Mildred would have been the church to which the union was effected, the parishes in all other respects being distinct. It is difficult, therefore, to hold, on the principle of the common law, that either parish (more especially St. Mildred's) should have been deprived of any right as to election it before possessed, and therefore an appointment by the rector alone would be bad. But the true question is upon the statute: and the 65th section, as to plate and goods, clearly shows that the union was an union of parishes, and not merely of churches. But the 68th provides, that, as to all privileges, &c., the parishes shall remain distinct. Therefore, as before the union there was a right in the rector and parishioners jointly, and as St. Mildred's was the church to which the union was made, St. Mildred's cannot have lost the right of election in question. We express no opinion whether the election in the united vestries is right or not, though it seems to be the natural mode; but it is enough for us to decide that the appointment of Hartley is bad, and therefore that the action cannot be maintained. Rule discharged.

## \*COURT OF KING'S BENCH.

Γ\*454

Sittings at Westminster after Hilary Term, 1833.

BEFORE LORD CHIEF JUSTICE DENMAN.

### WAKE v. LOCK. Feb. 8.

In an action for negligently driving the defendant's carriage against that of the plaintif.
the latter cannot examine his servant who drove his carriage, without releasing him.

CASE against the defendant for damaging a fly of the plaintiff, by the defendant's wagon running against it, through the negligence of the defendant's servant. Plea—General issue.

It appeared that the defendant's wagon had struck against the plaintiff's fly,

on its return from Epsom races.

On the part of the plaintiff, his servant, who drove the fly, was called; he gave evidence to shew that the injury had arisen from the negligence of the defendant's wagoner.

Campbell, S. G., for the defendant, objected that the plaintiff's servant was not a competent witness without a release; and he relied on the case of Morish

v. Foote, 8 Taunt. 454.

Sir J. Scarlett, contra. I have seen a plaintiff's servant examined in case of this sort over and over again.

DENMAN, C. J. I have often seen the plaintiff's servant examined without a release.

Campbell, S. G. I have heard the case which I rely upon referred to with approbation.

\*455] DENMAN, C. J., If I had been aware of the case, I would not \*have received the witness's evidence without a release.

Sir J. Scarlett. If the thing was of sufficient value I should be content to argue the case.

The plaintiff being in Court, the witness was released.

Campbell, S. G. As the plaintiff has examined the witness without a release, he ought to be allowed to release him now; but should go on with the examination, at the risk of the verdict being set aside.

DENMAN, C. J. The witness is now released, and I will ask him, if what he

has already told us is true.

The witness was examined.

Verdict for the plaintiff, damages 4l. 4s.(a)

Sir J. Scarlett and Platt, for the plaintiff. Campbell, S. G., and Steer, for the defendant.

[Attorneys-Brough and Lock.]

## \*456] \*SEAGER and OTHERS v. BILLINGTON. Feb. 8.

A. advanced 100*l*. to B., on the joint and several promissory note of B. and C., the latter, at the time owing A. 65*l*., on his own account; C. failed, and, at a meeting of his creditors, A. and others entered into a resolution that C. should assign certain property for the benefit of his creditors, and that his creditors should give him a release. A., at this meeting, stated his debt to be 65*l*., and he afterwards received a dividend on that sum. Subsequently to this B. failed:—Held, that A. could not then sue C. on the promissory note.

Assumestr by the plaintiffs, as the payers, against the defendant, as maker, of the following promissory note:—

"4th December, 1829. "On demand, we jointly and severally promise to pay Messrs. Seager, Evans,

Stafford & Co., one hundred pounds, with interest.

"Witness, "Christopher Wilson.

Frederick Barnet. George Billington."

(a) In the case of Green v. The New River Company, 4 T. R. 589, it was held, that in an action against a master, for the negligence of a servant, the latter is not a competent witness on the part of the defendants, to disprove the negligence without a release. In the case of Miller v. Falconer, 1 Camp. 251, which was an action for running against the plaintiff's cart with a dray, it was held that the servant, who was driving the cart when the accident happened, was not a competent witness for the plaintiff without a release; but in the case of Cuthbert v. Gostling, 3 Camp. 515, where, in trespass for breaking through the wall of the plaintiff's house, the defendant pleaded a license, to which the plaintiff new assigned excess, it appeared that the plaintiff had given the defendant leave to do what was necessary for the repairing of his own house, which adjoined the plaintiff's; it was held, that the workmen employed to do the repairs, were competent witnesses on the part of the defendant, to disprove the excess, without being released. In the case of Protheroe v. Elton, reported under the name of Rotheroe v. Elton, 1 Pea. N. P. C., 117, it was held, in an action on a policy of insurance on goods put on board a ship, that the shipowner was not a competent witness for the plaintiff, to prove the ship sea-worthy, without a release. The case of Morish v. Foote, 8 Taunt. 454, was an action against the proprietor of a mail coach, for the negligent driving of his servant, whereby the plaintiff's wagon horse was injured. For the plaintiff, the wagoner was examined in chief, and the defendant's counsel then objected, that he ought to have been released; but nothing having appeared to inculpate him at the time when the objection was made, Mr. Justice Abbott repudiated the objection; but the case afterwards went to the jury on the question, whether, at the time of the accident, the coachman was to blame or the wagoner: and Mr. Justice Abbott gave leave to move to enter a nonsuit, if the Court should think that the wagoner ought to have been released; and the Court held that the wagoner was not a competent witness without a release; and a nonsuit was entered.

Plca-General issue.

It was opened by Campbell, S. G., for the plaintiffs, that a person named Barnet was about taking certain premises, and that he borrowed 150l. of the plaintiffs, the defendant being his surety on this note to the amount of 100l.; the defendant himself, besides this, owing the plaintiffs \*65l. 7s. 1d. on [\*457 his own private account. Subsequently to this, the defendant had proposed to compound with his creditors, Barnet up to that time continuing in credit; the plaintiffs therefore stated themselves to be the creditors of the defendant, to the amount of 65l. 7s. 1d., on which they had received a dividend; however, since that time, Barnet had failed, and on the plaintiffs claiming the amount of this note from the defendant, a release was tendered to the plaintiffs, which they refused to execute. But, even if they had executed it, he submitted that that would not have defeated the present claim; and he cited the case of Payler v. Homersham.(a)

\*It was proved that Barnett wished the plaintiffs to advance him 150%, and that they refused to do so, unless the defendant would become his [\*548]

surety for 100l.; which he did by signing this note.

The note was put in and read.

Sir. J. Scarlett, for the defendant.—If this action could succeed, it would be a fraud on all the other creditors of the defendant. The creditors of the defendant signed a resolution to take a certain composition upon debts specified, and they agreed to execute a release. I say, that a creditor cannot state that his debt is 65l. instead of 165l., and then, having received his dividend on 65l., refused to sign a release, and get 100l. more than all the rest. The case cited turns on the construction of a deed; but I go on the general principle. Has any one creditor, I would ask, a right to keep in his pocket, in this way a claim for 100l.? The fact was, that the plaintiffs had this note payable on demand by Barnet and the defendant, and they took their chance of getting the money from Barnet. If this claim had been mentioned to the other creditors, they would at once have said, it would have been better to have had a bankruptey, and then the plaintiffs could only have got a dividend. I take the law to be this, that if a man agrees to assign his property to pay his creditors equally, no

(a) 4 M. & S. 423. In that case a release, contained in a deed, which recited that the defendant stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take of the defendant 15s. in the pound upon the whole of their respective debts, whereby the creditors, in consideration of the said 15s. in the pound paid to them before executing the release, each and every of them did release the defendant "from all manner of actions, debts, claims, and demands in law and equity. which they, or any or either of them had against him, or thereafter could, should, or might have, by reason of any thing from the beginning of the world to the date of the lease"-was held to release nothing but the respective debts and all actions and demands touching them: for the general words of a release have reference to the particular recital. and are to be governed by it. Therefore, where to debt brought by the plaintiffs on the defendant's bond, the defendant pleaded this release, it was held, that the plaintiffs, in their replication, might plead that the bond was given by the defendant, with others, as a security for the repayment of bills drawn upon them by the defendant, and for moneys advanced to him, and that the sum set against their names in the release, was due to them from the defendant on the day of the release, on his own account; and the moneys intended to be secured by the bond, although part was due at the time of executing the release were not nor was any part included, or meant by them or by the defendant to be included, in the sums set against their names, or in the release. In the case of Cork r. Saunders, 1 B. & A. 46, the defendant, being insolvent, had, by an agreement, stipulated to assign his property immediately, his creditors consenting that his business should be carried on for their benefit until the next Michaelmas, and that then the property should be divided among them. The defendant accordingly assigned his property; but, at Michaelmas, several of the creditors who had signed the agreement agreed that the business should be carried on for a further time. Held, that the plaintiff, who was a creditor, and had signed the first agreement, but had not concurred in the second, could not maintain an action against the defendant for a debt existing at the time of the first agreement. See also the case of Ward v. Bird, ante, p. 229; the case of Turner v. Hook, D. & R. N. P. C. 27, there cited; and the case of Margetson v. Aitken, ante, Vol. 3, p. 338.

creditor, having put his name to such an agreement, can claim any larger amount This note is not a note payable on demand, and it does not signify afterwards. whether the defendant was a surety or not. It has been decided, \*that, \*459] if a debtor owes two debts to the same creditor, and the debtor and creditor agree that the creditor shall state only one of them in the agreement for a composition, and the debtor either promise to pay the other or give a bill for it; such an agreement cannot be enforced, as it is a fraud on the other creditors. So, here, the plaintiffs cannot keep one of their debts in reserve, and then get paid more than all the other creditors of the defendant.

A paper, stamped as an agreement, bearing date, April 10, 1830, and signed by Mr. Stafford, one of the plaintiffs, and by several other of the defendant's creditors, was put in. It stated, that, at a meeting of the creditors of the defendant, it was resolved that the defendant should assign certain property for

the benefit of his creditors, who should execute a release.

It was proved that Mr. Stafford had stated at this meeting, that the debt due from the defendant to the plaintiffs, was 65l. 7s. 1d., and that a composition of 3s. 10d. in the pound had been subsequently received by the plaintiff on that amount.

DENMAN, C. J. By this agreement, the creditors who sign it are to execute a general release to the defendant. I think it is an answer to the action. sh: Il nonsuit the plaintiffs, giving them leave to move to enter a verdict.

Nonsuit, with leave to move.(a)

Campbell, S. G., Kelly, and Helps, for the plaintiffs. Sir J. Scarlett and Maule, for the defendant.

[Attorneys-W. Evans and Ivimey.]

### \*460] \*The TRUSTEES of the BRITISH MUSEUM v. FINNIS and Others.(b) Fcb. 12.

If a person opens his land, so that the public pass over it continually, they would, after the user of a very few years be entitled to pass over it and use it as a way; and if the person does not mean to dedicate it as a way, but only to give a license, he should do some act to shew that he gives a license only. The common course is to that it up one day in the year.

If there is an old way near to a person's land, and, by the fences decaying, the public come on the land, that is no dedication of the land as a way. By the stat. 57 Geo. 3, c. xxix., s. 114, the commissioners of paving of the metropolis are to enter their proceedings in a book, and such entries are made evidence. Whether an entry, stating that A. sent a letter to the commissioners, asking their permission to erect a rail at the side of a street, is evidence of such asking of permission.-Quære.

TRESPASS against two of the defendants, as clerk of the paving committee of St. Giles in the Fields, and St. George, Bloomsbury. The trespass was the taking up of some small stones, which paved a portion of ground on the outside of the south wall of the British Museum, and between it and the regular foot pavement on the north side of Great Russell-street, Bloomsbury.

On the part of the plaintiffs, a conveyance, in the year 1675, from the Hon. W. Russell to the Duke of Montagu was put in, in which the present south wall of the British Muscum was described; and by this the property conveyed was

<sup>(</sup>a) No motion was made.
(b) The defendants, Mr. R. Finnis and Mr. R. F. Finnis, were sued as cierks of the committee for paving, cleansing, and lighting the parishes of St. Giles in the Fields, and St. George, Bloomsbury, who are, by sect. 65 of the local paving act of those parishes, 59 Geo. 3, c. lxxiii., to sue and be sued in the name of their clerk or clerks; and, by sect. 68 of the same stat., persons acting under or by colour of that act may plead the general issue, and give special matter in evidence.

stated to extend to a breadth of five feet four inches on the outside of the wall, and abutting on Great Russell-street. A conveyance in the year 1753, from the Duke of Montagu to the Trustees of the British Museum, was also put in containing exactly the same description.

A witness, named Soley, stated that he recollected the portion of ground in question to have been fenced in by a wooden railing, which, having decayed, was taken away and not replaced by any other fence, but he could not accu-

rately recollect the date of the existence of this fence.

It was also proved, that the small stones with which this \*place was paved, were brought from the court-yard of the Museum; and that, in the years 1826 and 1827, when leave had been obtained by the Trustees of the British Museum from the committee of paving to remove the pavement for the making of a sewer, part of the pavement was replaced by the committee, and part by the trustees of the Museum. It was also proved that the servants of the Museum cleaned away the dirt and snow up to the termination of the small stones, and to that line only.

On the part of the defendants, it was proved that the place in question was completely open, and that it had been so for forty years; and that any one passing along Russell-street might pass over it exactly the same as he might over the flag pavement which adjoined it. The defendants' counsel also proposed to give in evidence two entries contained in the minute-book of the committee, as shewing that the officers of the Museum had acknowledged that the ground in question was within the jurisdiction of the defendants. The entries were as follows:—

"11th April, 1822.

"Application in writing from Joseph Planta, Esq., on behalf of the Trustees of the British Museum, was received and read, stating, that complaints had been laid before them by several inhabitants of the neighbourhood, that various nuisances are continually committed against the front wall of their premises, they had resolved to cause an iron fence to be placed against the whole length of the wall, at the distance of not more than five feet therefrom; that a doubt having arisen, whether they were at liberty to execute this plan without the approbation of the committee, they had determined to suspend the work till such time as they shall have received the assurance of this committee that they have no objection to its being effected.

"Resolved, that the directing committee do consider \*the said appli-

cation, and report their opinion thereon to this committee."

"19th April, 1822.

"The sub-committee, appointed at the last meeting, reported, that they had approved of the Trustees of the British Museum placing an iron railing in front of their wall, at the distance of not more than five feet at the east side of the entrance, and three feet at the west, next the sentry-box, and running off to nothing at the extreme end. The said report was confirmed; and Hawkins, the superintendent, directed to prepare two plans of the intended line of the railing, the same to be signed by three committee-men, and one of them sent to Mr. Planta."

Campbell, S. G., for the plaintiffs, objected that these entries were not evilence.

F. Pollock, for the defendants. By the statute 57 Geo. 3, c. xxix, s. 114,(a)

(a) By which it is enacted, "That all acts, orders, and proceedings of the said commissioners, trustees, or other persons as aforesaid," [which are the commissioners, or trustees, or other persons having the control of the pavements, in the streets or public places in any parochial or other district, within the jurisdiction of this act,] "at any of their meetings, shall be entered in a book or books to be kept by their clerk or clerks for the time being for that purpose, and shall be signed by such clerk or clerks; and that all such orders and proceedings shall then be deemed and taken to be original acts. orders, and proceedings; and such book or books shall and may be produced and read

\*463] the acts, orders, and proceedings of \*the paving commissioners in the metropolis are to be entered in a book, and that book is made evidence.

PATTESON, J. It is not evidence of an application.

F. Pollock. I submit, that it is evidence of something done upon an application.

PATTESON, J. The application ought to have been preserved. It is only eleven years ago.

F. Pollock. There is a permission to put up a rail.

Evidence was given, that the papers belonging to the committee would be in the possession of the Messrs. Finnis, as clerks to the committee; and a witness proved that he had made diligent search among the papers of the committee, but that he could not find the letter of Mr. Planta.

\*464] \*PATTESON, J. There is no distinct evidence, without these entries, that any letter ever was sent. I shall receive the evidence, and take a note of the objection.

The entries were read.

Campbell, S. G., in reply. There can be no dedication of a way to the public, without an intention to dedicate, and without the proprietors having renounced all control over the place for ever. The acts done here shew clearly, that, although the public might pass over this place, there was no intention to dedicate it to the public as a way. The evidence is as clear as that of the bar put up in Southampton street, every body walks there, but the putting up of the bar negatives a dedication. With respect to the letter of Mr. Planta, that only shews that a doubt existed in his mind, and that, to prevent any possibility of litigation, he wished for the approbation of the committee in what he was going to do.

PATTESON, J., (in summing up.) The whole question is, whether the public have acquired a right of way over this place, by the dedication of the Trustees of the British Museum. If there be any space of ground between the wall of the Museum and the way, there has been a trespass committed; as it is admitted that the soil has been turned up in the space between the pavement put down by the committee and the wall. It is quite clear that there has been a usage of the public going over this space of ground, as it is shewn that they have done so for more than thirty years, which is quite enough, if usage alone would establish the right. On the part of the plaintiffs, it appears, that, in the year 1675, there was a conveyance of the property, which describes it as extend-

as evidence of all such acts, orders, and proceedings, upon any appeal, or trial, or information, or any proceeding, civil or criminal, and in any Court or Courts of law or equity whatsoever; and that it shall not be necessary upon any appeal, or trial, or information or proceeding, or upon any occasion, to prove the appointment of such clerk or clerks; and that within ten years after the date of any such acts, orders, and proceedings, proof of the handwriting of such clerk or clerks, shall be necessary to verify his or their appointment, and the accuracy of such entries of such acts, orders, and proceedings; and that, after the expiration of ten years from the date of any such acts, orders, and proceedings, no other proof shall be necessary, or shall be required of his or their appointment, or of the accuracy of such entries, than the production of such book or books appearing to be signed by some person or persons as the clerk or clerks for the time being; and that any proof of his or their handwriting shall not be necessary, nor shall be required: and also, that upon any appeal, or trial or information or other proceeding, civil or criminal, and in any Court or Courts of law or equity, a certificate from the clerk or clerks for the time being, signed by him or them, that any person or persons who hath or have acted or may act as commissioners or trustees, or other persons having the control of the pavements in any parochial or other district, or as a surveyor or surveyors of pavements, or in any other office, was or were or is or are one or more of such commissioners or trustees or persons having the control of the pavements in such parochial or other district, or was duly appointed to be and was a surveyor or surveyors of pavements, or to such other office wherein such person or persons shall or may act or appear, shall be sufficient and conclusive evidence of the appointment and authority of such person or persons, without any other proof or evidence whatsoever,"

ing five feet four inches on the outside of the wall, and abutting on Great Russell-street, that being, no doubt, the very wall that is now standing. The conveyance was to the \*Duke of Montagu; and we find, that, even at that time, there was a way, but it was five feet four inches from this wall. If [\*465] a person lets people go over his land, and use it as a way, that is one thing; but if there is an old way near my land, and, by my fences decaying, the public come on my land, that is no dedication. In the year 1753, the Duke of Montagu conveyed the property to the Trustees of the British Museum, in exactly the same terms as were contained in the former conveyance; and, what is most important, Mr. Soley speaks to the place having been fenced in with a rail, which afterwards decayed. He appears to be uncertain as to the time when that was; but, up to that time at least; there could be no dedication. If a man opens his land, so that the public pass over it continually, the public, after a user of a very few years, would be entitled to pass over it, and use it as a way; and if the party does not mean to dedicate it as a way, but only to give a license, he should do some act to shew that he gives a license only. The common course is, to shut it up one day in every year, which I believe is the case at Lincoln's Inn. The question really is, did the Trustees of the British Museum ever dedicate this place as a way? To shew that they did not, there is, besides the testimony of Mr. Soley, evidence given that this particular spot is paved with small stones brought from the inner court of the Museum by the workmen of the Museum, who paved it. If there was a dedication, why should the small stones remain when the old way was flagged and repaired by the paving committee? There are two instances of work done, in 1826 and 1827, and on those occasions the person who did the work got leave from the committee to remove the pavement and make a sewer. But there a permission was necessary, because the work extended more than five feet four inches from the wall, and beyond that the Trustees had not the right of soil; and besides, even if they had, they would not have been authorized to take up the pavement. It appears too, that the committee, in 1826 and \*1827, replaced a part of the pavement, and the workmen of the Museum the rest, after the leave had been given by the committee to take up the pavement. It is rather remarkable, that the Trustees should have replaced a part, and the committee the rest; but, if part of the ground was theirs, that might be a reason for it. It is also proved that the servants of the Museum cleaned away the dirt and snow up to the termination of the small stones, and to that line only. The question is, whether, there being clearly an old highway adjoining the place in question, the Trustees of the British Museum ever dedicated this portion of land to the public. If there has been only a license, that is not sufficient, the question being, whether there has been a total dereliction on the part of the Trustees in Verdict for the plaintiffs—Damages 1s.(a) favour of the public.

<sup>(</sup>a) In the case of the Rugby Charity v. Merryweather, 11 East, 376, Lord Kenyon said, that the public at large, having the free use of a way for five or six years, had been held a sufficient time to presume a dedication of it to the public, and that the fact of its not being a thoroughfare made no difference. And in the case of Rex v. Lloyd, 1 Camp. 260, Lord Ellenborough appears to have been of opinion that it was not necessary that a way should be a thoroughfare. However, in the case of Wood v. Veal, 5 B. & A. 454, the Court appear to have great doubt whether it is not essential that it should be so. In that case the Court held, that there could be no dedication of a way except by the owner of the fee; in that case the user was during a long lease. In the case of Jarvis c. Dean, 3 Bing. 447; 11 Moo. 354, where persons had, for four or five years, passed up and down an unfinished street, the inhabitants of which paid highway and paving rates, Best, C. J., told the Jury, that if they thought the street had been used for years as a public thoroughfare, with the assent of the owners of the soil, they might presume a dedication. The Jury did so, and the Court refused a rule for a new trial. But, in the case of Harper v. Charlesworth, 6 D. & R. 572, where a way over crown land had been extinguished by an inclosure act, but the public had continued to use the way for twenty years afterwards; it was held, that this user was not evidence of a dedication of the way to the public, unless it appeared to have had the consent of the crown. In the case of Rex r.

Campbell, S. G., applied to the learned Judge, to certify that \*the freehold came in question, to entitle the plaintiffs to their costs.

\*PATTESON, J. The freehold can hardly be said to come in ques-\*468] tion.

Campbell, S. G. But, for the private act of Parliament, the defendants must have pleaded a justification.

PATTESON, J. Perhaps I had better certify.

Certificate granted.

Campbell, S. G., and W. H. Watson, for the plaintiffs. F. Pollock, Platt, and Steer, for the defendants.

[Attorneys-Bray & Warren, and R. & R. F. Finnia.]

## Adjourned Sittings in London after Hilary Term, 1833.

BEFORE LORD CHIEF JUSTICE DENMAN.

#### REX v. HEMP. Feb. 18.

If an indictment for perjury contain several assignments of perjury, on one of which no evidence is given on the part of the prosecution, the defendant cannot go into proof, to shew that the evidence, charged by that assignment of perjury to be false, was in reality true. A witness for the defence cannot be asked whether he has heard a witness for the prosecution commit perjury on the trial of a cause; and in stating whether he would believe that witness on his oath, he must do so from his knowledge of the witness's general character, and not from having heard him give particular evidence on a particular trial.

On the trial of an indictment for perjury, the witnesses to character were asked, "What

Barr, 4 Camp. 16, Lord Ellenborough said, "After a long lapse of time and a frequent change of tenants, from the notorious and uninterrupted use of a way by the public, I should presume that the landlord had notice of the way being used, and that it was so used with his concurrence. Notice to the steward is notice to the landlord." In the case of Rex v. Lloyd, 1 Camp. 260, his Lordship said, "If the owner of the soil throws open a passage, and neither marks, by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public." But, in Roberts v. Karr, Id. 262, where a bar had been at first put up, which was soon knocked down, and the place after that used as a thoroughfare, Mr. Justice Heath observed, that the putting up of the bar rebutted the presumption of a dedication to the public; and that such a dedication must be made openly, and with a deliberate purpose. So, in Lethbridge v. Winter, Ib., where originally a gate had been put up, but which had been down for twelve years, it was held, that there was no dedication. In the case of Woodyer v. Hadden, 5 Taunt. 125, the plaintiff had erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated from the end of the street for twenty-one years, by the defendant's fence; during nineteen years of which period the houses were completed, and the street publicly watched, cleansed, and lighted, and both the footways and half the horseway thereof, paved at the expense of the inhabitants; held, that the street was not so dedicated to the public, that the defendant, pulling down his wall, might enter it at the end adjoining to his land, and use it as a highway. In the case of the Marquis of Stafford v. Coyney, 7 B. & C. 257, where the plaintiff had for several years suffered the public to use a road through his estate, for all purposes except that of carrying coal; it was held, that this was either a limited dedication of the road, or no dedication at all, but only a license, revocable, and that a person carrying coals along the road, after notice not to do so, was a trespasser. In this case.

Mr. Justice Bayley and Mr. Justice Holroyd intimated that they saw no objection to there being a partial dedication of a way; but Mr. Justice Littledale doubted the possibility of making such a dedication. In the case of Roberts v. Karr, Mr. Justice Heath said, that there cannot be a partial dedication to the public, although there might be a grant of a footway only.

is the character of the defendant for veracity and honour?" and "Do you consider him a man likely to commit perjury?"

PERJURY. The perjury was alleged to have been committed in an affidavit sworn in a cause of Moses Jacobs v. Green Pellatt. This affidavit stated a conversation between the defendant Hemp and Moses Jacobs, and that a paper, marked B., contained the terms of a contract for the sale of posts; and that, on its being shewn by the defendant Hemp to Moses Jacobs, the latter admitted to the former, that this paper did contain the terms of \*that contract. There were assignments of perjury on the whole of these statements; but no evidence was given on the part of the prosecution in support of that assignment of perjury, which charged that the paper marked B. did not contain the terms of the contract.

The defendant's counsel proposed to give evidence to shew that the paper did,

in fact, contain the terms of the contract.

Campbell, S. G. I do not go upon that assignment of perjury. I have given

no evidence upon it.

Platt, for the defendant. It is a question on the record, and we may give evidence to disprove it.

DENMAN, C. J. I think not, as the prosecutor gives no evidence upon it. On the part of the prosecution, Moses Jacobs had been examined as a witness; and for the defence, Mr. Pellat was called, he was asked by-

Platt, for the defendant, whether, from having heard Moses Jacobs give false evidence on the trial of a former cause, he considered that the testimony of Jacobs could be relied on?

DENMAN, C. J. The question is, from what you know of the general charac-

ter of Jacobs, would you believe him on his oath?

Mr. Pellatt. I do not know enough of his general character to speak to

Platt. Did you ever hear him commit perjury?

Campbell, S. G. I must object to that.

\*DENMAN, C. J. That question cannot be put, as it would be trying [\*470] another specific charge.

A Juror. I should like for Mr. Pellatt to state whether he would not believe the witness because he has heard him commit perjury.

DENMAN, C. J. It must be from his general character.

Mr. Pellatt. I have not such a knowledge of his general character as to enable me to answer the question; but what I do know of him is not in his

For the defendant, several witnesses to character were examined. They were each asked, "What is the general character of the defendant for veracity and honour?" And also, "Do you consider him a man likely to commit perjury?"

The form of the last question was neither objected to by the Solicitor-General, nor remarked on by the Lord Chief Justice. Verdict-Not guilty.

Campbell, S. G., and Hutchinson for the prosecution.

Curwood, and Platt, for the defendant.

## [Attorneys-Spyers and E. Isaacs.]

See the case of Rex v. Bispham, ante, Vol. 4, p. 392, and Rex v. Nichols, post.

#### \*HEISCH v. CARRINGTON and Others. Feb. 23. [\*47]

By custom in the Corn Market, a buyer may pay the factor discount, within the two months which constitute the ordinary time of payment, either for his own accommoda-

tion or that of the factor: and, therefore, where a factor stopt payment after he had received the money for corn sold, but before the expiration of the two months, it was-Held, that the principal could not sue the buyer, but must look to the factor.

Assumpsit for goods sold and delivered.

On the part of the plaintiff, who, it appeared, traded under the name of Cox, Heisch & Co., a corn-factor, named Gibson, was called as a witness. He stated, that, on the 12th of December, 1831, he sold to the defendants, who traded as distillers, under the firm of T. V. Cooke & Co., a quantity of barley; and gave the following sold note, made out by his clerk:—
"Sold Messrs. T. V. Cooke & Co., about 280 quarters of barley, at 32s.,

for Wm. Gibson.—T. W."

He also stated, that the barley belonged to the plaintiff; that the time of payment was two months; and, that he gave the defendants a delivery order the same day, addressed to the master of the ship Charlotte, at Linehouse, on board which it was. The order was as follows:-

"Corn Exchange, 12th December, 1831.

"Captain -"Deliver to Messrs. T. V. Cooke, about 280 quarters of barley, for Wm.

He further stated, that he sent an invoice on the 23d of December, and on the 26th, received the sum of 411l. 13s. 7d., allowing a discount of 2l. 14s.; that he was not in possession of the bill of lading; that he stopped payment on the 4th of January, 1832, and had not paid over the money to the plaintiff.

On his cross-examination, he said-"It is usual for captains of ships to deliver to the order of the factor. I continued to buy and sell for myself up to the time of my failure. I did not deal largely on my own account. no defined custom as to the payment; it is at the option of the buyer to pay at two mouths, or sooner, with a discount. The plaintiff has done it more than \*1721 once. I have \*known other buyers do the same many times. I should \*472] once. I have known outer bayon to think it is done almost daily. I have no doubt about it. There is printed on the delivery order-'No refusal will be accepted, unless a satisfactory reason is given at my stand before ten o'clock next market day.' This means, if there is any objection to the quality. I send my own waterman to the ship for the sample. I did not stand del credere in this transaction. It is usual for corn-factors to stand del credere. I think I have heard in one or two instances, under peculiar circumstances, that they have not stood del credere. I had been selling for the plaintiff for a long time. He merely gave me the particulars, which imported that I was to sell. The time of payment is never mentioned in the sold note. Payment is frequently made within two months; and then the factor usually pays his principal at the end of the two months. There is no fixed rate of discount. Sometimes the payment within two months is for the factor's accommodation; it was for mine in this case. I do not know of any instance of a factor's refusing to take the money before the end of the two months. I always take it, having but little. I know of two instances where the plaintiff has received a portion of money on account within the two months; and this is very common with others.'

Sir J. Scarlett, for the defendants. No case has been made out on the paris of the plaintiff. The difference between a factor and a broker is this—the factor has possession of the property, but the broker has no control over the com-modity, as the factor has. A broker is the agent between both parties; he has no power to make a final contract; what he does, must be ratified by his principels. A factor sends no bought note, and keeps no contract book, as a broker must. In this case, on the face of the delivery order, the factor reserves to himself the power, and determines himself as to any objection by the buyer on

the ground of any difference between the bulk and the sample.

\*Campbell, S. G. The case of Baring v. Corrie, 2 B. & A. 137, decides

that a factor is substantially a broker.

Sir J. Scarlett. That was a peculiar case. Corrie was a broker at Liverpool, and the goods were also at Liverpool, and consequently he had the power over them. I speak of the general distinction. Peculiar circumstances may arise, as in the case referred to; but, I say in this case, that Gibson was really a factor. He sent his own clerk for the sample, and signed the delivery-order in his own name. How were we to know whether he was an agent or not? I agree, that an agent cannot vary the contract without his principal's consent; but, not so when he sells in his own name, and the buyer knows nothing about the principal. With respect to the custom. I admit, that when there is a precise contract in writing, it cannot be qualified by evidence of usage, unless it is ambiguous. There is no limit of time in the contract, it rests upon usage, which must be taken altogether. I say, the usage is, that payment under the contract is not demandable before the end of the two months; but, the buyer has a right to pay sooner if he wishes it, or if the factor wishes it and he assents. If these words were in a contract, it could not be said to be against law; and the custom, therefore, cannot be said to be illegal. The factor himself says, that the practice is so. It is proved, that the plaintiff himself has acted on this practice, and paid within the two months, and been allowed the discount; and it has been done in other cases too. It is also clear, that the factor is in the habit of paying the money to his principal within the two months: and three instances have been proved, in which, when the plaintiff was a seller, he got his money within the two months. There was an instance where the factor, not being satisfied with the responsibility of the buyer, sent to him for, and obtained 1000%, which he paid to the plaintiff. The \*factor has paid more than 1000l. to the plaintiff since the 26th of December, which he would not have been able to do without this money of the defendants. I do not say that makes him receive the money for this particular corn; I say, first, that the factor, as far as the buyer knew, was a principal; if he was not a principal, yet, if he acted as a principal, he, by the late act, having been intrusted with goods, may receive payment for them. But, I say further, that he had the right as factor; for, if the note is not controlled by the usage, there is no time for payment mentioned; and if it is so controlled, then the usage, taken altogether, is in the defendant's favour.

DENMAN, C. J. The question in this case is, whether in your opinion the plaintiff has been paid for this barley; and that will depend upon whether you are satisfied that there is a custom in the corn market by which the party has a right to pay within the time upon discount; whether any person dealing with a factor there would know, from the prevalence and universality of the custom, that he would have the right of paying within the two months. But, unless that custom is proved to your satisfaction, it is clear there is no answer; as. although the money got into the plaintiff's hands, yet it would not be received as payment for the particular articles. As to the custom, it seems to me, the witness does not speak very distinctly. There may have been some instances every day, and yet the practice may not be universal. Perhaps he may be speaking of an usage where the factor stands del credere, which, he says. he did not. If the custom is generally and universally understood, I do not think it matters for whose accommodation the payment is made.—[His Lordship read the evidence of Mr. Gibson, and observed]-The question for you upon this evidence will be, whether you think it has been satisfactorily proved, that when a party authorizes a factor, in the manner in which this plaintiff authorized Mr. Gibson, he gives him also an authority to receive payment \*within two months, and to allow a discount. Whether the plaintiff gave Mr. Gibson authority during the two months' credit to accept payment and allow a discount? Whether you think the practice relied on is proved to be a general, I should rather say, an universal custom, on the

Corn Exchange? If that is made out to your satisfaction, then the plaintiff will have received payment through Gibson, although Gibson has not paid the money over to him. If you think that the custom is not made out, then the plaintiff will not have been paid, and you will give your verdict for him.

The jury found their verdict for the defendants, saying, that they

thought the custom had been established.

Campbell, S. G., and J. H. Lloyd, for the plaintiff. Sir J. Scarlett and R. V. Richards, for the defendants.

[Attorneys-Haddon & G., and Baxendale & Co.]

#### FREEMAN v. BAKER and Another. Feb. 27.

A party bought a ship under a representation that she was copper-fastened. He ascertained, in the course of a few days, that she was not, but did not make any complaint to the seller till several months afterwards, when she had been on a voyage and returned:—Held, that this delay would not prevent his recovering an action for the misrepresentation, provided the action was in other respects maintainable:—Held, also, that "Lloyd's Register of Shipping" was not admissible in evidence to show that the vessel was considered as copper-fastened. The contract stated that the vessel was to be delivered with all her stores, according to the inventory: the inventory was at the end of the advertisement for the sale:—It was held, that this did not import into the contract the representation contained in the advertisement, as the vessel itself was not mentioned in the inventory, but only the stores. The questions for the jury, in such a case, are, whether the vessel was in fact copper-fastened; and if it was not, did the seller know that it was not?—and if he did, did he use any means to conceal the fact from the buyer?

THE first count of the declaration stated, that before and at the time, &c., the defendants were possessed of a certain ship or vessel, called the Leslie Ogilby, which was not copper-fastened, as they well knew; yet the said defendants contriving, &c., to deceive and injure the plaintiff in that respect, and to induce him to purchase the said ship or vessel at and for a large sum of money, on the 23rd of \*August, 1831, falsely, fraudulently, and deceitfully \*476] on the zord of August, 1001, and ship or vessel was a copper-fastened represented to him that the said ship or vessel was a copper-fastened ship or vessel: and then averred, that the defendants further contriving, &c., then and there kept the said ship or vessel afloat in a certain dock, called the West India Dock, so that it could not be inspected or examined by him, and used and employed divers other subtle arts and devices for the purpose of preventing an inspection and examination by the plaintiff, and thereby afterwards induced the plaintiff to purchase the said ship or vessel as a copper-fastened ship or vessel, with divers stores, for the sum of 1300l., and then and there falsely, fraudulently, and deceitfully sold the said ship or vessel as a copper-fastened ship or vessel, with the stores, to the plaintiff, for the said sum of 1300%. then and there paid by the plaintiff to the defendants; by means whereof the said ship or vessel became and still was of little or no use or value to the plaintiff, whereby he was cheated and defrauded by the defendants of the said sum of 1300l.

The second count was similar, except that it contained no averment that means were used to prevent examination. The third count was similar, but it charged a false representation only. The fourth count was on a representation that the vessel shifted without ballast. It contained a scienter, and averred special damage. The fifth and sixth were similar to the fourth, but without special damage. The seventh count was on a warranty that the ship was copper-fastened, and particularised iron-fastenings as in fact there. The eighth count omitted the part relating to iron-fastenings. The ninth count was on a warranty that the ship would shift without ballast, and contained special damage. The tenth was similar, but without special damage. Plea—Not Guilty.

It appeared that the vessel was sold under the following advertisement:—
"For sale, the fine brig Leslie Ogilby of 193 \$\frac{1}{2}\$ tons; British built; coppered and copper-fustened; \*shifts without ballast; takes the ground well; takes a large cargo for her tonnage; was coppered in August, 1829; is \$\frac{1}{2}\$ well adopted for general purposes, and requires little more than provisions to send her to sea. Now lying in the West India Docks. The vessel, with all stores, to be taken with all faults as they now lie, witout any allowance for weight, length, quantity, or quality." An inventory of the stores followed this description.

The contract for the sale contained a provision that a legal bill or bills of sale should be made out, and stated that the vessel was to be taken with all her

stores according to the inventory.

The bill of sale did not contain either a warranty or a representation.

On the part of the plaintiff, a surveyor from Lloyd's, who examined the vessel in January, 1832, swore that she was not copper-fastened: he described "copper-fastened" as meaning that all the bolts should be of copper which go through the keel and kelson, stern-box, stern-post and stem. He considered the

vessel as only partially copper-fastened.

The person for whom the vessel was originally built, and who superintended the sheathing of her with copper, in the year 1825, proved that the description copper-fastened was not a correct description of the vessel in the state to which he brought her at that time. The captain was also called, and stated that the vessel would not shift without ballast; and added, that having a considerable quantity of ballast in her, yet, in a gale of wind beyond Yarmouth, she hid down, and he was obliged to put back and take in several tons more. He admitted that he saw the vessel the day after she was bought, and discovered the iron bolts in her, when he had only got half way down the ladder leading to the hold; and that he told his owners of it in the course of a few days. The broker, who purchased the vessel for the plaintiff, stated, that he \*relied on the representation of the defendants, and did not send any surveyor to examine the vessel at the time of the purchase; but in December, 1831, after she had been to Newcastle, he requested the defendants to send a person to meet the plaintiff's surveyor, for the purpose of examining.

Campbell, S. G., for the plaintiff. By copper-fastened, I understand that all under water is fastened with copper bolts, and therefore the vessel is tighter, and less likely to be injured by the water. The meaning of shifting without ballast is, that the whole of the cargo may be taken out without any fresh ballast being put in; that is, that the vessel will stand stiff in the water. It is to be said, as I understand, that as the vessel is to be taken with all faults, we cannot complain: but there is a distinction between a fault and a misrepresentation. The party is not liable for a mere fault, but here we complain of a direct misrepresentation. It would be absurd to say that the words "with all faults" would cure a direct misrepresentation. Suppose the warranty was, that the vessel should be all oak, and it turned out to be of Canada timber, it would be a breach of the warranty. The case of Shepherd v. Kain(a) is all fours with

the present, as here there are a few copper fustenings.

Sir J. Scarlett, for the defendants. There is a defence both in law and fact. If it is at all material that the ship should be copper-fastened, it can be proved that she was so \*fastened after the defendants became possessed of her, though the iron bolts were left in. The plaintiff's witnesses did not try the iron bolts from the inside, to see if they had corroded, and were in conse-

<sup>(</sup>a) 5 B. & Ald. 240. This was an action on the case for the breach of a warranty. The advertisement for the sale of a ship described her as "a copper-fastened vessel;" and added that the vessel was to be taken with all faults, without any allowance for any defects whatsoever. It appeared that she was only partially copper-fastened. It was held that, notwithstanding the words "with all faults," &c., the vendor was liable for the breach of the warranty.

quence moveable. It does not lie in the plaintiff's mouth to say that she was not copper-fastened, for his own card describes her as "A. 1, coppered and copper-fastened;" and she has been described in Lloyd's book by the plaintiff as copper-fastened. As to Shepherd v. Kain, I do not deny the law of that case; but that was only the first act of the tragedy. There was afterwards an action brought against Old by Kain, who had bought the vessel of him. It was special assumpsit, stating the particular circumstances. In Shepherd v. Kain the warranty was in the contract, which is necessary. Kain v. Old was argued as a special case, and in it the case of Pickering v. Dowson(a) is referred to: which shews that there is no warranty, unless it is imported into the bill of sale; and that the party is not liable, whether he knew the fact or not, if there is no evidence of fraud. Lord Chief Justice Gibbs there says, "I thought at the trial, and still think, that the parties were not now at liberty to shew any representation made by the seller, unless they could shew that by some fraud the defendants prevented the plaintiffs from discovering a fault which they knew to exist." I do not rely upon the words "with all faults," as, without these, it would be the same. Unless there is a practice not to allow an inspection, a man is not answerable for what is not in the contract, unless he takes pains to \*480] conceal the defect. There is no fraud in this case. I remember \*\*a case relating to the Claremont estate, which was sold by the Marquis of Waterford to the present Lord Dover; and after the purchase, it was discovered that a bridge on the estate was out of repair, and an action was brought to try whether the bridge was repairable by the owner of the estate, and it was found that it was; and Lord Chief Justice Gibbs, then at the bar, investigated the subject a great deal, and no proceedings were taken on the principle, that, without fraud could be shewn, there was no remedy. As to the shifting without ballast, it did not mean that the vessel would sail without ballast, but merely that she would shift from one place to another in the dock without ballast. The statement as to the copper-fastening is neither in the contract signed by the brokers, nor in the bill of sale, nor is the shifting without ballast. I take the law to be clearly and indisputably this: that if a man makes a representation, and allows the purchaser to go and see the article, and he afterwards purchases, there is an end of the representation, unless the seller takes any steps to conceal the defect from the purchaser, for this is fraud.

DENMAN, C. J. Is not this case exactly like Pickering v. Dowson? I cannot

distinguish the one from the other.

Campbell, S. G. Yes, it is; but it is also exactly like Shepherd v. Kain,

which was decided since.

Maule, for the defendants. Kain v. Old is the latest case, and that recognises Pickering v. Dowson(b) as law.

Campbell, S. G. Kain v. Old was decided on the ground that the action was

in assumpsit.

\*481] \*\*Denman, C. J. I am not so much looking to Kain v. Old as an authority, as to Pickering v. Dowson; and I really cannot distinguish it from the present case.

Campbell, S. G. Shepherd v. Kain is untouched by Kain v. Old, and that is a later authority than Pickering v. Dowson. And in the present case the con-

tract refers to the inventory.

(a) 4 Taunt. 779. According to the decision in that case, if a representation be made before a sale of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for a deceit lies against the vendor on the ground that the article sold is not answerable to that representation: and this, whether the vendor knew of the defects or not.

(b) In the case of Kain v. Old, 4 D. & R. 61, Lord Tenterden (then Lord Chief Justice

(b) In the case of Kain v. Old, 4 D. & R. 61, Lord Tenterden (then Lord Chief Justice Abbott) said, "These are not new principles, they are all clearly and fully laid down in the judgment of the late Lord Chief Justice Gibbs in the case of Pickering v. Dowson. That

case appears to us to be quite decisive of the present," &c.

Maule. The inventory does not commence till after the representation.

DENMAN, C. J. I observed that, in the opening, the advertisement was called the inventory; but I think it will be better for all parties that the case should go on.

Sir J. Scarlett, to the jury. The plaintiff should have notified his objection sooner, and not have suffered the vessel to go a voyage before he mentioned it

to us.

On the part of the defendants, several witnesses were called: they differed from the plaintiff's witnesses as to the proportion of the iron to the copper-fastenings; but admitted that it could not be said that the vessel was altogether copper-fastened.

It was then proposed to put in a book called Lloyd's Register of Shipping, in which the vessel was said to be described as copper-fastened. The witness who produced it said, that it was made up from information furnished by survey-

ors.(a)

Comyn, for the plaintiff, objected to its reception.

Sir J. Scarlett, submitted that it was evidence, as shewing \*that among ship-owners and underwriters it was considered as copper-fast-ened.

DENMAN, C. J. I think we do not know enough of the mode in which the

book is made up to justify its admission in evidence.

A card, issued by the plaintiff in relation to the vessel in question, was put in, which contained the following words:—"For the Cape of Good Hope, the fine fast sailing ship, Leslie Ogilby; A. 1, coppered, and copper-fastened, &c."

DENMAN, C. J., in summing up, said—The questions I propose to leave to you are: First, whether the vessel was copper-fastened; and, if she was not, whether the defendants knew it, and were guilty of any fraud in concealing the fact from the plaintiff? The second question will be, whether she shifted without ballast; and, if she did not, were the defendants aware of that also; and did they use any means of concealment? As to the advertisement, I think it has been improperly called the inventory. The words in the contract are, that she is to be delivered, with all her stores, according to the inventory. I do not think that this imports into the contract the description in the advertisement, as the ship is not mentioned in the inventory. A question of law has been raised, which will be considered hereafter; for I think it will be better to have it understood now, that the plaintiff shall be entitled to a verdict. [His Lordship read the evidence, and observed ]-Upon this conflicting testimony you are to say, whether, in the understanding of those who are conversant with the subject, the vessel had a sufficient number of copper bolts to make her a copper-fastened vessel. If you think she can be properly called a copper-fastened vessel, then the defendants will be entitled to your verdict, so far as that is concerned. If you think she \*cannot, then, was there any fraud used to conceal the fact from the plaintiff. And upon the question of whether she was copper-fastened or not, I own I think that the plaintiff's card is not to be altogether disregarded. If it had appeared that the plaintiff the next day, with a perfect knowledge of the fact, offered her for sale as a copper-fastened vessel, I should have thought it almost a bar to the action, and no doubt it would have been very strong evidence for your consideration. But I confess I do not think that is quite the effect of the card, as the vessel was not unsafe at the time for pas-Yet it makes it a little difficult for the plaintiff to say, she is not, in the popular sense at least, a copper-fastened vessel, when, a year after she was bought, he described her as such. His Lordship then read the evidence to the jury, on the point of shifting without ballast, and left the question of damages entirely to their consideration.

<sup>(</sup>a) For a description of this book, see the case of Kerr v. Shedden, ante, Vol. 4, P. 531, n. (a).

The foreman of the jury inquired whether it would make any difference as to the verdict, if the jury should think that the ship was not copper-fastened, but

that the plaintiff ought to have made his objection sooner.

DENMAN, C. J. I do not think that it will make any difference; it would have been much better if notice had been immediately given. But, I think, that the plaintiff was not bound to give it. I think a man may complete the contract, and then recover from the seller any difference in the value, if he has been deceived. I think so for this reason, viz. that a man may want a vessel for his immediate purposes, and it may be inconvenient to him to give it up at the time.

The jury were of opinion that the vessel did shift without ballast, and was not copper-fastened; but that there was no evidence that the defendants were \*484] aware of the \*fact, and consequently they did not use any means to conceal it. They found a—

Verdict for the plaintiff—Damages 1201.(a)

Campbell, S. G., and Comyn, for the plaintiff.

Sir J. Scarlett, Maule, and Tomlinson, for the defendants.

[Attorneys—Collins and Gale.]

## COURT OF COMMON PLEAS

Adjourned Sittings at Westminster after Hilary Term, 1833.

BEFORE LORD CHIEF JUSTICE TINDAL.

## HEAD v. BRISCOE, Bart., and Wife. Feb. 11.

A man is answerable to a third person for what is done by his wife, so long as the relation of husband and wife continues, though they may be permanently living apart; at least, if it be not shewn that the wife at the time was living in adultery.

ACTION for a libel published by the female defendant, Dame Sarah Briscoe.

Plea—that she was not guilty.

It appeared that the plaintiff, who was a house agent, had let a house to a Mrs. Toleson, with whom the female defendant lived for some time, when, they having quarrelled and separated, the female defendant caused a placard to be printed and stuck about in the street, which commenced as follows:—"Felony. Ten guineas reward. Whereas Mary Tolesan, of &c., late of &c., was left in charge of a house, &c." It then went on to charge Mrs. Toleson with having \*stolen some furniture belonging to the female defendant, and added these words—"It is supposed that Mary Toleson was assisted by George Head, house agent, of No. 7, Upper Baker Street, New Road, in conveying the same to his house for the purpose of secreting it." Information was requested, at the bottom of the bill, to be given to Messrs. Pasmore & Taylor, Basinghall Street.

Wilde, Serjt., for the plaintiff. A person suspecting a felony may reasonably do what is necessary to apprehend the felon, but this mention of the plaintiff could not be necessary. I admit that Sir W. Briscoe had nothing to do with the libel, and only require such damages as may relieve the character of the

<sup>(</sup>a) The legal effect of this verdict will be considered by the Court on the discussion of a rule which has been obtained, to shew cause why a nonsuit should not be entered. See, in addition to the cases cited, Baglehole v. Walters, 3 Camp. 155; Dobell v. Stevens, 3 B. & C. 623; Budd v. Fairmaner, ante, p. 78; and Paley's Law of Principal and Agent, pp. 161 to 165.

plaintiff from any suspicion. The defendant, Sir W. Briscoe, is living separate from his wife; yet he is answerable for her acts, until he obtains a dissolution of the marriage. And if he has been correct in his own conduct, and his wife has not, he may relieve himself from any liability by application to the proper Courts.

Adams, Serjt., for the defendant Sir W. Briscoe. This is a case of first impression. I have searched all the law books from the earliest time, and cannot find the principle even agitated. The defendant, Sir W. Briscoe, cannot be acquainted with the circumstances of the case. The ground of damages in an action of libel, when no special damage is averred, is the existence of malice; and then in this case there is no malice on the part of my client. But if he is by law to be charged, the most temperate damages should be given. The plaintiff should have indicted the female defendant instead of bringing an action for damages against her husband.

TINDAL, C. J. There is no doubt, in point of law, that a husband, so long as the relation of husband and wife continues, is answerable to a third person for what is done \*by the wife. And whether their separation be permanent or temporary it does not affect the question, unless it operates so upon the marriage as to make that civil relation cease; for, by the law of England, you cannot bring an action against the wife without joining the husband; and a man would be without remedy if he could not sue the husband. Upon this ground I have no doubt, as at present advised, that the action is maintainable. If I am wrong in my opinion the learned counsel for the defendant will have an opportunity of moving the Court.

His Lordship left the question of damages to the jury, who found a verdict for the plaintiff— Damages 40s.

Wilde, Serjt., and Hutchinson, for the plaintiff.

Adams and Bompas, Serjts., for the defendant Sir W. Briscoe.

## [Attorneys-Carlon, and Springhall & H.]

In the ensuing term, Adams, Serjt., moved pursuant to the leave given; but the Court, after observing that there was no evidence that the wife was living in adultery(a)—

Refused a rule.

#### WALKER v. RAWSON. Feb. 11.

Payment of money into Court in assumpsit on the common counts for work and labour, is an admission that the contract was with the party suing, where it appears that there was in fact only one contract.

Assumpsit for work and labour as an engineer, against the defendant, as chairman of the Directors of the \*Leeds and Manchester Railway Company. A sum of money had been paid into Court.

It appeared in the course of the cause that a bill had been delivered in the names of Walker & Burgess, and it appeared that those gentlemen were in partnership as engineers, but Mr Walker had received the communication from the parties on the business.

On the part of the plaintiff, the payment of money into Court was relied on

as an admission that the contract was with Mr. Walker, the plaintiff.

(a) See, upon this point, the case of Rex v. Flintan, 1 B. & Ad. 227, which decides that a man is not liable to the penalty of the stat. 5 Geo. 4, c. 83, s. 3, for neglecting and refusing to maintain his wife, who has left him, and committed adultery, although he result has been guilty of adultery since her departure.

Jones, Serjt., for the defendant, contended, that payment of money into Court was no admission on the common counts of anything more than that such sum was due. He referred to the case reported under the name of Seaton v. Bene-

dict.(a)

TINDAL, C. J. The only question here is, with whom was the contract made? I think the payment of money into Court gets rid of the difficulty. There can be but one contract. It is not like the case of the goods furnished for the wife, which has been referred to; for in that case there might have been authority for one part and not for another.

Wilde and Talfourd, Serjts., and Hoggins, for the plaintiff.

Jones, Serjt., and Baines, for the defendant.

[Attorneys-Chisholme & Co., and Walmsley.]

## Adjourned Sittings in London, after Hilary Term, 1833.

#### BEFORE LORD CHIEF JUSTICE TINDAL.

#### \*4887

#### \*PHIPPS v. TANNER. Feb. 20.

A bill of exchange for twenty-five, seventeen shillings and three-pence, is a bill of exchange for twenty-five pounds, seventeen shillings and three-pence, and may be declared on as such.

Assumpsit by the plaintiff, as drawer, against the defendant, as acceptor of the following bill of exchange:—

"25: 17: 3.

"London, 6th March, 1832.

"Three weeks after date pay to me or my order twenty-five, seventeen shillings and threepence, value received.

"To Mr. Alfred Tanner,

"Robert Phipps.

"4, Brabant Court, Philpot Lane."

This bill was declared on as a bill for 25l. 17s. 8d.

Jones, Serjt., objected, that this was not a bill for twenty-five pounds, seventeen shillings and three-pence.

TINDAL, C. J. It must mean pounds, it cannot mean anything else.

The defence was usury, and the case was left to the jury on that defence.

Verdict for the defendant.

Addison, for the plaintiff.

Jones, Serjt., for the defendant.

#### [Attorneys-Aston, and Tanner.]

In the case of Rex v. Post, Bay. on Bills, 8 (n.), a prisoner had altered a note for one pound into a note for ten, by substituting ten for one before the word "pound" in the body of the note, and also in the corner. It was urged, that a note for the payment of ten pound was not a money note; but the twelve Judges were clear that it was. So, in a case mentioned as cited by Lord Mansfield and also by Lord Hardwicke, (Id. 6), where a note contained the words "I promise not to pay," the word not was rejected.

(a) 2 Moore & Payne, 66, the decision in that case was, that payment of money into Court in assumpsit for goods sold and delivered, only amounts to an admission by the defendant of the plaintiff's right of action to the amount of the sum paid in, and applies only to a legal demand, and not to all the items contained in a bill of particulars, in which the goods are stated to have been supplied at different times.

#### \*CURTIS v. MILLS. Feb. 21.

In an action for not sufficiently securing a fierce dog kept by the defendant, and by which the plaintiff was bitten, the plaintiff may recover, notwithstanding he had on a previous day been warned against going near the dog, if the jury think that the accident was not occasioned by the plaintiff's own carelessness and want of caution.

CASE. The first count of the declaration stated, that the defendant wrongfully kept a dog, well knowing it to be accustomed to bite mankind, and that the plaintiff was bitten by it. The second count charged, that the dog was of a ferocious and mischievous nature, as the defendant well knew; and that it bit the plaintiff. The third count stated, that the dog was of a ferocious and savage nature, as the defendant well knew, and that it was his duty to secure it; but that, not regarding his duty, he did not sufficiently secure it, by means of

which the plaintiff was bitten.(a) Plea—General issue.

\*It appeared, that the defendant kept a very fierce dog chained in his yard; but, that any one going from the yard gates to the stable would be within the reach of the dog, notwithstanding his chain. It further appeared, that the defendant had bought some planks of Messrs. Goodman, and that he himself carried one of the planks down his yard, the plaintiff, who was in the service of Messrs. Goodman, following him, and carrying the other: the defendant passed by the dog, and as the plaintiff, who followed him, was passing it also, the dog made a spring at him, and bit him very severely. On the part of the defendant it was proved, that the yard had been twice robbed before this time, and that the plaintiff had been several times cautioned on former occasions not to go within the reach of the dog; but no caution was given on the day on which the accident occurred; there was no evidence that the dog had ever bitten any person on any other occasions.

Spankie, Serjt., for the defendant. The question is, whether this dog was kept by the defendant improperly. The plaintiff had notice that the dog was there, and was a sharp dog; and he was indiscreet in going near him; he need not have passed the dog, and he had been repeatedly cautioned not to go within his reach. The premises had been robbed, and the dog was known as a ficree

(a) As the form of this count is not contained in the books of precedents, we think a copy of it may be useful; it was as follows-"And whereas also, the said defendant. on the day and year aforesaid, at London aforesaid, and from thence for a long space of time, to wit, until and at the time of the damage and injury to the plaintiff as hereinafter next mentioned, to wit, at London aforesaid, was possessed of, and wrongfully and injuriously kept a certain dog, which then was of a ferocious and savage disposition, and which the said defendant then and there well knew, and thereupon it then and there became and was the duty of the said defendant to take due and proper means to confine and secure the said dog in a careful, sufficient, and proper manner; yet the said defendant, not regarding his duty in that behalf, kept and secured the said dog in so careless, insufficint, and improper a manner, that afterwards, to wit, on the day and year aforesaid, at London aforesaid, by and through the carelessness, negligence, and improper conduct of the said defendant in that behalf, the said dog did attack, seize, lay hold of, and bite the said plaintiff, and did then and there greatly lacerate, hurt, and wound the said plaintiff in divers parts of his body, and thereby the said plaintiff then and there became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time the said plaintiff thereby suffered and underwent great pain, and was thereby then and there hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be performed and transacted; and also, by means of the premises, the said plaintiff was thereby then and there put to great expense, costs, and charges, in the whole amounting to a large sum of money, to wit, the sum of ten pounds, in and about endeavouring to be cured of the said wounds, sickness, lameness, and disorder, so occasioned as aforesaid, and hath been and is, by means of the premises, otherwise greatly injured and damnified, to wit, at London aforesaid, to the damage of the said plantiff of five hundred pounds; and, therefore, he brings his suit, &c."

dog; indeed, I should say, that the reputation of the dog is the security of the premises. If a man keeps a dog to protect his property, it is not surprising that \*491] he keeps a sharp dog. Of course he would not keep a poor spiritless fawning \*beast, as such an animal would be of no manner of use; and if a man is not allowed to keep a sharp dog, he cannot keep his property secure from depredations.

Wilde, Serjt., in reply. A party has no right to keep a dog of this sort, so as to command the way to his stable. It was the bounden duty of the defend-

ant to have given the plaintiff an express caution on this occasion.

TINDAL, C. J. (in summing up.) The first question is, whether this dog was of a savage disposition to the knowledge of the defendant; and, if so, you will then have to consider whether the dog was placed in such a situation, that, by common care, he might have been avoided. Another question will be, whether the plaintiff was bound to take notice of the danger, as he had been told that the dog was there. If you think, that, by reason of the plaintiff's not taking common care, this accident occurred, he cannot recover; however, you may be of opinion, that, the master of the dog walking just before the plaintiff, and, as it were, leading him on, the plaintiff might think he was safe, more especially as no caution was given him at this time by the defendant. I am of opinion, that the plaintiff is entitled to recover, if he did not as it were run himself into the mischief by his own carelessness and want of caution.

Verdict for the plaintiff—Damages 201.

Wilde Serjt., and Shee, for the plaintiff. Spankie, Serjt., and Carrington, for the defendant.

### [Attorneys-Rippingham and W. P. Clarke.]

See the cases of M'Kone v. Wood, ante, p. 1; Blackman v. Simmons, ante, Vol. 3, p. 138; and Sarch v. Blackburn, ante, Vol. 4, p. 297. In the case of Jones v. Perry, 2 Esp. 482, Lord Kenyon held that an action would lie for damage occasioned by the keeping of a dog known to be fierce not properly secured. In the case of Brock v. Copeland, 1 Esp. 202, it was held, that if a dog, accustomed to bite mankind, was kept on the defendant's premises, and the injury received in consequence of the plaintiff imprudently going there, an action would not lie; but Lord Kenyon said, that, where an accident arose from a mischievous bull, and it appeared that there was a contest respecting a right of way through the field in which it occurred, he had held that the defendant was liable. In actions of this kind, the defendant's knowledge of the animal's being vicious is essential. In the case of Mason v. Keeling, 12 Mod. 332, the declaration stated, that the defendant kept a dog, which was very fierce, and suffered it to go unmuzzled about the streets, so that, by the want of care of the defendant, the plaintiff, while walking in the street, was bitten. This declaration was held bad, because it did not state a scienter. The following cases also decide the scienter to be material: Dy. 25 b.; Baynton v. Sharp, Lut. 33, 2 Salk. 662; Jenkins v. Turner, 2 Salk. 662; Lord Ray. 109; Smith v. Pelah, 2 Str. 1264.

## \*492] \*COURT OF EXCHEQUER.

Adjourned Sittings at Westminster after Hilary Term, 1833.

BEFORE MR. BARON GURNEY, (Who sat for the Lord Chief Baron.)

### SARJEANT v. COWAN AND Another.

A sheriff had obtained judgment against A. in an action on a bail bond. On this a fieri facias issued, directed to the coroner. S., who was attorney for the sheriff, and also

for others, indorsed the name of a sheriff's officer on the writ; the coroner's broker seized a barge, which was bought by B., and the price paid to the officer; subsequently, the barge was claimed by others, and B. lost his purchase:—Held, that, under these circumstances, the officer was not agent of the sheriff, so as to make the sheriff liable in an action for money had and received at the suit of B., although it was proved to be the practice at the sheriff's office, to indorse the name of the officer on the writ.

Assumpsit for money had and received. Plea—the general issue.

It appeared that the defendants, who were Sheriff of Middlesex, had been plaintiffs in an action on a bail bond, against a person named Wigeon, and obtained a verdict \*and judgment, in consequence of which a writ was issued, directed to the Coroner of Middlesex, by which a barge, alleged to be the property of Widgeon, was seized and sold by the coroner's broker. The writ had the names of Simpson and Burder indorsed on it, who were at the time officers of the Sheriff of Middlesex, which names were indorsed by Smith, Son, & Merriman, who were attorneys for the sheriff as well as others. Simpson was called as a witness for the plaintiff, and proved that he did not execute the writ, but had received the money from the broker, and retained it in his possession, and did not pay it over to the defendants, for a reason which he stated. The action was brought to recover back the money paid by the plaintiff for the barge, on the ground that the consideration had failed, as other persons had claimed the barge as theirs, and deprived the plaintiff of the profit of his purchase.

GURNEY, B., inquired of the plaintiff's counsel how he fixed the defendants

with the possession of the money.

J. Williams. I rely on the fact, that the money was received by a person, who was at the time an officer of the sheriff, and whose name was on the writ,

and who must therefore be taken to be the agent of the defendants.

GUBNEY, B. An officer of the sheriff is not a general agent of the sheriff to receive money. He is the particular agent of the sheriff appointed in each particular case. Here the legal authority to sell was given by the coroner. You do not shew that these defendants gave an authority in the matter.

J. Williams. For this reason I wish to inquire into the course of business

in the sheriff's office.

Simpson was allowed to be recalled, and said, that he had been an officer of the sheriff for twenty years, and \*that the practice was, when the sheriff gave a warrant to his officer, to put the name of the officer at the tail of the writ.

J. Williams. I submit, that inasmuch as it appears that the writ was not indorsed in the coroner's office, but in the office of the sheriff's attorneys, and as the person whose name was on it was an officer of the sheriff at the time when he received the money, he must be taken to have received it on behalf of the sheriff, as the practice of the sheriff's office was to indorse the writ with the name of the officer. And the reason he gave for not having paid over the money to the sheriff was matter of arrangement between the defendants and him and would not prevent the plaintiff from suing the sheriff.

W. H. Watson, on the same side.—The action is not against the defendants,

qua sheriff, but as persons suing out the writ directed to the coroner.

GURNEY, B. I think that mode of stating the argument is most correct, which assumes that the defendants are not charged as sheriff, but as plaintiffs in the former action. Yet I think that the plaintiff has not fixed them with the possession of the money, and therefore he must be nonsuited.

Nonsuit.

J. Williams and W. H. Watson, for the plaintiff. Holt, for the defendant.

In the ensuing term, J. Williams moved to set aside the nonsuit; but the Court— Refused a rule.

## \*495] \*NICHOLSON v. HARDWICK, Esq. and Another. Feb. 6.

A woman died after a very short illness. Rumours were generally in circulation in the neighbourhood where she had lived, that her husband had poisoned her, and a great crowd was collected in front of his house; upon which the constable of the parish, without any warrant, took him into custody and conveyed him before a magistrate, who detained him till medical men had reported the cause of death, and then discharged him:—Held, that if the jury were of opinion that the constable had reasonable ground of suspicion to justify the apprehension, the action could not be maintained. The jury thought that there was such ground, and found a verdict for the defendants.

Assault and false imprisonment. Plea—not guilty.(a)

The plaintiff sued in forma pauperis. It appeared that the plaintiff's wife died, after an illness of only a few hours, on the morning of the 12th June; and in the course of that day a great sensation was excited in the neighbourhoodin which the plaintiff lived; and rumours were in general circulation, that he had poisoned his wife. A great crowd was collected about six o'clock in the evening; and, in consequence of the rumours, the defendant, Brooman, who, it was proved, acted as constable of the parish, without any warrant, took the plaintiff into custody, and conveyed him before the other defendant, Mr. Hardwick, who was a police magistrate. The plaintiff was detained in custody till the next day. He was not put into any cell, but allowed to sit by the fire at the police station; and, as soon as the medical men who opened the body had reported that the woman died from natural causes, he was immediately discharged. It appeared afterwards, and was proved at the trial, that the woman was taken very ill in the street, about half-past eleven in the evening of the 11th June, and was carried by a patrol to Bishopsgate watch-house, and conveyed home in a cabriolet. The patrol, who proved this, said that the husband assisted him in taking her up stairs, and that she spoke of her husband in the highest terms.

GURNEY, B., to the plaintiff's counsel.—If this is to repel any suspicion of your client's having poisoned his wife, there is no necessity for it, for that is not suggested now. The question is, what was the notion at the time? What is

known now was not known then.

\*496] \*A witness who was called for the plaintiff proved, on his cross-examination, that he had seen the wife only the day before, in excellent health and spirits; and, hearing of her death, spoke to the plaintiff about it, but could scarcely get any answer from him. He added, that the plaintiff did not seem at all affected by the loss of his wife; and that in consequence of the unsatisfactory nature of the plaintiff's answers, he himself went to the police office and stated his suspicions. But it did not appear whether or no the constable was aware of his having done so.

Platt for the defendants submitted, that there was no case on the part of the plaintiff, because the defendant Broman was a constable; and it was his duty,

under such circumstances, to take the plaintiff into custody.

GURNEY, B., in summing up, said—The case of Beckwith v. Philby,(b) which was cited before me the other day, is precisely in point. There some horses had been stolen, and the plaintiff was suspected of having stolen them; and a constable was told of it and desired to take him before a magistrate, which

(b) This case is reported in 6 B & C. 36, 9 D. & R. 487.

<sup>(</sup>a) Vide stat. 21 Jac. 1, c. 12, s. 5, referred to ante, Vol. 1, p. 41. Notice of action was proved pursuant to 24 Geo. 2, c. 44, ss. 2 & 3.

The plaintiff brought his action for false imprisonment. Mr. Justice Littledale tried the case at the Spring Assizes—He did not nonsuit, but told the jury, that provided the constable had reasonable cause for suspecting that the plaintiff had committed a felony, he was justified in what he did, and their verdict must be for him. But his Lordship gave leave for a motion on the part of the plaintiff. This motion was made, and Lord Tenterden afterwards gave the judgment of the Court, and said-" There is no ground, in my opinion, for disturbing this verdict; the only question of law in the case is, whether a constable, having a suspicion, may arrest a person without a warrant; we are of opinion \*that he may. There is this distinction between a private individual and a constable. To justify a private individual, he must not only prove that there was reasonable suspicion against the party, but that a felony had been actually committed; whereas a constable, having reasonable ground of suspicion may arrest upon that only." Such being the law as laid down in that case, the question in the present case will be, whether the constable Brooman had reasonable ground of suspicion to justify his taking the plaintiff into custody. The fact of the wife's being taken ill in the street was not known at that time. One person actually made inquiry of the plaintiff, and not being satisfied with his answer, went to the police-office and stated his suspicions. seems that at six o'clock there was a great crowd in front of the plaintiff's house, and the constable went and took him away. And I confess I think that the act of the constable was an act of kindness; because a person suspected of murder is not in the safest state in the world from a mob who are making the charge against him. Now, what are the facts of this case? Here is a very sudden death, and a wide spread rumour; and a man is allowed to sit by the fire at the police station. If you think there was reasonable ground of suspicion to justify what was done, then you will find your verdict for the defendants.

Verdict for the defendants.

C. Jones and Mansel, for the plaintiff. Platt and Bodkin, for the defendants.

[Attorneys-Abrahams, and Henderson & Smith.]

Adjourned Sittings in London after Hilary Term, 1833.

BEFORE LORD LYNDHURST, C. B.

\*HICKS v. MARECO. Feb. 15.

**[\*498** 

Interest cannot be recovered on money had and received, or money paid, without a special agreement; but, if money was at first had and received, and there is a subsequent agreement to pay interest, the plaintiff may recover such money and interest on a count for money had and received, and on a count for interest, and need not declare specially.

Assumpsit.—The first count of the declaration stated, that the plaintiff had advanced money to the defendant at his request, the defendant undertaking to invest it in the funds, which he had not done. There was also a count for money had and received, and a count for interest. There being no dispute about the amount—

R. V. Richards appeared to consent to a verdict for 2000l., and interest, but

suggested that it must be entered on the special count.

The plaintiff's counsel wished to enter the verdict on the count for money had and received, and on the count for interest.

Lord LYNDHURST, C. B. You cannot recover inferest on money had and received, or money paid, without a special agreement.

J. Williams, for the plaintiff. The money was first had and received; and

there was a subsequent agreement to pay interest.

R. V. Richards. That special agreement ought to have been declared upon.

Lord LYNDHURST, C. B. I think the verdict may be taken on the count for money had and received, and on the count for interest.

Verdict accordingly.(a)

\*1997 \*J. Williams and M Mahon, for the plaintiff.

R. V. Richards, for the defendant.

[Attorneys-Woodhouse, and Holt & G.]

### REID v. FURNIVAL. Feb. 15.

A. procured a banking company to advance 100% on a bill of exchange for 300%, A. giving the company his guarantie for the amount so advanced, but having no other interest in the bill:—Held, that A. might recover the whole amount of the bill in an action against the acceptor, and not merely the amount for which he gave his guarantie.

Assumpsit on a bill of exchange drawn by a person named Retemeyer on and accepted by the defendant, for 300*l*., dated 24th December, 1830, and payable three months after date to the order of the drawer. The bill had been indorsed by the drawer, and also by persons named Mackenzie and Macgregor.

For the defence, a letter written by the plaintiff to the defendant's attorney,

containing the following passages was put in:-

"All I knew about the matter was, that Mr. Furnival's bill for 300l. was sent to me by a particular friend in London, requesting that I might get it discounted; which, as I happened to know some of the parties whose names were attached to the bill, I complied with, from a wish to accommodate my friend. It was accordingly handed over to the British Linen Company's Bank here, by whom it was discounted at my request; but, as the whole amount of the bill was not at the time required, the sum of 100l. only has as yet been advanced upon it and remitted to my friend, 200l. being withheld in consequence of the bill having been dishonoured."

"The only satisfactory reply which I received on the subject was, that Mr. Furnival, the acceptor, was a responsible person; consequently, for my own better security, I had determined in the first instance to institute legal proceedings against him, as I had no advantage directly or indirectly from the transaction, but, on the contrary, I am \*held answerable to the bank for the

\*500] amount advanced on it on my guarantie."

"In the full hope, however, that the explanation I have now given will at once induce you or your client to reimburse me, at least in the amount already advanced on the bill, vis. 100l., and 2l. 1s. 11d., already incurred for expenses and interest, from 27th of June to 4th September next," &c.

Carrington, for the defendant, submitted, first, that the plaintiff had no right of action, as he had not discounted the bill, but had merely carried it to the British Linen Company as the agent of others; and that, even if it could be considered that, from his having given a guarantie, he had an interest in the

<sup>(</sup>a) We have reason to believe, that the plaintiff's object in wishing to have the verdict entered on these two common counts was, that he feared, that, if a verdict was taken on the special count only, there might be an application to discharge the bail.

bill, still it would only entitle him to a verdict to the amount of his guarantie.

Lord LYNDHURST, C. B. The plaintiff has a right to sue on this bill, because he is liable on the guarantie for the amount that has been advanced on it; and, if he has a right to sue, he may recover the whole amount: but he will be only a trustee for all above the amount of his own claim, and he must pay the residue to the person from whom he received the bill.

Verdict for the plaintiff—Damages 3131.

R. V. Richards, for the plaintiff. Carrington, for the defendant.

#### [Attorneys-Hutchinson and Pyne.]

In the ensuing term, Carrington moved for a new trial, or to reduce the damages; but the Court refused a rule, Mr. Baron Bayley observing, that there was a case in Wilson's Reports(a) which bore on this point.

#### \*THOMPSON v. MOSELY. Feb. 16.

r\*501

A person having a lien upon a document is no objection to his producing it on a trial at Nisi Prius; but if he fears that it may be abstracted, the Judge will allow him to stand by the witness while the witness is examined respecting it.

In an action on a bill of exchange, where the defence is, that the bill had been altered the defendant cannot go into evidence to shew that other bills have been likewise

altered.

Assumpsix by the indorsee against the acceptor of the following bill of exchange:—

"£75.

"Three months after date pay to my order the sum of seventy-five pounds, value received.
"James Thorn.

"Mr. William Mosely,

"2, King's Road, Bedford Row."

\*It was alleged on the part of the defendant, that the bill had been originally for 55*l*.; and that it had been altered by the taking out of the word fifty and the figure 5 by chloride of soda, with the use of which it was proved that the drawer, who was a surgeon, was acquainted.

(a) In the case of Johnson v. Kennion, 2 Wils. 262, which was an action by the indorsee against the drawer of a bill of exchange for 1000l. It appeared that an indorser named Benson, had paid the plaintiff 232l., part of the money. The verdict was for the whole amount; and, on a rule for a new trial being argued, Pratt, C. J., (afterwards Lord Camden) said, "Though there are many indorsements on the bill, yet there is but one security for one sum of money, and he who has the possession of the bill may bring the action. Where there are many indorsers the indorsees have a right of action in succession; but there is but one right of action against one person at one and the same time. The bill being in one indorsee's hand, the indorser pays a part, and the objection is, that this ought to be considered a payment for the drawer; but I think, toto colo, it is otherwise, because the indorser is no servant, nor is agent to the drawer. Suppose Benson had paid the whole 1000l to the plaintiff, and Benson's name had not been struck out, and an action had been brought in the plaintiff so name against the drawer, will you say the action will not lie. The bill is a security for every indorser as cestui que trust. I think it is a plain case that the plaintiff has a right to recover the whole money, and when he receives it, he will have received 232l of Benson's money. The defendant has no reason to complain." Mr. Justice Bathurst said, "You cannot split the bill so as to subject the party to different actions." And Mr. Justice Gould says, "where the drawer of the bill has paid part, you may indorse it over for the residue, otherwise not, because it would subject him to variety of actions."

On the part of the defendant, Mr. Lewis was called to produce another bill. Mr. Lewis objected to producing that bill, because he claimed a lien on it.

R. Alexander, for the defendant. Mr. Lewis's having a lien on the bill is no

objection to the production of it.

LORD LYNDHURST, C. B. I think that it is no objection. They only want you, Mr. Lewis, to show the bill, and you can stand by the witness while he looks at it, if you fear that the bill may be abstracted.

Mr. Lewis did so.

R. Alexander proposed to ask one of the witnesses for the defence as to ten other bills of exchange which were alleged to have been altered.

Lord LYNDHURST, C. B. I think that I cannot receive the evidence. Has

not the point been decided?

R. Alexander. Yes, my Lord, at Nisi Prius.(a)

Lord LYNDHURST, C. B. I cannot receive the evidence; it is trying other issues, which the opposite party are not prepared to meet.

Evidence rejected. Verdict for the plaintiff.

\*5037

\*Follett, and Helps, for the plaintiff.

R. Alexander and Cowling, for the defendant.

[Attorneys-Bodman, and Johnson & Weatherly]

#### PEARCY v. FLEMING. Feb. 16.

One of the bail was called as a witness for the defendant, and objected to; but, on a sum equal to double the amount sworn to being deposited with the Marshal of the L. C. B., his Lorship struck the witness's name out of the bail-piece, and he was examined.

Assumpsit on an agreement relating to the sale of a public-house.

On the part of the defendant, one of the bail was called. He was objected to, and the bail-piece being in Court, it appeared that he was bail to the amount of 100l.

Law, for the defendant, proposed to deposit 200l. with Mr. Walton, the marshal of the Lord Chief Baron, and that the name of the witness should be struck out of the bail-piece; he cited the case of Bailey v. Hole, ante, Vol. 3, p. 560.

Lord Lyndhurst, C. B. I think you may do that.

Two bank notes of 100% each being handed to Mr. Walton, and his lordship having struck the name of the witness out of the bail-piece, he was examined.

Nonsuit, with leave to move to enter a verdict for the plaintiff.

Talfourd, Serjt., and Godson, for the plaintiff.

Law and Thesiger, for the defendant.

#### [Attorneys-Scargill, and Young & W.]

In the ensuing term, Godson applied to set aside the nonsuit: but the reception of the witness's evidence was not objected to.

(a) In the case of Balsetti v. Serani, Pea. N. P. C. 192, by Mr. Justice Buller; and in the case of Viney v. Barss, 1 Esp. 293, by Lord Kenyon: in the latter case Lord Kenyon mentions that the point had also been ruled by Lord Mansfield.

# OLD BAILEY APRIL SESSIONS, 1833.

BEFORE LORD CHIEF JUSTICE DENMAN, AND MR. BARON VAUGHAN.

## \*REX v. CHARLES SHADBOLT. April 12.

If a person, for the purpose of accomplishing a robbery, wound, by means of kicking, the skin of the party whom he is endeavouring to rob, he is punishable, under the stat. 9 Geo. 4, c. 31, s. 12, if the jury find that his intent was either to disable or to do grievous bodily harm.

THE prisoner was indicted for that he, on the 8th of April, at the parish of St. Luke, in and upon one John Masters, wilfully, maliciously, and unlawfully did make an assault, and feloniously, unlawfully, and maliciously did strike and wound him in and upon his head and face, with intent, feloniously, wilfully, maliciously, and unlawfully to obstruct, resist, and prevent his lawful apprehension and detention, for feloniously assaulting the said John Masters, with intent to rob him, for which he was liable by law to be apprehended, imprisoned, and detained.

The second count stated the prisoner's intent to be to disable John Masters. The third count stated the intent to be to do him some grievous bodily harm.

The prosecutor stated, that about one o'clock in the morning of the 8th of April, he was in Mitchell Street, Saint Luke's, when the prisoner, whom he did not know before, came up, and, without speaking, walked with him for some distance; that he (the prosecutor) then said to him, "I am close at home:" soon after which, the prisoner put out his foot and threw him down, and tried to take his watch by pulling at the chain; that he put down his hand to prevent him, and the prisener kicked him in the mouth \*several times with violence; [\*505 that he bled very much from the mouth and nose; that the skin of his face was cut near the lips, and also broken a little near the eye. When the prisoner was taken, his hands were covered with blood, and blood was upon one of his shoes, to which also two small pieces of flesh and skin adhered. The prosecutor was a cripple.

DENMAN, C. J., (VAUGHAN, B., being present,) left it to the jury to say whether the prisoner's intent was either to disable the prosecutor, or to do him some grievous bodily harm by the violence which he used. Nothing was more likely to accomplish the robbery which he had in view than the disabling which such violence would produce. The intent in the first count could hardly be said

to be proved, as no endeavor to apprehend was made at the time.

The jury found the prisoner guilty on the last two counts.

See the 1st Vol. of Russell on Crimes and Misdemeanors, p. 599, where he refers to the case of Rex v. Gillow, Ry. & Moo. C. C. R. 85, and says, "Although the intent laid be that of doing grievous bodily harm, and upon the evidence it appears that the prisoner's main and principal intent was to prevent his lawful apprehension, yet he may be convicted. if, in order to effect the latter intent, he also intended to do grievous bodily harm. The prisoner was engaged in poaching, and had fired his gun at one of three keepers, who being on the watch for poachers, suddenly sprung up, and were rushing forwards to seize him. The Jury were of opinion, that the prisoner's motive was to prevent his lawful apprehension; but that, in order to effect that purpose, he had also the intention of doing the keeper some grievous bodily harm. Upon objection taken, the learned Judge was of opinion, that if both intents existed, the question which was the principal and which was the subordinate intention was immaterial; and upon the point being submitted to the consideration of the Judges, it was holden, that, if both the intents existed, it was immaterial which was the principal and which the subordinate one; and that the conviction was therefore proper."

In the case of Rex v. Hunt, Ry. & M. C. C. R. 93, a point was made on behalf of the

prisoner that no grievous bodily harm was done, as the cut was upon the wrist, and did \*506] not appear to have \*been dangerous, as it got well in about a week; and the prisoner's counsel relied upon a doubt expressed by Mr. Justice Bayley, in Rex v. Akenhead, Holt, N. P. C. 470, whether the injury done was a grievous bodily harm contemplated by the act, if the wound was not in a vital part. Upon the case being submitted to the Judges, they were of opinion, that, if there was an intent to do grievous bodily harm, it was immaterial whether grievous bodily harm was done. In the case of Rex v. Thomas Davis, ante, Vol. 1, p. 306, it was decided, by Mr. Baron Carrow, that if a person shoot at another who was endeavouring to apprehend him, he might be convicted on the usual indictment for shooting with intent to murder; though shooting with intent to prevent apprehension was then a distinct capital offence under Lord Ellenborough's act.

# NORFOLK SPRING CIRCUIT, 1832.

## CAMBRIDGE ASSIZES.

BEFORE MR. BARON GURNEY.

\*507]

\*REX v. JOSEPH THRING. March 13.

The Minute Book of a Court of Quarter Session is not evidence of its proceedings. The record should be made up on parchment, and an examined copy produced by a witness who examined it.

THE prisoner was indicted for perjury, committed in a case tried at the Cambridge Borough Sessions.

A book, containing minutes of the former trial, was produced by the officer

of the sessions, as evidence of what had occurred.

Gurney, B. inquired if the record was made up on parchment? and was answered in the negative by the counsel for the prosecution, who added, that it was not considered necessary.

GURNEY, B. The Minute Book of a Court of Quarter Session is not evidence. The record should be made up on parchment, and then an examined copy of it would be evidence.

The book was not received in evidence, and the prisoner was-

Acquitted.

Hunt, for the prosecution.

### BURY ASSIZES.

BEFORE MR. BARON VAUGHAN.

\*5087

\*REX v. CRICK. March 17.

"A certain cover, in the parish of A.," is too general a description to sustain an indictment for poaching under the stat. 9 Geo. 4, c. 69.

THE prisoner was indicted for poaching in "a certain cover, in the parish of \_\_\_\_." The parish was mentioned.

On the part of the prisoner, it was submitted that the description was too general.

And of this opinion was the learned Judge; and the prisoner was-

Acquitted.

Prendergast, for the prisoner.

The words of the stat. 9 Geo. 4, c. 69, s. 9, are, "any land, whether open or inclosed." The better way would be, perhaps, to have one count, describing the land by name, if it has any; and another, stating the name of the occupier.

#### REX v. FALLOWS and SAXTON. March 19.

A. and B. were walking together, B. carrying A.'s bundle, when C. and D. came up and assaulted A. B. threw down the bundle, and ran to the assistance of A., when C. took it up and made off with it. C. and D. were indicted for robbery, A. being the prosecutor:—Held, that they could not be convicted of the robbery, but only of simple larceny, as the thing stolen was not in the personal custody of the prosecutor.

as the thing stolen was not in the personal custody of the prosecutor.

It is the duty of a magistrate to return to the Judge not only the depositions of witnesses, but also any confession taken down as made by a prisoner; and it is no excuse for not

doing so that the confession was wanted to be sent before the Grand Jury.

THE prisoners were indicted for assaulting the prosecutor, and putting him in

fear, and taking from him a bundle, his property.

It appeared that the prosecutor had the bundle in his own personal custody at a beer-house; and when he came out, he gave it to his brother, who was with him, to carry it for him. While they were on the road, the prisoners assaulted \*the prosecutor; upon which his brother laid down the bundle in the road, and ran to his assistance. One of the prisoners then took the bundle and made off with it.

VAUGHAN, B., intimated an opinion, that, under these circumstances, the indictment was not sustainable, as the bundle was in the hands of another person at the time when the assault was committed. Highway robbery was a felonious taking of the property of another by violence, against his will, either from his person or in his presence.

Austin, for the prosecution, submitted that there was evidence to go to the jury. He referred to a case in Hale's Pleas of the Crown, where a man's hat fell or was knocked off, and the thief took it; and, being accompanied by vio-

lence, it was held to be a robbery.

VAUGHAN, B. But the bundle, in this case, was not in the prosecutor's possession. If these prisoners intended to take the bundle, why did they assault the prosecutor and not the person who had it?

It was then agreed that the case should go to the jury as for a simple larceny. A confession made by the prisoner Saxton was given in evidence: it was produced by the magistrate's clerk, who stated, in answer to a question from Mr. Baron Vaughan, that he had not returned it with the depositions to his Lordship, because it was wanted to be sent before the Grand Jury.

VAUGHAN, B., said, that it was his duty to have returned the confession, with the depositions, to him, according to the provisions of the act of Parliament.

The prisoners were convicted of the simple larceny.

## HOME SPRING CIRCUIT, 1833.

BEFORE LORD C. J. TINDAL, AND LORD LYNDHURST, C. B.

## HERTFORD ASSIZES.

BEFORE LORD CHIEF JUSTICE TINDAL.

## \*REX v. PRICE and Fifteen Others. March 2.

An indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for feloniously beginning to demolish a house, cannot be supported, unless the persons committing the outrage had an intention of destroying the house; and therefore, where considerable damage was done to a house by a mob, who did this with an intention of seizing a person who had taken refuge in the house, this was held to be not within the stat.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for feloniously beginning to demolish the Ram public-house, at Hertford, on the 11th December, 1832.

The transaction out of which this prosecution arose, occurred on the evening of the first polling-day, at the election of members of Parliament for the borough of Hertford. The election was warmly contested, and had excited much feeling among the lower orders of persons in that town. Shortly after the close of the poll, two or three persons, among whom was a man named Pitts, who were supporters of the Whig candidate, were casually met by a small party of persons who were in the interest of the conservative candidate; a quarrel and a scuffle ensued, in the course of which Pitts was repeatedly knocked down and much beaten; he then drew a knife, with which he slightly wounded one of the opposite party. A considerable crowd had by this time collected, and Pitts, being pursued by them, took refuge in the Ram public-house, the landlord of which was known to be in favour of the Whig candidate. Pitts having been admitted into the public-house, the doors and windows were all secured, and a crowd of about two hundred persons (among whom some of the defendants are proved to \*have been present and actively employed,) came up, carrying sticks and \*511] stones, and demanded that Pitts should be given up to them, and threatening, in case of refusal, that they would "pull the bloody house down." attack was then made upon the house, the front door and the lower windows were beaten in, and the shutters and frames of some of the windows much broken. A portion of the mob entered the house, repeating the expressions before mentioned, and did much damage to the furniture; but, in about twenty minutes from their first approach, the mob being unable to find Pitts, and a rumour being spread that the mayor was coming, they went away.

The question was, whether proof of these facts was sufficient to support the

indictment.

TINDAL, C. J. I am of opinion, that this offence does not come within the act of Parliament on which these parties are indicted. The persons committing the outrage must have the intention of destroying the house before they can be charged with a felonious beginning to demolish. In the present case, it is clear that they had no such intention, and that they had another intention, not within the scope of this indictment, which was merely to get possession of the person of Pitts. The prisoners must be acquitted.

Verdict—Not guilty.

Ryland and Bullock, for the prosecution.

Andrews, Serjt., Price, and Dowling, for the prisoners.

See the case of Rex v. Thomas, ante, Vol. 4, p. 237; and the stat. 7 & 8 Geo. 4, c. 30, s. 8, which is set out, Id. p. 238. See, also, the charge of Lord Chief Justice Tindal, on the Bristol Special Commission, ante, p. 265, n.

## \*KINGSTON ASSIZES.

**F\*512** 

(Civil side.)

#### BEFORE LORD CHIEF JUSTICE TINDAL.

## POINTER v. BUCKLEY.

Upon a count for not selling goods distrained at the best prices, the plaintiff may go into evidence to shew that the goods were allowed to stand in the rain, and that they were improperly lotted.

Case for an excessive distress, with a count for not selling at the best prices. Plea—General issue.

It was proposed, on the part of the plaintiff, to shew that the property distrained, which consisted of materials used by coachmakers, was kept in the rain; and that at the sale the articles were not properly lotted, and that therefore the property distrained did not sell for a good price.

Andrews, Serjt., objected, that as there was no count for treating the distress improperly, and no count for mismanaging the sale, this evidence was not re-

ceivable.

TINDAL, C. J. I am of opinion, that, under the count for not selling at the best prices, this evidence is admissible, because the mis-management imputed is so nearly connected with the sale, and it is alleged, that, in consequence of this mismanagement and neglect, the property did not sell at better prices.

The evidence was received. Verdict for the plaintiff—Damages, 201.

Platt, for the plaintiff.

Andrews, Serjt., and Petersdorf, for the defendant.

[Attorneys-J. Rippon and Sharpe.]

#### \*ALTEN v. FARREN.

**F\*513** 

A defendant executed a release to a witness, but before it was given to the witness it was handed to the counsel on the opposite side, for his inspection. He objected to the form of it, and it was altered, and the defendant re-executed it:—Held, that it was sufficient, and that it did not require a new stamp.

Assumpsit on a bill of exchange. Plea-General issue.

A witness for the defendant having been objected to, on the ground of interest, a release which had been previously executed by the defendant was handed to the plaintiff's counsel for him to look at.

Platt, for the plaintiffs, objected to the form of it, as it did not cover liabili-

ties which might afterwards accrue.

The release was altered to meet this objection, and the defendant re-exe-

cuted it.

Platt, for the plaintiff, objected, that this release was not sufficient to render the witness competent, as it required a new stamp, it having been executed before the alteration.

TINDAL, C. J. I think that is quite sufficient without a new stamp, it was only handed to Mr. Platt for his perusal, and not absolutely delivered.

The witness was examined.

Verdict for the defendant.

Platt, for the plaintiff.

Hutchinson, for the defendant.

[Attorneys-Padwick, and Spence & D.]

\*514]

#### \*JOLL v. FISHER. March 29.

Assumpsit for necessaries supplied to the defendant's wife. The writ was sued out in June, the declaration being in November, and the record dated in November:-Held, that the plaintiff might recover for things supplied up to the date of the record.

Assumpsit for necessaries supplied to the defendant's wife. Plea—General issue.

It appeared that the defendant was arrested on bailable process in this cause, in the month of June, 1832, and that the declaration was of Michaelmas Term, 1832; the record being dated on a day in that term.

Platt, for the defendant, submitted, that the plaintiff could not recover for

any thing supplied after the suing out of the writ.

TINDAL, C. J.—I think that the plaintiff is entitled to recover for necessaries supplied up to the time of the declaration, which is the date of the record; and I think that the writ is merely process to bring the defendant into Court.

Verdict for the plaintiff for the amount claimed up to the date of the

record.

Thesiger, for the plaintiff. Platt, for the defendant.

[Attorneys-Rippon and Toulmin.]

#### MASPERO v. STRACHAN.

The Judge at the assizes will not postpone the trial at the instance of the plaintiff, on the ground of the illness of a material witness, as the plantiff can withdraw his record.

Andrews, Serjt., applied on the part of the plaintiff to put off the trial of this cause, on account of the absence of a material witness, on affidavits of the plaintiff and his attorney that the witness was ill.

Platt, for the defendant. The plaintiff ought to withdraw his record.

\*TINDAL, C. J. Is there any instance of such an application being \*515] granted.

Andrews, Serjt. I apprehend that it has been frequently done.

TINDAL, C. J. The plaintiff has the remedy in his own hands—he may withdraw his record.

Application refused, and the plaintiff withdrew the record.

Andrews, Serjt., for the plaintiff.

Platt, for the defendant.

#### [Attorneys—Fawcett, and Smith & Co.]

At the Sittings in London and Middlesex, applications of this kind are always refused-The only cases in which such applications are ever entertained (except at the instance of the defendant), are, where the defendant enters the record, as is the case with indictments preferred in the Court of King's Bench, indictments removed by certiorari at the instance of the defendant, &c.

# WELCH SPRING CIRCUIT. 1833.

BEFORE MR. BARON BAYLEY AND MR. JUSTICE PATTESON.

## \*CARMARTHEN ASSIZES.

BEFORE MR. JUSTICE PATTESON.

#### REX v. WOOLCOCK and Another.

If an indictment on the riot act 1 Geo. 1, stat. 2, c. 1, s. 1, for remaining assembled one hour after proclamation, in setting out the proclamation omit the words "of the reign of," which were contained in the proclamation read by the magistrate—this is a fatal variance.

If the proclamation be read several times, the hour is to be computed from the first reading.

If there be such an assembly, that there would have been a riot if the parties had carried their purpose into effect—this is within the stat.; and whether there was a cessation or not, is a question for the jury.

INDICTMENT on the riot act, 1 Geo. 1, st. 2, c. 1, s. 1, for a capital felony, in remaining together one hour after the making of proclamation under that statute.

It appeared, that, on the 1st October, 1832, which was the day on which Mr. Phillips was sworn in Mayor of Carmarthen, there was a large assemblage of persons in front of the Six Bells Inn, in that town, at which Mr. Phillips was dining, and that some stones were thrown. It was proved that the proclamation contained in the riot act was read by him from a book which was produced, but the words of the proclamation contained in the book differed from the statement of the proclamation in the first count of the indictment, by containing the additional words "of the reign of."

PATTESON, J., held this to be a variance, and that the counsel for the prosecution must go upon the other counts of the indictment, to which this objection

did not apply.

It appeared that the proclamation was read by Mr. Phillips a second and a third time before an hour had elapsed from the time of his reading it the first time. The \*defendants were proved to have been present at the first [\*517]

reading.

The counsel for the defendants submitted, that the second and third readings must be considered as new warnings, and as if the former readings were abandoned; and that, therefore, the persons assembled were not guilty of a capital felony, in so remaining together till the expiration of an hour from the third reading.

PATTESON, J. I am of opinion, that the second, or any subsequent reading of the proclamation, does not at all do away with the effect of the first reading, and that the hour is to be computed from the time of the first reading of the

proclamation.

Mr. Thomas, one of the defendants, in his defence, submitted that there was no riot, and that it was at most an unlawful assembly, and cited the case of Rex v. Birt, ante, p. 154.(a)

<sup>(</sup>a) See the stat. set forth, ante, Vol. 4, p. 442; Rex v. Child, Ib.; and Rex v. James, pto, p. 153.

PATTESON, J. I am of opinion, that if there was such an assembly, that there would have been a riot if the parties had carried their purpose into effect, it would be within the act; and whether there was a cessation or not is a question for the jury.

Verdict—Not guilty.

Wilson and Herbert Jones, for the prosecution.

Chilton, J. Evans, Whitcombe, E. V. Williams, and James, for the defendant Woolcock.

The defendant Thomas, in person.

## WESTERN SPRING CIRCUIT.

1833.

BEFORE MR. JUSTICE PARK AND MR. JUSICE LITTLEDALE.

## \*5187

## \*WINCHESTER ASSIZES.

BEFORE MR. JUSTICE LITTLEDALE.

#### REX v. EDWARDS and WARREN.

Obtaining money from a woman, by threatening to accuse her husband of an indecent assault, is not robbery.

ROBBERY. The prisoners were indicted for robbing the wife of Philip Abraham.

It was opened by *Missing*, for the prosecution, that the prisoner, under a threat of charging Philip Abraham with an indecent assault on one of them, obtained money from his wife.

LITTLEDALE, J. Have you any case deciding this to be robbery.

Missing. The nearest cases were those on the special commission in 1831.

C. Saunders, for the prisoners. Those were cases where rioters came to the house of the husband and obtained money from the wife, the husband not being at home.

\*519] \*LITTLEDALE, J. I think this is not such a personal fear in the wife as is necessary to constitute the crime of robbery. If I were to hold this a robbery, it would be going beyond any of the decided cases.

His Lordship directed an acquittal. Verdict—Not Guilty.

Missing, for the prosecution.

C. Saunders, for the prisoners.

In many cases, where money was obtained from a person by threatening such person with an accusation of an unnatural offence, it has been held robbery. So, where money has been obtained by rioters, under a threat of burning a person's house. But, we believe, that the only instances put of robbery, where the money was obtained from one, and the injury threatened to be done another, are the following—In Donolly's case, 2 East, P. C. 718, Mr. Baron Hotham says: "In the case put in argument, of one man walking with his child, who delivered his money to another, upon a threat, that, unless he did so, he would destroy the child, he had no doubt it was sufficient to constitute a robbery;" and, in the case of Rex v. Reane, Id. 735, Lord Chief Justice Eyre says: "A man might be said to take by violence, who deprived the other of the power of resistance, by whatever means

he did it; and he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the Judges, of a man holding another's child over a river, and threatening to throw it in, unless he gave him money."

## SALISBURY ASSIZES.

#### BEFORE MR. JUSTICE PARK.

#### The APOTHECARIES' COMPANY v. COLLINS. March 9.

A diploma of M. D. from the University of St. Andrew's, in Scotland, is no defence to an action for penalties under the 55 Geo. 3, c. 194, s. 20, for practising as an apothecary, without having obtained a certificate from the Apothecaries' Company. And, semble, that a similar diploma from an English University would not be so.

DEBT for penalties under the stat. 55 Geo. 3, c. 194, s. 20, (set forth, ante,

vol. 1, p. 539,) for practising as an apothecary without a certificate.

\*It appeared that the defendant had dispensed medicines; but that, previously to his having so done, he had obtained the diploma of a doctor of physic from the University of St. Andrew's, in Scotland.

Barstow, for the defendant, submitted, that this diploma was an answer to

the present action; and he cited the case of Smith v. Taylor.(b)

Mr. Justice Park. My opinion is, that this diploma is \*no defence [\*521 in this action; indeed, I think, that even a diploma from one of the English Universities would not exempt a party from the penalties of this act.(c) However, I will give you leave to move to enter a nonsuit.

Verdict for the plaintiffs for one penalty, with leave to move.

(b) 1 N. R. 202. In that case, Sir J. Mansfield, C. J., says—"Though there might be some difficulty in instituting a prosecution against a person for practising physic unlawfully, it is by no means impossible: the stat. of Hen. 8 having confirmed the charter relating to the practice of physicians, which provides, that no one shall practise physic without having been examined by the College of Physicians, and obtained letters testimonial, with an exception of persons who have taken degrees in Oxford or Cambridge. Since the union with Scotland, it has been considered, though I do not exactly know upon what ground, that a degree conferred by a Scotch University is of the same effect as a degree conferred by the University of Oxford or Cambridge, though, in looking through the article of union, I find nothing upon the subject, except that the four Scotch Universities shall subsist as before, with the same rights. Had the matter been attended to at the union, some express provision would probably have been made; but, although no such provision was made, it has been generally understood, that, in consequence of the clause alluded to, a diploma granted by one of the Scotch Universities gives the same right to practise physic, as a degree at one of the English Universities, and dispenses with the necessity of being examined by the College of Physicians, and obtaining letters testimonial from thence. This right of examination is not very likely to be exercised upon persons practising physic, when it is in their power, for about 14l., to obtain a diploma from a Scotch University. But a person practising physic without any authority is liable to a prosecution at the suit of any person; for, as the prohibition is general, and no particular mode of punishment is pointed out, it follows, that he who offends against the provision is liable to an indictment. There is, indeed, a good reason why such prosecutions are not instituted, arising from the difficulty of ascertaining whether a degree of diploma has been obtained or not. But the proof, though difficult, is not impossible."

(c) By stat. 55 Geo. 3, c. 194, s. 29, there is a saving of the rights heretofore vested in, exercised, and enjoyed by the English Universities, and the Colleges of Physicians and Surgeons; but we believe none of those learned bodies ever authorized persons to practise

as apothecaries.

Coleridge, Serjt., and Gambier, for the plaintiffs. Barstow, for the defendant.

In the ensuing term, Barstow moved, pursuant to the leave given; but the Court of King's Bench refused a rule.

## REX v. PEGLER.

On the trial of an indictment for arson, a witness for the prosecution was himself in custody on a charge of felony. The counsel for the prisoner wished to ask him, "Have you not said that you committed the offence for which you are now in custody?"—Held, that this question ought not to be put.

INDICTMENT for arson. A witness for the prosecution, who was in custody on a charge of felony, to be tried at these Assizes, was asked by the counsel for the prisoner—"Have you not said that you committed the offence for which you are now in custody?"

Mr. Justice PARK (having conferred with Mr. Justice LITTLEDALE.)—My learned brother is clearly of opinion that the question ought not to be put; and I am, myself, entirely of the same opinion.

Verdict—Not Guilty.

Bingham and Erle, for the prosecution.

Coleridge, Serjt., and Crowder, for the prisoner.

See the case of Rex v. Slaney, ante, p. 213.

## EXETER ASSIZES.

BEFORE MR. JUSTICE LITTLEDALE.

\*5221

#### \*REX v. ELLICOMBE. March 20.

A prisoner, tried at the assizes for arson on Wednesday the 20th of March, was, on Monday the 18th, served at the prison with a notice to produce a policy of insurance. The commission day was Friday, the 15th, and the prisoner's home was ten miles from the assize town:—Held, that the notice was served too late. Held also, that the intent to defraud an insurance office being charged in the indictment, was not such notice to the prisoner as would make a notice to produce the policy unnecessary.

ARSON.—The prisoner was charged with setting fire to his own house in which he lived. The first count charged the offence to have been committed with intent to defraud the Sun Fire-office; and a second count charged an intent to defraud John Tothil, who had a mortgage on the house.

The commission day at Exeter was on Friday the 15th of March, and this

case came on to be tried on Wednesday, the 20th.

The counsel for the prosecution called for the policy of insurance under a notice to produce, which had been served on the prisoner at the gaol on Monday, the 18th of March. The prisoner's home was ten miles from Exeter.

Moody, for the prisoner, objected that this service was too late; and that the

notice ought to have been served before the commission day.

John Greenwood and Sewell, contrà. As the prisoner's residence is only ten

miles distant, there was ample time to have procured the policy.

Mr. Justice LITTLEDALE (having conferred with Mr. Justice PARK.)—Both my learned brother and myself are of opinion, that the notice was served too

late. It cannot be presumed that the prisoner had the policy with him when in custody; and the trial might have come on at an earlier period of the assize. We therefore think, that secondary evidence of the policy cannot be received. (See the case of Hargest v. Fothergill, ante, p. 303.)

\*The counsel for the prosecution submitted, that the intent laid in the indictment to defraud the Sun Fire-office was such a notice in pleading [\*523]

as to dispense with the necessity of a notice to produce.

Mr. Justice LITTLEDALE. I think not.(a) You must confine yourselves to the second count.

\*The case proceeded on the second count only.

**[\*524** 

Verdict-Not guilty.

John Greenwood and Sewell, for the prosecution. Moody, for the prisoner.

NORFOLK SPRING CIRCUIT.

1833.

BEFORE MR. BARON VAUGHAN AND MR. BARON BOLLAND.

## AYLESBURY ASSIZES.

BEFORE MR. BARON VAUGHAN.

#### REX v. HOLLOWAY. Feb. 27.

- If a poacher take a gun by force from a gamekeeper, under the impression that it may be used against him, it is not felony, though he state afterwards that he will sell the gun, and it be not subsequently heard of.
- (a) In the case of How v. Wall, 14 East, 274, it was held, that in an action of trover for a bond, the plaintiff might give parol evidence of it to support the general description of it in the declaration, without having given the defendant notice to produce it, as the nature of the action gave sufficient notice to the defendant of the subject of the inquiry. to prepare himself to produce it, if necessary for his defence; and in that case Mr. Justice Le Blanc said, "where the contents of a written instrument may be proved as evidence in a cause, and it is uncertain before hand whether such evidence will be brought forward at the trial, we see the good sense of the rule which requires previous notice to be given to the adverse party to produce it, if it be in his possession, before secondary evidence of its contents can be received, that he may not be taken by surprise. But where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice." This applies to actions where the adverse party must know what is contained in the declaration; but in many of the most important cases of felony, the prisoner is wholly unacquainted with the contents of the indictment till it is read over to him when he pleads, that being immediately before the commencement of the trial. In the case of Rex v. Moore, 6 East, 421, n., which was an indictment for administering an unlawful oath, a witness swore to certain words spoken by the prisoner, by way of administering an oath, and stated, that the prisoner held a paper in his hand, from which it was supposed that he read the words. Lord Alvanley held, that this evidence was receivable, without giving the prisoner notice to produce the paper; and the Court of K. B. afterwards concurred in that opinion. In the case of Rex v. Hunt, 3 B. & A. 566, it was held, that a copy of resolutions delivered by the defendant to a witness as resolutions intended to be proposed, and which corresponded with those that the witness heard read from a written maper, was admissible, without a notice to produce the original; and in the same case it

The prisoner was indicted for stealing a gun from the prosecutor, who was one of the gamekeepers of the manor of Beaconsfield.

The prosecutor met the prisoner and another man, whom he knew to be poachers, on a part of the manor, and seized the prisoner; his companion came "525] up and rescued him. The prisoner, on getting free, wrested the \*gun from the prosecutor, and ran off with it. It was proved that the next day the prisoner said he should sell the gun. It was not afterwards found.

VAUGHAN, B., in summing up, said, that the prisoner might have imagined that the prosecutor would use the gun so as to endanger his life; and, if so, hi taking it under that impression would not be felony; but if he took it, intend in a shading a

ing at the time to dispose of it, it would be felony.

The jury said, that they did not think that the prisoner, at the time he took

the gun, had any intention of appropriating it to his own use.

VAUGHAN, B. Then you must acquit him. It is a question peculiarly for your consideration. If he did not, when he took it, intend its appropriation, it is not a felony; and his resolving afterwards to dispose of it will not make it such.

Verdict—Not guilty.

## BEDFORD ASSIZES.

BEFORE MR. BARON BOLLAND.

## REX v. JAMES WARNER, WILLIAM ALBONE, JOHN BUTLER, and JOHN CHESHAM. March 6.

A gamekeeper, accompanied by his assistant, met four poachers on the highway, one carrying a gun, another a gun-barrel, and the other two bludgeons. There had been previously two shots fired. The gamekeeper said to his assistant, "Mind the gun;" and the assistant laid hold of it, and then the gamekeeper called to another person. Upon this three of the poachers knocked him down and stunned him; and when he came to himself, he saw all of them near him, and one said, as they passed, "Damn them, we have done them both," and one turned back and cut him on the left leg, and all then ran away. It was objected, first, that the wounding in the leg was the act of one alone; and there was no evidence to show which of them it was. Secondly, that, from the expressions used, it was evident that both were thought to be dead; and that there could be no intent to murder, &c. Thirdly, that the prisoners being on the highway, the gamekeeper and his assistant had no right to interfere with them. The prisoners were convicted, and the Judges held the conviction right.

THE first set of counts in the indictment charged James Warner with un\*526] lawfully, maliciously, and feloniously, \*assaulting Thomas Perkins on
the 3rd of December, and unlawfully cutting and wounding him on the
left leg, with an intent feloniously, &c., to kill and murder him, against the
statute; and William Albone, John Butler, and James Chesham, with being
present, aiding, abetting, and assisting the said James Warner to commit the
said felony. The like with intent to disfigure Thomas Perkins. The like with
intent to disable him. The like with intent to do him some grievous bodily
harm.

A second set of similar counts charged Wm. Albone as principal, and the other prisoners with aiding, abetting, and assisting him.

was also held, that parol evidence of inscriptions and devices on banners and flags, displayed at a meeting, was admissible without notice to produce the originals. In Spragge's case, cited 14 East, 276, where the prisoner, who was charged with having forged a note, had got possession of it and swallowed it, Buller, J., allowed parol evidence to be given of its contents, though no notice to produce had been given, as such a notice would have been nugatory.

Vol. XXIV.—44

A third set charged John Butler as principal, and the other prisoners as aiders and abettors.

Thomas Perkins, the prosecutor, was head gamekeeper to Francis Pym, Esq., and was out on duty with his brother, George Perkins, who was his assistant. On the night of the 3rd of December, they heard a gun towards Biggin wood, the property of Mr. Thornton. At that time they were near Everton wood; they shortly after heard another gun towards Biggin wood, and then went into the Everton road. They saw four people coming along the road in the direction of Biggin wood. One of the four men had a gun, another a gun-barrel, and the other two had bludgeons. The men stopped when they saw the prosecutor and his brother. It was then about half-past ten, and a light night. The prosecutor and his brother advanced towards the men, when the former said, "So, you have been knocking them down: you are a pretty set of people to be out so late at night." This was said loud. The men said something, which was not heard by the prosecutor. They were then about three yards off. The prosecutor said to his brother, sufficiently loud for the prisoners to hear, "Mind the gun." His brother caught hold of it, his hands being close to the lock. The prosecutor saw Chesham, and advanced to look at the faces of the other two, but \*they bounced off. Chesham had the gun-barrel. The prosecutor then turned back towards his brother and the man who had the gun, and called out as loud as he could, "Forward Giggles." Giggles was the keeper of Mr. Thornton, but was not there. Three of the men (who had not the gun), ran in upon the prosecutor, knocked him down, and stunned him; when he recovered himself he saw all the men coming by him; and one said, "Damn'em, we've done 'em both." They had got two or three paces beyond him, when one of them turned back. The prosecutor saw what he thought was a stick, and was struck with it a violent blow on the left leg. When he got home be examined his leg, and found a hole had been cut through his leather gaiter and stocking, and that he was wounded in the leg. The wound was about an inch long. After he was so struck on the leg, the men set off and ran away. The prosecutor then got up, and saw his brother lying by the side of the road, and groaning. He helped him up, and they went towards home. The prosecutor had committed no assault on either of the four men. When the prosecutor said, "Mind the gun," he made no gesture. The prosecutor was smothered with blood in his mouth, and could not move hand or foot after he was knocked down. He could not tell how long he lost his senses.

George Perkins said, he and his brother were on the road leading from Templeford; and when about two hundred or three hundred yards from Biggin wood, he saw four men coming, about one hundred yards off. They moved on, and when they were within twenty yards, he saw that one, had a gun; they came closer, within about seven yards, and he then saw that one had a gunbarrel, and that the other two had bludgeons. Prosecutor said, "Hollo! my lads, you been knocking 'em down?" He was then thirty yards from them. He spoke loud. They said something loud, which witness could not understand. When they got close to them, prosecutor said, "Mind him with the gun." Witness took hold of the gun gently; placing one hand on the stock, and the \*other on the barrel. It was a detonator, and witness took off the cap gently. The man did nothing. When the witness laid hold of the gun, one of the others came up within a yard of him, and said, "This is not his manor." That man had the gun barrel. It was Chesham. The man who had the gun was Warner. Witness had had hold of the gun two minutes, and his brother called out, "Forward Giggles," quite loud. Witness also hallo'd "Forward Giggles;" when one of the four men said, "Damn it, we wont stand this." It was not the man with the gun. The three then stepped up to his brother, and witness saw them strike him. Witness turned the man round who had the gun, by turning the barrel. At this time the prosecutor and the three men were about seven yards off. One of the three came running to witness (he had a stick), and knocked him down. As he was striking at witness, the man who had the gun rather drew back to avoid the blows, and said three times "Don't hit me." Witness was stunned on the head, "fell down, and remembered nothing further. Witness did nothing but lay hold of the gun. When they first saw the men, they did not shew any desire to avoid witness and his brother, or prevent them going on. Witness took hold of the gun to prevent the man's running away, but did not tell him so. He took hold of it gently, to let his brother see if he knew them. There was no struggle. The man did not say any thing. No name had been used when the man said, "This is not his manor." It was Mr. Thornton's manor. Up to that time nobody had been assaulted. The man with the gun did not seem angry at witness's holding it. It was a public road. Mr. Thornton's manor extends more than two or three hundred yards beyond where witness and his brother saw the The man did not attempt to wrench the gun from witness when he took off the cap.

The two men who had bludgeons were afterwards proved to be the other two

prisoners, Butler and Albone.

\*Praced and Byles, for the prisoner, objected that the blow on the leg, under the circumstances proved, was the act of one alone; and there was no evidence which of the prisoners inflicted it. Secondly, that, before the blow was given, one of the prisoners said, "Damn 'em we've done 'em both." And it must be taken, therefore, that it was supposed both men were dead; and, however the party giving the blow might have intended to inflict insult on the body, he could not have had any such intention to murder, &c., as was charged in the indictment. Thirdly, that the prisoners were on the high road, and the prosecutor and his brother had no right to obstruct them. They cited Rex v. Hawkins.(a)

BOLLAND, B., told the jury, that it was proved that George Perkins had taken hold of Warner's gun, but that the prosecutor had done nothing to justify the assault upon him; and that, as to the infliction of the wound in the leg, if they thought the prisoners were acting in concert, they were all equally guilty.

The jury convicted the prisoners, but recommended them to mercy on two grounds—first, because the provocation was first given by the prosecutor's brother; secondly, because it happened off the prosecutor's manor.

The case was afterwards submitted to the consideration of the Judges; who, after hearing the counsel on both sides, certified that they were of opinion that the conviction was right.

Storks, Serjt., and Smith, for the prosecution.

Praed and Byles, for the prisoners.

[Attorneys-Chapman, and Rogers-Hankin.]

\*5307

## \*BURY ASSIZES.

BEFORE MR. BARON VAUGHAN.

#### REX v. TUBBY. March 17.

A statement relating to an offence made upon oath by a person not at the time under

(a) Ante, Vol. 3, p. 392. That case decides, that if a gang of poachers attack a game-keeper and leave him senseless on the ground, and one of them return and steal his money, &c.; that one only can be convicted of the robbery, as it was not in pursuance of any common intent.

See the cases of Rex v. Edmeads, ante, Vol. 3, p. 390, and Rex v. Whitehorne, Id. p. 394.

suspicion, is admissible in evidence against him, if he be afterwards charged with the commission of it.

THE prisoner was indicted for burglary.

B. Andrews, for the prosecution, proposed to read a statement made upon oath by the prisoner, at a time when he was not under any suspicion.

Prendergast, for the prisoner, objected that it was a violation of that rule of

law, which held, that a prisoner should not be sworn.

VAUGHAN, B. I do not see any objection to its being read, as no suspicion attached to the party at the time. The question is, is it the statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time when

Andrews stated, that having read through the paper, he did not find any thing material in it, and therefore would withdraw it, although he had no doubt of its being evidence.

VAUGHAN, B. Very well; otherwise I should certainly have received it. I The prisoner was convicted.

have no doubt upon the subject.

B. Andrews, for the prosecution. Prendergast, for the prisoner.

## OXFORD SPRING CIRCUIT.

1833.

BEFORE MR. JUSTICE J. PARKE, AND MR. JUSTICE TAUNTON.

## BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

\*WILLSON v. DAVENPORT and Another. Feb. 25.

A. rented land of B., who was trustee of certain property (a part of which was this land), the rents of which B. was to pay in certain shares; one of those shares belonged to the wife of A. B. had in his hands a greater amount due to A. in right of his wife than the rent amounted to:-Held, that this could not be set off against the rent without a special agreement to that effect.

In replevin, a defendant avowed for rent payable yearly, for rent payable half yearly, and for rent payable quarterly; and to each of these avowries the plaintiff pleaded non tenuit, and riens in arrear. A holding at a rent payable half yearly was proved, and the jury were directed to find for the plaintiff on the 1st and 5th issues; for the defendant on the 3rd and 4th; and the jury were discharged on the 2nd and 6th issues.

REPLEVIN. The defendants avowed for 30%. rent in arrear. The first avowry stated the rent to be payable yearly; the second stated it to be payable halfyearly; and the third, quarterly. Pleas to the first avowry, non tenuit and riens in arrear; and the like pleas to the second and to the third avowries.

On the part of the defendants it was proved, that the plaintiff had taken cer-

tain lands of them, at a rent of 30% a year, payable half-yearly.

Curwood, for the plaintiff, opened that the lands in question, together with other property, had been conveyed to the defendants as trustees, to receive the rents and profits, and to pay them over in certain shares; one of which shares

\*532] belonged to the plaintiff in right of his wife; and he opened, that \*the defendants had in their hands a greater sum, which was due to the plaintiff as his wife's share of the profits, than the rent in question amounted to; and that, therefore, the plaintiff was entitled to a verdict on those issues which were taken on the riens in arrear.

Mr. Justice J. PARKE. I think that this trust money, due to the plaintiff in his wife's right, cannot be set off against the defendant's claim for rent in arrear, without a special agreement to that effect. The defendant has, therefore, no legal answer to the claim for rent; and the verdict must be for the plaintiff on the first and fifth issues; for the defendant on the third and fourth issues; and the jury must be discharged from giving any verdict on the second and sixth, as those issues become immaterial.

Verdict accordingly.(a)

\*533] \*Curwood and Carrington, for the plaintiff.
Talfourd, Serjt., and Justice, for the defendants.

[Attorneys-Bartlett and Davenport.]

## OXFORD ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

#### REX v. PRATLEY. Feb. 27.

A. had consigned three trusses of hay to B., and had sent them by the prisoner's cart.

The prisoner took away one of the trusses which was found in his stable, but not broken up:—Held, no larceny, as the prisoner did not break up the truss.

LARCENY. The indictment in the first count charged the prisoner with stealing a truss of hay, the property of Thomas Cheatle; and the second count stated it to be the property of Thomas Baylis.

It appeared that Cheatle had sent three trusses of hay, consigned to Baylis, by the prisoner's cart; and that the prisoner had taken away one of the trusses, which was found in his possession, but not broken up.

(a) By the General Rules of all the Courts, H. T. 2 W. 4, r. 74, "No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." In Cox v. Thomason, a MS. case cited in Mr. Jervis's addit of the normalization of the norm rules of the Courts (p. 84), and which came before the Court of Exchequer, T. T. 1832, it was decided that a distinct issue is raised upon each count of a declaration by the general issue pleaded generally to the whole declaration; and that this rule applies to every taxation occurring after the first day of Easter Term. The declaration, in case, contained eighteen counts, nine for a malicious prosecution, and nine for slander; the Jury found for the plaintiff on three counts, with 40s. damages; and for the defendant on the remaining fifteen, and the postea was entered accordingly. The Master in taxation disallowed the plaintiff's costs on the fifteen counts on which the defendant had a verdict, but did not deduct the defendant's costs on those counts from the plaintiff's costs. On motion to review the taxation, Bayley, B., expressed his opinion, that each count was a separate issue within the meaning of the rule, so that the costs of the defendant on the fifteen counts ought to have been deducted from the plaintiff's costs; and, on the 29th May, he said, that all the Courts agreed that the costs of the issues found for the defendant should be deducted from the plaintiff's costs; and that the true construction of the rule was, that the general issue raised a distinct issue on each count. He added, that the King's Bench and Exchequer agreed that the rule applied to every taxation occurring after the first day of Easter Term, though the cause might have been tried before that day; and the Common Pleas did not differ upon this last point, although they did not entertain so strong an opinion upon it.

Mr. Justice J. PARKE. This is no larceny, as the prisoner did not break up the truss. The prisoner must be acquitted. Verdict-Not guilty.

Phillimore, for the prosecution.

## [Attorney-J. Scarlett Price.]

In 3 Inst. 107, Lord Coke says, "If a bale or pack of merchandize be delivered to one to carry to a certain place, and he goeth \*away with the whole pack, this is no felony; but if he open the pack, and take any thing out animo furandi, this is larceny. Likewise, if the carrier carry it to the place appointed, and after take the whole pack animo furandi, this is larceny also, for the defendant had taken his effect, and the privity of the bailment is determined; and so it is of a tun of wine, or the like, mutatis mutandia."

## REX v. FREEMAN. March 1.

The prisoner had worked for the prosecutor, sometimes as a regular labourer, and sometimes as a roundsman; but, at the time in question not being at all in the prosecutor's service, he was sent by the prosecutor to get a check cashed at a banker's; for doing which he was to be paid sixpence. He got the cash, and made off:—Held, no emberslement, as the prisoner was not a servant of the prosecutor within the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 47.

EMBEZZLEMENT. The prisoner was charged under the stat. 7 & 8 Geo. 4, c. 29, s. 47, with having embessled a sum of Il. 19s. 8d., the property of James Freeman. The indictment alleged, that he was the servant of James Freeman.

It appeared that the prosecutor had given the prisoner a check, which he was to get cashed at the Bicester bank, and bring back the money to the prosecutor. The prisoner obtained the money at the bank, and applied it to his own use. It further appeared that the prisoner had sometimes been employed by the prosecutor as a regular labourer, and sometimes as a rounds-man, for a day at a time; and that he had several times before been sent to the bank for money. It however appeared, that, on the day in question, the prisoner was not working for the prosecutor, and that he was to be paid sixpence for fetching this money from the Bicester bank.

Mr. Justice J. PARKE, (having conferred with Mr. Justice TAUNTON). My learned brother agrees with me in opinion that the prisoner was not a servant of the prosecutor within the meaning of the act of Parliament, and that this is therefore no embezzlement. Verdiet-Not Guilty.

Abbot, for the prosecution.

## [Attorney-White.]

In the case of Rex v. Spencer, R. & R. C. C. R. 299, the prisoner had applied to a person named Boynton, a carrier, to give him \*employment, and Boynton agreed to let him carry out parcels and go on messages when the prisoner had no other employment; for which Boynton was to give him what he should think fit. On the fourth day of his being in this employment, Boynton gave him an order, upon which he was to receive 21.: he received the money, and embezzled it. Bayley, B., entertained some doubt whether he was a servant within the 39 Geo. 3, c. 85 (the act then in force as to embezzlement), and reserved the case; but all the Judges held the conviction right.

## REX v. COOPER and WICKS. March 2.

The committing magistrate had told a prisoner that he would do all that he could for him if he would make a disclosure: after this, the prisoner made a statement to the turnkey of the prison, who held out no inducement to the prisoner to confess:—Held, that what the prisoner said to the turnkey could not be received in evidence, more especially as the turnkey had not given the prisoner any caution.

If a person set fire to a stack, the fire from which is likely to, and which does, communicate to a barn, which is thereby burnt, the person is indictable for burning the barn.

It is not essential that there should have been any direct communication between an accessory before the fact and the principal felon. It is enough if the accessory direct an intermediate agent to procure another to commit the felony; and it will be sufficient, even if the accessory does not name the person to be procured, but merely direct the agent to employ some person.

ARSON. The indictment in the *first* count charged the prisoner Cooper with having set fire to a stack of straw; in the *second*, with having set fire to a stable; in the *third*, two barns; and in the *fourth*, two outhouses; and the prisoner Wicks was charged in each count as an accessory before the fact.

It appeared that the straw stack had been set on fire, and that the fire had communicated to a stable, an ox-house, and two barns which were adjacent, and

which were all destroyed.

It was proposed on the part of the prosecution, to give in evidence a confession of the prisoner Cooper. It appeared that the committing magistrate, Mr. Simeon, had told him, that, if he would make a disclosure, he (Mr. Simeon) would do all that he could for him.

Mr. Justice J. PARKE. We must not hear what he said after this.

\*536] The prisoner Cooper, after he had been committed, \*made a statement to the turnkey of Reading Gaol. The turnkey had held out no inducement to him to confess, and had not given him any caution not to confess.

Carrington, for the prisoners, objected that this statement was not receivable

after what had been said to the prisoner Cooper by Mr. Simeon.

Mr. Justice J. PARKE. I think that I ought not to receive the evidence after what Mr. Simeon said to the prisoner, more especially as the turnkey did not give any caution to the prisoner. (a)

The statement was not received.

It was proved, by a king's evidence named Maskell, that the prisoner Wicks had desired him to tell the prisoner Cooper to set the place on fire at the straw stack; and that he told Cooper accordingly; but did not inform Cooper that he

did so at the desire of the prisoner Wicks.

Mr. Justice J. Parke. The prisoner Cooper is charged with setting fire to two barns, &c., as well as to the straw rick, to which the fire seems, in the first instance, to have been applied. However, if a person set fire to a stack, the fire from which is likely to, and which does, communicate to a barn, which is thereby burnt, he is in point of law indictable for setting fire to the barn.(b). With respect to an accessory before the fact, it is not necessary that there \*5371 \*should be any direct communication between the accessory and the principal. It is enough if the accessory direct an intermediate agent to procure another to commit the felony; and it will be sufficient, even though the accessory does not name the person to be procured, but merely directs the agent to employ some person.

Talfourd, Serjt., Curwood, and Shepherd, for the prosecution.

Carrington, for the prisoners.

#### [Attorneys-Newbery and Neale.]

(a) If a person of inferior authority cautions a prisoner not to confess, after an inducement held out by a person of superior authority, it is important to consider whether a statement made by a prisoner, under such circumstances, would be receivable; as it seems to be but a fair conclusion, that what was said to the prisoner by a magistrate would be much more likely to operate on his mind than any thing subsequently said to him by a constable.

(b) See the charge of Lord Chief Justice Tindal, ante, p. 266, (n).

## WORCESTER ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

#### REX v. BOULTON. March 4.

A bible had been given to a society of Wesleyans, and it had been bound at the expense of the society. B. stated that he was one of the trustees of the chapel, and also a member of the society. No trust deed was produced:-Held, that in an indictment for stealing the bible, the property was rightly laid in B. and others.

LARCENY. The prisoner was charged with stealing a bible, a hymn book.

and a pair of brass sconces, the property of John Bennett and others.

It appeared that the bible and hymn book were presented to the society of Wesleyan Methodists at Feckenham, from which chapel they had been stolen. It further appeared, that the books had been bound at the expense of the society; and it was stated by Mr. Bennett, that he was one of the trustees of the chapel, who had bought the scones, and was also a member of the society, which consisted of about sixty-two members. No trust deed was produced.

\*Shutt, for the prosecution, cited the case of Rex v. Hutchinson.(a) Mr. Justice J. PARKE. I think, as Mr. Bennett is one of the society,

the property in the books is well laid in him and others.

Verdict-Guilty.(b)

Shutt, for the prosecution. Carrington, for the prisoner.

#### \*REX v. RICHARD ENOCH and MARY PULLEY. **F\***589 March 6.

If a child has breathed before it is born, this is not sufficiently life to make the killing of such child murder. There must be an independent circulation in the child, or the child cannot be considered as alive for this purpose.

A man and woman being apprehended on a charge of murder, another woman who had the female prisoner in custody, told her that she "had better tell the truth, or it would lie upon her, and the man would go free:"-Held, that a declaration of the female prisoner, made to this woman afterwards was not receivable in evidence.

The first count of the indictment charged the two prisoners with the wilful murder of the female bastard child of the prisoner Mary Pulley, by stabbing it in the head with a fork. The second count charged that they killed

(a) R. & R. C. C. R. 412. In that case it was held, that the goods in a dissenting chapel, vested in trustees, cannot be described as the goods of a servant, who has merely the custody of the chapel and things in it to clean and keep in order, though he has the

key of the chapel, and no other person but the minister has another key.

(b) By the stat. 7 & 8 Geo. 4, c. 29, s. 10, it is enacted, "that if any person shall break and enter any church or chapel, and steal therein any chattel, or, having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon." However, it seems, that in this enactable ment the legislature did not intend to include the chapels of dissenters; because, in the stat. 7 & 8 Geo. 4, c. 30, ss. 2, 8; and in the stat. 7 & 8 Geo. 4, c. 31, s. 2, in which they are meant to be included, the words are "any church or chapel, or any chapel for the religious worship of persons dissenting from the united Church of England and Ireland, duly registered or recorded." Those statutes received the royal assent on the same day as the stat-7 & 8 Geo. 4, c. 29. It is also worthy of observation, that the words "church or chapel," are to be found in the 1 Edw. 6, c. 12, s. 10, which related to the offence of sacrilege, there being then no chapels of dissenters in existence.

the child with their hands. The third count charged, that, before the child was completely born, the prisoners stabbed it with a fork, and that it was born, and then died of the stab. The fourth count was similar to the third, except that it charged the child to have been killed by the hands of the prisoners, and not with a fork.

A puncture was found in the child's skull; but, when the injury that had caused it was inflicted did not appear: some questions were asked as to whether the child breathed.

Mr. Justice J. PARKE. The child might breathe before it was born; but its having breathed is not sufficiently life to make the killing of the child murder.

Godson. The wound might have been given before the child was born, and the child might have lived afterwards.

Mr. Justice J. PARKE. Yes, but there must have been an independent circulation in the child, or the child cannot be considered as alive for this pur-

It was proposed to give in evidence a declaration of the female prisoner; the witness called to prove it, whose name was Abigail Commander, said—"I was placed by the constable with the prisoner Mary Pulley, while he went to the inquest. I was placed with her to prevent her from laying violent hands on herself, and to prevent her from going away. I told her to the effect, that she had better tell the truth or it would lie upon her, and the man would go free."

\*540]

\*Curvood, for the prisoner Mary Pulley. I submit that any thing the prisoner said after this cannot be received in evidence; a confession ought to be perfectly voluntary. Here there was an allurement held out to her to make a statement; and a statement after that cannot be considered as made voluntarily.

Whateley. This is in effect an inducement to make the prisoner criminate herself; because, in attempting to charge another person, she may shew her own connexion with a felonious transaction.

Godson, contra. It has never been held that a prisoner's being induced to free himself from the charge, is a ground for rejecting what he has said.

Mr. Justice J. Parke, (having conferred with Mr. Justice Taunton). I have conferred with my learned brother on this point; and as this declaration of the female prisoner can only be legitimately received in evidence to affect her and no one else, we think that it is not receivable, as it was made after an inducement held out by a person who had her in custody. If it were to be used at all it could only be used to criminate her; and then it would be evidence obtained to criminate her by means of an inducement.

The declaration was rejected.

Verdict-Not guilty.

Godson and Whitmore, for the prosecution. Curwood, for the prisoner Mary Pulley. Whateley, for the prisoner Richard Enoch.

#### [Attorneys-Gwinnell and John Parker.]

It may be a question whether a child has a completely separate circulation till the umbilical cord is divided; because, if that be divided, and not properly secured, the child would \*541] bleed to death; \*which would rather lead to an inference, that while it is undivided, some, at least, of the blood circulates through it. With respect to the killing of a child en ventre sa mere, Lord Coke lays down, that, "if a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this a great misprision, and no murder. But, if the child be born alive, and dieth of the potion, battery, or other cause, this is murder." In support of this position he cites the following passage from Bracton, (lib. 3, fol. 21). "Si aliquis qui mulierem pregnantem percusserit, vel ei venenum dederit per quod facerit abortivum, si puerperium jam formatum fuerit, et maxime si fuerit animatum, facit homocidium."—And he also cites Fleta as confirming this doctrine. 3 lnst. 50.

In 1 Curw. Hawk. book 1, ch. 13, s. 16; 1 Ea. P. C. 227, and 1 Russ. Cr. & Misd. 424. the same doctrine is laid down. However, Lord Hale (1 H. P. C. 433,) lays down, that if a woman is quick, or great with child, if she take, or another give her, any potion to make an abortion; or if a man strike her, whereby the child within her is killed, it is not murder, nor manslaughter, by the law of England. So it is, if after such child were born alive and baptized, and after die of the stroke given to the mother, this is not homicide. And Staun. 21 acc.

The only case on this point that we are aware of, is to be found in the Year Book, 1

Edw. 3, p. 23, pl. 18 which is as follows:-

"Brief issist al vic. de Glouc. de prendr', un D. q' p. tesmoign. de Sir G. Scrop duist aver batu un feme grosse ensient de deux enfants issint q' maintenant apres l'un enfant morust et fuit del alter deliver q' fuit baptise John p. nosme et deux jours apres p. le mai q' l'enfant avoit il morust: et le indictme't fuit returne devant Sir G. Scrop et D veign'et pled de rien culp et p' ceo q' les Justices ne fuerent my en volunte de adjudge cest chose felonie l'endictee fuit lesse a mainprise e puis la parol demurra sans jour issint q' brief issust come devant et dit q' Sir G. Scrop rehersa tout le case et coment il venit et pled—Herle au vic' faits vener son corps etc. et le vic' returne le br'e al bailie de la franchise de tiel lieu q' disoyent q' mesme celvy fuist pris p' le Major de Brist, mes la cause de l'a prisel penitus ignoramus, &c."

Lord Coke, 3 Inst. 51, denies this case to be law; but Lord Hale cites it as anthority. The stat. 9 Geo. 4, c. 31, s. 13, makes it a capital offence to procure the miscarriage of a woman quick with child, and a transportable offence to procure the miscarriage of any woman not quick with child. And the same stat. s. 13, makes the concealment of the birth of a dead child a misdemeanor; but it seems that the first and second of these offences must be committed by some person other than the woman herself; and it also seems that the third can only be committed by the woman herself. As to whether the birth of a dead child can be considered a miscarriage or abortion, after the seventh month of preg-

nancy, see Carr. Supp. App. xxx.

## \*STAFFORD ASSIZES.

**[\*542**]

(Crown Side.)

BEFORE MR. JUSTICE J. PARKE.

#### EARLE and Wife v. PICKEN. March 13.

What a party says is evidence against himself as an admission, notwithstanding it may relate to the contents of a written paper.

Issue from the Court of Chancery to try, at what period a certain conversation occurred, with a view of determining whether or not it operated as notice.

The plaintiff's counsel wished to ask a witness for the defendant, whether he had not heard the defendant say, that Mr. Symonds had agreed to give 14,000% for the estate in question.

Maule, for the defendant. I submit that this cannot be asked. It is giving

evidence of the contents of a written agreement.

Mr. Justice J. PARKE. What a party says is evidence against himself, as an admission, whether it relate to the contents of a written paper, or to any thing else.

The question was put. Verdict for the defendant.

Jervis, R. V. Richards, and Bishton, for the plaintiffs.

Maule and Whateley, for the defendant.

#### [Attorneys-Stanley, and Corser.]

In the course of this circuit, Mr. Justice J. Parke several times observed, that too great weight ought not to be attached to evidence of what a party has been supposed to have

said; as it very frequently happens, not only that the witness has misunderstood what the party has said, but that, by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say.

## \*543] \*COCKAYNE v. HODGKISSON. March 14.

Every wilful unauthorized publication, injurious to the character of another, is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interest of that person, that which he writes under such circumstances is a privileged communication, and no action will lie for what is thus written, unless the writer be actuated by malice.

A., being a tenant of B., was desired by B. to inform him if he saw or heard any thing respecting the game. A. wrote a letter to B., informing B. that his gamekeeper sold game:—Held, that if A. had been so informed, and believed the fact to be so, this was a privileged communication, and that the gamekeeper could not maintain any action

for a libel.

In such a case the defendant may give in evidence representations made to him as to the conduct of the gamekeeper, but cannot go into evidence of acts done by the gamekeeper.

LIBEL. Plea-General issue.

It appeared that the father of the plaintiff had been for some years game-keeper of the Marquis of Anglesey, and that the plaintiff wished to become his Lordship's gamekeeper, and overlooker of fences for the Haywood Park farm, of which the defendant, who was about seventy years old, was the tenant. The libel was contained in a letter sent by the defendant to the Marquis of Anglesey, which letter was as follows:

"To his Excellency the Marquis of Anglesey, Dublin Castle, Ireland.
"Haywood Park, May 4, 1832.

"Your Excellency the Marquis of Anglesey .- I most humbly and heartily thank your Lordship for the benefit I have received since I wrote to you in February, respecting the deer and rabbits troubling me so very much; and as an opportunity offers itself to make a tender to your Lordship of my poor but real and sincere wishes to supply you with a good stock of game upon my land, which I hold as tenant; and I shall feel much more comfortable could I receive a tender from you or your agent, for me to take the management of the game, which I will execute with all personal gratitude and punctuality. The actual reason that I wish to try my skill is, that I understand, please your Lordship, it is intended to allow John Cockayne to be admitted into the cottage to take charge of the game and the repairing of the fences; but, my Lord, I have found great deficiency with John Cockayne's and his father's character, both of which are not becoming to gamekeepers; they both appear in the behalf of encouraging poaching and destroying game. If your Lordship will \*favour me with communicating your real wish and intentions to Mr. Hodson, and thereby cause him to hold a strict investigation of the Cockaynes' characters, from the witnesses I can bring to prove that which will not be very pleasing to your Lordship's wishes. If you think that I am not a sufficient person to hold the situation which I ask from your Lordship, you will very much oblige me if you will inquire of any of the neighbouring nobility and gamekeepers; for, was it in Cockayne's power to retain so good a character as I can, there would be no fault to be found with him on my behalf; as I am uncertain whether they have had any one to uphold them in their unbecoming behaviour, for, had they looked after the game and fed it as they ought to have done, there might have been a great deal more game killed, from the quantity of pheasants fed on my corn all the summer season; but they were not half attended to as they ought to have been: but, please your Lordship, their play has been to find something out against me

and to put young Cockayne into the cottage, where, if he could regain his aim, he would carry on a pretty game of defraud upon your Lordship's property; as I can bring a respectable man to prove that young Cockayne offered to dispose of your Lordship's game to the said man, and likewise told him that he, Cockayne, had sent hares to Birmingham, and sold them for a good price, and moreover told him, that if he wanted some to send to the same place, he would keep him some, but cautioned the man not to let any one know; and by that means he thought he had no right to kill game on a nobleman's estate like your Lordship's, and dispose of it in such a manner, so he would have nothing to do with him or the game, with the exception of a rabbit or two. He was to meet him at a certain place. For I have had great mind to give them notice to keep off my But, please your Lordship, I thought I would inform you of the transactions of young Cockayne. As to his father, I must omit for want of room, but notice is what they deserve off your Lordship's estate altogether; but perhaps \*their characters have been stated quite differently to your Lordship. But, in regard to what I have said, you will find it quite correct, if your Lordship will inquire into it, or cause it to be done; and if you will give me permission, I will transact what I have offered much better than it has been done since I became tenant to your Lordship; but with regard to the Cockaynes, I will not allow them to put a foot on my land, until things are settled and proved on both sides. William Cockayne has been in the habit of cohabiting and drinking with the Stafford poschers to a great excess.

"Believe me, from your most humble and obedient servant, &c.

"Thomas Hodgkisson."

R. V. Richards, for the defendant, opened, that the defendant had been directed by the Marquis of Anglesey to look after the game on his Lordship's estate, and to report to him on the subject; and he submitted that it became the duty of the defendant to write letters to the noble Marquis respecting the game; and that any letter so written was a privileged communication; and that, therefore, no action would lie against the defendant, if he acted without malice, and believed what he wrote to be true.

The defendant's counsel proposed to prove that the plaintiff associated with

poschers.

Mr. Justice J. PARKE. I cannot allow you to do that. You may give evidence of any representation on the subject that had been made to the defendant before he wrote the letter.

R. V. Rickards. Suppose that we prove that the fact was notorious, the jury, without our being able to prove who was the particular person that told the defendant, would be convinced that he must have heard of it.

Mr. Justice J. PARKE. Then you must prove the rumour, and not the fact.

\*Jervis, for the plaintiff.—Is not that going too far my Lord?

Mr. Justice J. Parke. It is going a great way, but I think I must [\*546]

receive that evidence.

The evidence was not given.

R. V. Richards proposed to shew what the defendant had heard respecting the plaintiff's father.

Jeruis. That can have nothing to do with the present action.

Mr. Justice J. PARKE. I think I must receive it, because the whole letter must be read together; and it is a question of bona fides.

R. V. Richards proposed to give evidence of the bad state of the fences.

Mr. Justice J. PARKE. I think it is not admissible, as the letter makes no charge against the plaintiff in respect of the fences.

The following evidence was given on the part of the defendant.

Mr. Hodson said—I am the agent of the Marquis of Anglesey, and have been so for twenty-seven years; the noble Marquis wished to have the game preserved on the Haywood Park farm; I communicated that to the defendant, and told him he should report if he saw any thing wrong. I expected, that if any thing

had been wrong, the defendant would have reported it to me. Lord Anglesey receives reports continually from his tenants. I know it, as anything relating to the land is sent to me.

James Hodgkisson said—I am the son of the defendant. In the year 1829, the Marquis of Anglsey was out shooting; he came to my father's and said, "Hodgkisson, you are an old man, used to live with gentlemen who have preserved \*game in the strictest degree, and if ever you hear or see any thing respecting the game on my land, I desire you to inform me about I communicated to my father, that I had heard the plaintiff and his father were connected with poachers; it was after that, that this letter was written.

Thomas Brown said—I am a tailor; I was at Rugely; the plaintiff was there; it was at the Dog and Partridge; I had a conversation with the plaintiff, which I communicated to the defendant. The plaintiff wanted me to make him a suit of clothes, and take game in part payment; I asked the defendant if the plaintiff had any right to give away game or sell it. He told me that he had not, and advised me to have nothing to do with the plaintiff. The plaintiff told me, that if I wanted any game, either for my own use, or for sale, he would help me to it; and he added, that I could, if I chose, send hares to Half Moon Street, Birmingham, and get 7s. a head for them, as he had done the year before. I told him I did not want any, but I should like a small rabbit for my little girl, who was ill.

William Padmore said, I am an assistant bailiff to Mr. W. Smith, he is bailiff of a hundred, and I have followed the profession many years. I told the defendant, that I had seen the plaintiff's father at the Star, and that his, the defendant's, name was brought into question. I told him also, that the plaintiff was inviting the people to come and kill the game, and that the plaintiff said, if they would come, he would find them scales, fur, or feathers. Five or six who were in the company catch game, they were what I call poachers; I also told the defendant that I had seen the plaintiff's father drunk several times.

Mary Russell said—I told the defendant that Thomas Browne had told me. that the plaintiff had offered to find him in game off Haywood Park farm, if

he would make him a suit of clothes.

Jervis in reply. The question here is, whether this was a letter which the defendant wrote in discharge of a \*duty he owed to the Marquis of Anglesey, or whether it was written maliciously. Looking at the letter, there is an abundance of passages which shew that it was a malicious and not a

privileged communication.

Mr. Justice J. PARKE (in summing up.) The propositions of law which are applicable to this case I shall state to you in a few words. Every wilful unauthorized publication, injurious to the character of another, is a libel, and every such publication is, in a legal sense, malicious; however, if all that is contained in a libel be strictly true, the person libelled has no right to maintain an action for it; and it is on a different principle that truth is no justification of a libel in criminal cases, as many libels, which are quite true, would endanger a breach of the public peace. Still, if the present libel had been true, it was the duty of the defendant to have pleaded a justification, which he has not done; and you will therefore not inquire whether the allegations contained in this letter are true or not. I have already said, that every wilful and unauthorized publication, to the injury of the character of another, is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of another, that which he writes under such circumstances is a privileged communication. first question is, whether it was the duty of the defendant to make communications to the Marquis of Anglesey in respect of any neglect of duty in his gamekeepers. If he was desired to do so by the noble Marquis, or his agents, any communication he made would be privileged, if he wrote it bona fide, and considering that he was doing his duty to the Marquis as his landlord. If it was the duty of the defendant to make the communication, this case falls within the principle of many other cases. To write of another, that he is a thief, is a libel; but if one gentleman asks another gentleman respecting a servant's character, and he writes that the servant \*was a thief, he is protected, if he acts [\*549 bona fide. You will say in the present case, whether the defendant was told these stories, and whether he believed them to be true. You will also look at the letter, and say whether you consider it such a letter as a man would write to the Marquis of Anglesey, merely wishing to put him on his guard, and to cause him to institute an inquiry; or whether you think that the defendant was actuated by malice, and wished to supplant the plaintiff, and get the killing of the game for himself. In the former case, the defendant is entitled to a verdict, and in the latter, the plaintiff; indeed, the plaintiff is also entitled to a verdict, if you think that there had not been any direction given to the defendant by or on behalf of his landlord, for the defendant to communicate with him, for in that case the letter would be unauthorized and libellous.

Verdict for the defendant.

Jervis and Whateley, for the plaintiff. R. V. Richards and W. J. Alexander, for the defendant.

[Attorneys-A. Flint and C. Flint.]

## REX v. CAPEWELL and PEGG.

A count in an indictment for night poaching stated, that the prisoners were in a field called A., for the purpose of then and there taking game:—Held that the prisoners could not be convicted on that count, unless the jury were satisfied that the prisoners had an intention of taking game in that particular field.

INDICTMENT on the stat. 9 Geo. 4, c. 69, s. 9, for night poaching. The first count of the indictment stated, that the prisoners, together with another person unknown, being armed, entered together into a field called the Nineteen Acres, in the night time, for the purpose of then and there taking game. The second count was similar, except that it stated the name of the occupier of this field instead of the name of the field itself. The third count stated, \*that [\*550] Peol

It appeared that the prisoners were seen in the Nineteen Acres; but it was not shewn that they were doing any act tending to the destruction of game in it. There was a wood adjoining the Nineteen Acres to which they were going, and another wood from the direction of which they were coming; and in which shots had been previously heard. Both the woods (which were inclosed,) and the Nineteen Acres, belonged to Sir Robert Peel.

Greaves, for the defendants, submitted, that the jury ought not to convict on the first and second counts, unless they were satisfied that the defendants entered into the Nineteen Acres for the purpose of killing game in that very field; and he cited the case of Rex v. Braham.(a)

Mr. Justice J. PARKE (in summing up.) The first two counts make it necessary to shew that the defendants were in the field called the Nineteen Acres,

(a) R. & M. C. C. R. 151. In that case the indictment charged that the prisoner entered into a certain close, with intent then and there to destroy game. It was left to the jury to say, whether the defendant entered that particular close intending to kill game there. The jury found that the defendant was in pursuit of game, but whether in that close or not they could not say. The defendant was convicted, but the twelve Judges held, that the conviction was wrong; and that, inasmuch as the entry with intent to kill game was confined by the indictment to the close specified, it was therefore necessary to prove the intent as to that close.

for the purpose of killing game there; but the third count is applicable to the wood; and the question on that count will be, whether the defendants were not in the wood for that purpose.

Verdict—Guilty.

Whateley, for the prosecution. Greaves, for the defendants.

[Attorneys and Jones.]

## \*5517

#### \*REX v. FINACANE and WILLIAMS.

A count for night poaching may be joined with a count on sect. 2 of the stat. 9 Geo. 4, c. 69, for assaulting a gamekeeper, authorized to apprehend, and with counts for assaulting a gamekeeper in the execution of his duty, and for a common assault.

NIGHT poaching. The first count of the indictment was on the stat. 9 Geo. 4, c. 64, s. 9, for entering enclosed land with another person armed, for the purpose of killing game. The second count was framed on sect. 2 of the same statute, for assaulting gamekeepers authorized to apprehend. The third count was for assaulting the gamekeepers in the execution of their duty. The fourth count, for a common assault.

Greaves, for the defendants. I submit that the counsel for the prosecution ought to be put to their election as to which count they will go upon. The judgment in the first count is different from that on the last; indeed, the offences are triable by different Courts; one may be tried at the sessions, whereas the other must be tried at the assizes.

Mr. Justice J. PARKE. I do not see any reason why these counts should not be joined. It is like the case of an assault upon a constable being joined with a common assault.

Verdict—Guilty.

Whateley and Kinnersley, for the prosecution.

Greaves, for the defendants.

#### [Attorneys-A. Flint and Jones.]

In the books it is laid down, that several misdemeanors may be included in the same indictment, "provided the judgment upon each be the same." However, in practice, the latter part of the rule has not been adhered to. A count for an assault with intent to commit a rape is continually put in the same indictment with a count for a common assault. Counts for conspiracy and false pretences are often to be found in the same indictment; and in the case of Rex v. Collier, ante, p. 160, counts for false pretences and forgery at common law were joined in the same indictment, without any objection being made.

\*5521

#### \*BEFORE MR. JUSTICE TAUNTON.

## REX v. JOHN ROBEY. March 9.

A prosecutor and his witnesses were bound by recognizance to prosecute and give evidence at the assizes; they attended there and preferred an indictment, which was found. The prisoner had been by mistake discharged by proclamation at an adjourned sessions, which had preceded the assizes, and had absconded. The Judge allowed the expenses; but, semble, that if the prosecutor and witnesses had merely appeared at the assizes, and had not preferred any indictment, the Judge would have had no power to allow any expenses.

Housebreaking. The prisoner had been committed by a magistrate, who had taken the recognizances of the prosecutor and witnesses to prosecute and give evidence at these assizes. By a mistake, the prisoner had been discharged by proclamation at the adjourned sessions which had preceded the assizes. The prosecutor and his witnesses had appeared at the assizes, and had preferred an indictment against the prisoner, which had been returned a true bill by the grand

F. V. Lee applied for the expenses of the prosecutor and witness, under sect. 22 of stat. 7 Geo. 4, c. 64, by which it is enacted, "that the Court before which any person shall be prosecuted or tried for any felony," shall be "empowered, at the request of the prosecutor, or of any other person who shall appear on recognisance or subpoens to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment; and also payment, to the prosecutor and witnesses for the prosecution, of such sums of money as to the Court shall seem reasonable, and sufficient to reimburse such prosecutor and witnesses for the expenses they shall severally have incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution; and also to compensate them for their trouble and loss of time therein."

Mr. Justice TAUNTON. The usual course, where a bill is found and the party is not in custody, is, that no expenses \*should be allowed till after the [\*553]

the party is taken and brought to his trial.(a)

F. V. Lee. I am imformed, that since his discharge the prisoner is not to be found. Here, the prosecutor has preferred his indictment, and has done all that he could do; and for the discharge of the prisoner he is no way to blame.

Mr. Justice TAUNTON. I think that, as the bill has been preferred and found. I may, under the word "prosecuted" in the section you refer to, order the expenses. But, if the witnesses had merely appeared here according to their recognizances, and no bill had been preferred, I think that I should have had no authority.

Expenses allowed.

F. V. Lee, for the prosecution.

[Attorney-Bagshawe.]

#### REX v. EVANS.

A person who obtained goods on delivering a forged letter, "Please to let the bearer W. T. have for J. R. four yards of linen," signed J. R., is not indictable for obtaining goods by false pretence, as this is an uttering a forged request for the delivery of goods, which is a felony under sect. 10 of the stat. 1 Will. 4, c. 66.

FALSE pretence. The indictment charged that B. E. on &c., at &c., a certain counterfeit letter in writing, in the name of one John Roe, as a true letter of the proper hand-writing of the said John Roe, falsely, fraudulently, and deceitfully, to one John Brooks did deliver, and also did then and there falsely pretend to the said John Brooks, that he had brought the same from the said John Roe for \*the articles specified therein; and by which false and counterfeit letter it was mentioned, that the said John Roe desired the said John Brooks to supply the bearer thereof with four yards of Irish linen and a waistooat; and which said false and counterfeit letter is as follows, that is to say:—

<sup>(</sup>a) See the case of Rex v. Hunter, ante, Vol. 3, p. 591. See the stat. 7 Geo. 4, c. 64, ss. 22 to 30, respecting the allowance of expenses and rards, set forth Carr. Supp. p. 106, et seq.

"Mr. Brooks-Please to let the bearer, William Turton, have for J. Roe four yards of Irish Linen and a waistcoat.

"Jan. 6, 1833. "John Roe."

By means of which counterfeit letter and of the said false pretences, the said B. E. did obtain, &c.

Mr. Justice Taunton. This is a forged request for the delivery of goods. This case comes within the 19th sect. of the stat. 11 Geo. 4 & 1 Will. 4, c. 66.(a) It is clearly an uttering of a forged request for the delivery of goods.

W. J. Alexander, for the prosecution. I submit that it is still a false pre-

tence within the stat. 7 & 8 Geo. 4, c. 29, s. 53.

\*555] Mr. Justice TAUNTON. No; it is uttering a forged \*request for the delivery of goods. It is a felony, and not a misdemeanor. The prisoner must be acquitted. Verdict-Not guilty.

W. J. Alexander, for the prosecution.

F. V. Lee, for the prisoner.

## ' REX v. HAUGHTON. March 15.

A building had been built for an oven to bake bricks, but afterwards was roofed, and a door put to it. In this place the prosecutor kept a cow; adjoining to it, but not under the same roof, was a lean-to, in which another person kept a horse. Neither the prosecutor nor the person of whom he rented this building had any house or farm-yard near it, nor did any wall connect it with any dwelling-house, the nearest dwelling being one hundred yards off, and not belonging to either the prosecutor or his landlord:— Held, that the building was neither a stable nor an out-house; and that if a person set it on fire (the lean-to not being burnt), he is not indictable for arson.

The prisoner was charged with setting fire to an "outhouse;" and in another count with setting fire to a "stable," the property of Joseph Owen. In other counts, the outhouse and stable were stated to be the property of John Sparrow.

It appeared that the place burnt had been an oven to bake bricks, and that the prosecutor had made a door-way (with a door) into it, and had put boards and turf over the vent-hole at the top. It also appeared that two poles had been fixed across it at about half its height, on which boards had been laid, so as to make a loft-floor. In this place, the prosecutor kept a cow; and adjoining to it, but not under the same roof, was a lean-to, in which a person named Cope kept a horse; but this latter building was not injured by the fire.

C. Phillips, for the prisoner. I submit that this indictment must fail. This was a building for burning bricks, which has latterly been used as a cow-house, but never as a stable. It is not a stable, as it was only used for cows; indeed,

the witness calls it a cow-house.

The prosecutor being recalled, said, that the building was about one hundred yards from any dwelling-house, and that the owner of the nearest dwelling-

(a) By which it is enacted, "that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any court roll, or copy of any court roll relating to any copyhold or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money, or any warrant, order, or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years or less than two years." Vol. XXIV.—45

house had no \*interest in it; and that no dwelling-house or farm-yard of either himself or Mr. Sparrow was near it; and that there was no wall to connect it with any dwelling-house.

C. Phillips. This is not an outhouse. It is not within the curtilage. The

next point is, whether it is a stable.

Mr. Justice TAUNTON. I think that it is not properly described as a stable.

The question is, whether it is an outhouse?

C. Phillips.—On that point, I would refer to the case of Elsmore v. St. Briavel's, 8 B. & C. 461; and 2 M. & R. 514. That case shews, that where a house was built for a particular purpose, but was used for other purposes, it could not be described as a building of the kind that it was used for. There, though the house had been used as a barn, and had never been used for any thing else, yet, being three stories high, and built as a dwelling-house, it was held not sufficient to The building, in the present case, was a brick oven, used describe it as a barn. as a cow-house. I also submit that this is not an outhouse, as it is not attached

to any dwelling-house, or within the curtilage of any dwelling-house.

Greaves, on the same side. I will call your Lordship's attention to the common law, and then to the acts of Parliament, and I think I shall shew that the legal meaning of the term "outhouse" has never been altered. Mr. Serjt. Russell (Russ. Cr. & Misd. 488,) says, in treating of the common law respecting the burning of a house-"It may be briefly observed, that the term 'house' extends not only to the dwelling-house, but to all outhouses which are parcel thereof, though not adjoining thereto, or under the same roof (of which kind of outhouses mention has been made in a former part of this work;") and he then refers to the \*cases of such outhouses within the curtilage, in which, till very recently, a burglary might have been committed. The first act of Parliament which notices outhouses is the riot act, 1 Geo. 1, stat. 2, c. 5, in which the words are, "barn, stable, or other outhouse;" the word "outhouse" is also contained in the stat. 9 Geo. 1, c. 22, with respect to arson: and by Breeme's case, 2 Russ. Cr. & Misd. 491, it appears that that statute created no new offence with respect to the burning of outhouses; and this also appears from the judgment of Lord Ellenborough, in the case of Hyles v. The Hundred of Shrewsbury, 3 East, 457. I, therefore, submit, that where any term has obtained a precise and definite meaning at common law, and it is used in an act of Parliament, it will be taken to have the same meaning that it had at common law; and for this I would refer to Bac. Abr. tit. Statute (H. 4,) and the cases of Moore v. Hussey, Hob. 97, and Smith v. Harmon, 6 Mod. 142. In the stat. 43 Geo. 3, c. 55, the term "outhouse" is again used; and it is repeated in the stat. 7 & 8 Geo. 4, c. 30. If this were an outhouse, almost every building, of whatever nature and however applied, would be within the statute: and a very strong argument is to be drawn from the statute itself, that outhouses within the curtilage were the only outhouses meant to be included in this term "outhouse;" because, if it were otherwise, the words "stable, coach-house, office, shop, hop-oast, barn, or granary," need not have been used. tion then is, whether this was an outhouse within the meaning of this act of Parliament. It is proved that there was no house near this building; and the term "outhouse" evidently refers to some building that has a relation to the house—a building outside the house, but having a relation to it; and it is clear, that the converting of a building to a particular use does not, for this purpose, alter its nature. That was decided in the case of Elsmore v. St. Briavel's, where it was held that a place having been used as a barn, \*did not make [\*558 it one within the statute then in force respecting arson. There the building was intended as a dwelling-house, but used as a barn. Here, the building was erected for a brick oven, and used as a cow-house.

F. V. Lee, for the prosecution. The judgment in the case of Elsmore r. St. Briavel's does not apply to the present case. The place burnt was not a house, as it never had been inhabited; and no burglary could have been committed in it. It is quite clear that it was not an outhouse, as it was intended to be a place of residence; and it could not be considered as a barn, merely because it had agricultural produce put into it. My friend, Mr. Greaves, has said, that whenever a character has been given to a term at common law, it con-Formerly, a barn within the curtilage might have been the subject of burglary, but that is not so now; therefore, the extent of the term burglary has been altered with respect to buildings in which a capital offence can be committed. At one time a burglary could have been committed in a particular building, and not at another; and that will apply on all occasions where a house is inhabited at one time and not at another. Here, though the place was once a kiln, it was afterwards permanently used in the way in which it was at the time The argument would go to this, that a place built for a particular purpose must always continue to have that character; and that certainly cannot be, for, if a barn had doors and windows put into it, and was inhabited, it would become a dwelling-house. I submit, that an outhouse may be at a distance from the dwelling-house, and that it always is so, when a person lives on one farm, and occupies another.

C. Phillips, in reply. The word 'warehouse' is specifically mentioned, because, if it were not, a warehouse not within the curtilage would not be protected by this act of Parliament; and that is no doubt the reason why the word \*warehouse was introduced. A warehouse within the curtilage would be

\*559] an outhouse.

Mr. Justice Taunton. I am clearly of opinion, that this is not a case within the act of Parliament. It is true, that the word 'outhouse' occurs in the act of Parliament; but, I apprehend that it has been settled from ancient times, that an outhouse must be that which belongs to a dwelling-house, and is in some respects parcel of such dwelling-house. This building is not parcel of any dwelling-house, and does not appear to be connected in any way, either with the premises of Mr. Sparrow, or of the prosecutor. It had been a brick kiln, and the prosecutor kept his cow there afterwards. There is no such word as cow-house in the statute. The only word likely to be applicable in this case is the word outhouse; and this building being wholly unconnected with the dwelling-house, it is not included in the legal definition of outhouse. It is also not a stable; indeed, I do not see that it could be much more properly called a stable than it could be called a coach-house. The prisoner must be acquited.

Verdict—Not Guilty.

F. V. Lee, for the prosecution.

C. Phillips and Greaves, for the prisoner.

[Attorneys-Astbury & Williams, and Jones.]

## REX v. HAUGHTON. March 15.

If A. set fire to a cow-house, and burn to death a cow which is in it, A. is indictable under the stat. 7 & 8 Geo. 4, c. 30, s. 16, for killing the cow.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 16, for maliciously killing a cow, the property of Joseph Owen.

\*It appeared, that the cow-house mentioned in the last case had been

set fire to; and burnt, and that the cow had been burnt to death in it. Mr. Justice TAUNTON. If the prisoner set this place on fire while the cow was in it, and the cow was thereby burnt to death, that is a killing of the cow by him within the meaning of the act of Parliament. Verdict—Guilty.

F. V. Lcc, for the prosecution.

C. Phillips and Greaves, for the prisoner.

## [Attorneys-Astbury & Williams, and Jones.]

By the stat. 7 & 8 Geo. 4, c. 30, s. 16, it is enacted—"That if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment." See also the case of Rex v. Hughes, ante, Vol. 2, p. 420. The stat. 4 Geo. 4, c. 54, is repealed by the stat. 7 & 8 Geo. 4, c. 27, except so far as relates to threatening letters, and to the rescue of offenders.

## SHREWSBURY ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE TAUNTON.

#### JONES v. CLIFF.

A. delivered to B. a pawnbroker's duplicate, for B. to take some goods of A.'s out of pledge. B. did so; but, on A. sending to B. for the goods, B. said he had not got them, and refused to tell who had:—Held, that if, after this, trover was brought against B., he could not insist on a lien on the goods for the money he had advanced to get them out of pledge.

TROVER for a watch and other articles. Plea-General issue.

It appeared that the plaintiff had pawned these articles \*with a person named Drake, a pawnbroker, at Manchester, in the month of September, 1828, and that, in July, 1829, he delivered the duplicate to the defendant to take them out of pledge, which the defendant accordingly did on paying the pawnbroker 11%. 17s. for principal and interest.

It further appeared, that, on the 9th of November, 1832, the plaintiff sent a person named Wycherly to the defendant to demand the articles. This witness said, "I demanded the articles from the defendant, who said that he had not got them, and that he would not tell me where they were. I said, of course Mr. Jones would allow him, in account, any sum he might have paid to redeem

the goods.

Justice, for the defendant. I submit that the plaintiff must be nonsuited. The defendant was entitled to hold the goods till he was repaid the sum that he had advanced to redeem them. The plaintiff's witness says that the plaintiff would allow the sum in account. That is not sufficient. The amount ought to have been tendered.

Ludlow, Serjt., for the plaintiff. No tender was necessary in this case. The defendant does not put it on the ground of lien, and refuse to deliver the goods upon that ground; but he says that he has put it out of his own power to deliver them up, and refuses to tell where they are.(a)

Justice. The plaintiff was in no condition to ask the return of the goods till he made a tender of the money; and it therefore signified nothing where the

goods were.

Mr. Justice Taunton. I certainly shall not nonsuit. \*Mr. Justice. \*562] if you have any evidence to offer, I will hear it.

Justice, for the defendant, opened that the pawnbroker's duplicate was put into the defendant's hands, that he might repay himself a balance that the plaintiff owed him; and, to substantiate this defence, a letter from the plaintiff to the defendant was put in.

Mr. Justice TAUNTON left it to the jury to say whether there was any agreement between the parties to the effect suggested on the part of the defendant.

Verdict for the plaintiff.

Ludlow, Serjt., and Whateley, for the plaintiff. Justice, for the defendant.

[Attorneys-J. Burns, and Burgess.]

## COURT OF EXCHEQUER.

(In Bank.)

BEFORE LORD LYNDHURST, C. B., MR. BARON BAYLEY, AND MR. BARON VAUGHAN.

April 18. Justice moved for a rule to shew cause why there should not be a new trial, on the ground that the defendant had a right to hold the goods, as there had been no tender of the money advanced; and also on the ground that the verdict was against evidence.

Lord LYNDHURST, C. B. As the defendant said that he had given over the possession of the goods, and would not tell to whom, he could not insist on a \*563] formal tender. A party can only be obliged to make a tender \*when, by tendering, he would get possession of the goods.

BAYLEY, B., and VAUGHAN, B., concurred.

Rule refused.

#### DOE on the demise of ALLEN v. BLAKEWAY.

A. was tenant for life, with a power of appointment by will, attested by three credible witnesses. By will, attested by three witnesses, he appointed the lands to B. for life, and after her death to C. in fee. B. was one of the witnesses to the will, and the appointment to her was therefore void. On the death of the testator, the husband of B. entered, and held the land till his death, which was three years after the death of B.: -Held, that the statute of limitations did not begin to run against C. till the death

EJECTMENT. The lessor of the plaintiff claimed as the heir at law of William Allen, deceased. It appeared that Richard Park, who was tenant for life of the premises in question, with a general power of appointment by will attested by three credible witnesses, by his will attested by three witnesses devised to Martha Allen for her life, and after her death to William Allen in fee. Martha Allen was one of the attesting witnesses to the will. On the death of the testator, in 1805, the husband of Martha Allen entered and retained possession of the premises till his death in the year 1831. Martha Allen died in the year 1828, and William Allen in the year 1832, he having attained his full age of 21 years in the year 1815. The present ejectment was commenced in Hilary Term, 1833.

Mitule, for the defendant, submitted that, as the devise to Martha Allen was

void by the stat. 25 Geo. 2, c. 6, s. 1, (a) the title of William \*Allen accrued immediately on the death of the testator; and that, as ten years [\*564] had elapsed since he came of age, and before the present ejectment was brought,

his entry was barred by the statute of limitations, 21 Jac. 1, c. 16.

Mr. Justice TAUNTON. I am of opinion that the right of William Allen must be taken for this purpose not to have accrued till the death of Martha Allen, notwithstanding the life estate was bad. William Allen's estate is, by the terms of the will, to commence after the death Martha Allen. It is analogous to the case of a remainder-man, where there has been a forfeiture of the life estate; he is not bound to insist on the forfeiture, but he may wait the regular expiration of the particular estate; and the statute of limitations does not begin to run till that time. The lessor of the plaintiff is entitled to recover.

Verdict for the plaintiff.

Talfourd, Serjt., and R. V. Richards, for the lessor of the plaintiff. Maule and Whateley, for the defendant.

[Attorneys-How, and Watson.]

## \*REX v. WILLIAM HANDLEY and JOHN HANDLEY. [\*565 March 28.

A. was indicted for shooting at B., a game-keeper. There being another indictment against A. for night posching:—Held, that although both indictments related to the same transaction, yet the offences were quite distinct from each other; and that the prosecutor, therefore, ought not to be put to his election to go upon one indictment and abandon the other.

THE prisoners were indicted under the stat. 9 Geo. 4, c. 31, ss. 11 & 12, for shooting at John Bannock, the game-keeper of Mr. Eyston. They were also indicted, under the stat. 9 Geo. 4, c. 69, s. 9, for night posching on the land of Mr. Eyston.

Godson, for the prisoners, submitted that, as the two indictments were in reality founded on the same identical transaction, the prosecutor ought to be put

to elect which he would proceed upon, and abandon the other.

Mr. Justice J. PARKE. These are quite distinct offences, and the one cannot by possibility merge in the other. I think, therefore, that the prosecutor is not bound to abandon either.

The indictment for the shooting was tried, and the prisoner William Handley was convicted, and the prisoner John Handley acquitted.(b)

Bather and Corbett, for the prosecution.

Godson, for the prisoners.

#### [Attorneys-Duke & Salt, and Asterley.]

(a) By which it is enacted, "That if any person shall attest the execution of any will or codicil which shall be made after the 24th day of June, in the year of our Lord 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such devise, legacy,

estate, interest, gift, or appointment mentioned in such will or codicil."

(b) The prisoner John Handley was discharged without being tried on the indictment for night poaching; the learned Judge observing, that, by the conviction of the other prisoner, the ends of justice would be attained.

## HEREFORD ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

## \*WILLIAMS v. CARWADINE. March 22.

A. published a handbill, offering a reward to any person who would give such information as would lead to the discovery of the murderers of B. C., knowing of this handbill, gave the information:—Held, that C. was entitled to the reward, although it was found by the jury that C. did not give the information in consequence of the offered reward but from other motives.

Held, also, that the first person who gives the information is entitled to the reward, and

the motive of such person in giving the information is not material.

If two persons go together to give the information, they must bring a joint action for the reward.

Assumpsit. The first count of the declaration stated in substance, that the defendant had caused to be published a placard or advertisement, reciting, that Walter Carwardine had been robbed, and that there was great reason to suppose that he had been murdered; and that by this placard the defendant did "promise and undertake, that whosoever would give such information as might lead to a discovery of the murder of the said Walter Carwardine, should, on conviction, receive a reward of 201; and that any person concerned therein, or privy thereto, except the person who actually committed the offence, should be entitled to such reward, and every exertion used to procure a pardon; and that, by the said placard or advertisement, the defendant "directed that the said information should be given, and application for the above reward be made to him, or Mr. Watkins, solicitor, Hereford." The plaintiff then averred, that she, "confiding in the said promise of the said defendant," and not being the party who actually committed the offence, "did give to the said defendant such information as led to the discovery of the murder of the said Walter Carwardine;" and that, afterwards, at the Hereford Assizes, held on the 20th day of March, 1832, Joseph Pugh, John Matthews, and William Williams, who were guilty of the said offence, to wit, the murder of the said Walter Carwardine, were in due manner convicted of the said murder, "in consequence of such information so given by the said plaintiff as aforesaid." This count went on to state, that of all this the defendant had notice, and that he became liable to pay the plaintiff 201., which, although requested by the plaintiff, he had not paid her.

\*The second count was similar, except that it omitted to state to whom information was to be given; and did not aver that the information was given by the plaintiff to the defendant; nor that Pugh, Matthews, and Williams, were guilty of the murder; nor that they were convicted in consequence of the information given by the plaintiff. The third count was similar to the first, except that it omitted the clause respecting the procuring of a pardon for an accomplice, and that it did not aver that the plaintiff was not the person who committed the offence; and that it did not state that J. P., J. M., and W. W. were convicted in consequence of the information given by the plaintiff. The fourth count was similar to the second, omitting that part which related to the procuring a pardon for an accomplice, and the averment that the plaintiff had

not committed the offence.

The fifth count stated, that before the making of the promises in that and the two next counts mentioned, the body of Walter Carwardine had been found in the river Wye, with marks of violence on his person, so as to give reason to believe that he had been murdered; and that, for the better apprehending and bringing to justice the person or persons concerned in the murder, the defendant "promised that whoever, except the party who actually committed the

offence, would give such information as would lead to a discovery of the murder of the said Walter Carwardine, should, on conviction, receive a reward of The plaintiff then averred, that she, not being the party who actually committed the offence, "did give such information as led to the discovery of the murder of the said Walter Carwardine;" and that, at the Hereford Assizes, on the 20th March, 1832, J. P., J. M., and W. W., were convicted of the murder; of all which the defendant had notice, whereby he became liable to pay the plaintiff 201., but had refused to do so.

The sixth count was similar, omitting the exception of the person who actually committed the offence, and the \*averment, that the plaintiff had not committed it. The seventh count stated, that, in consideration that the plaintiff had given such information as had led to a discovery of the murder, the defendant promised, that, "on conviction he would pay her the sum of 201." It then stated the conviction of J. P., J. M., and W. W., as in the former counts. The eighth count was for work and labour, money paid, money had and received, and on an account stated. Plea-General issue.

On the part of the plaintiff it appeared, that the brother of the defendant had been murdered at Hereford on the 24th of March, 1831, and that his body was found in the river Wye, on the 12th of April; and that, on the 25th of April,

the defendant caused the following handbill to be published:-

"Ten pounds reward and twenty pounds reward. Whereas Walter Carwardine, late of Broxwood, in the county of Hereford, farmer, was, on the night of the 24th of March last, or early on the following morning, robbed of a 5l. Kington and Radnorshire bank note, at a house of ill fame in Quaker's Lane, in the city of Hereford; and the body of the said Walter Carwardine was found in the river Wye on the 12th day of April instant, with marks of violence on his person, and there is great reason to believe that he was murdered. And whereas Sarah Coley, late of the city of Worcester, single woman, is charged on oath with having committed such robbery, and being privy or concerned in such murder, whoever will apprehend the said Sarah Coley, and lodge her in any of his Majesty's gaols, shall receive a reward of 101; and whoever will give such information as may lead to a discovery of the murder of the said Walter Carwardine, shall, on conviction, receive a reward of 201.; and any person concerned therein, or privy thereto, (except the party who actually committed the offence,) shall be entitled to such reward, and every exertion used to procure a \*pardon. [Here followed a description of Sarah Coley.] Information to be given, and application for the above reward to be made, to Mr. William Carwardine, Holmer, near Hereford, or to Mr. Watkyns, solicitor, Hereford.

"Hereford, April 25, 1831."

It further appeared, that, at the Hereford Summer Assizes of 1831, two persons, named Pugh and Connop, were tried for the murder, and acquitted, the plaintiff having been examined as a witness against them; and that, shortly after that time, the plaintiff having been dreadfully beaten by William Williams, and thinking herself not likely to recover from the violence she received, she made a disclosure to Mr. Howells, the swordbearer of the city of Hereford, in consequence of which, she, on the 23rd of August, made the following deposition before Milton, a magistrate-"The voluntary statement of Mary Anne Williams, made this 23rd day of August, 1831, before me, one of his Majesty's justices of the peace in and for the said city, who, on her cath saith, that, in consequence of her miserable and unhappy situation, and believing that she has not long to live, she makes this voluntary statement to ease her conscience, and in hopes of forgiveness hereafter. That, on Thursday night in the assize week, in the month of March last, between the hours of eleven and twelve o'clock, I went into Joseph Pugh's house, in Quaker's Lane, and there saw Susan Connop Sarah Coley, Susan Reignart, Mr. Webb, the butcher, and Walter Carwardine After drinking with them, I left the house with Mr. Webb. I walked as far as

the King's Head Inn, in Broad Street; I returned by the way of Eign Street to the end of Quaker's Lane, by Eign Gate Turnpike. I went along the lane as far as the gate of Mr. Thomas the coachmaker's meadow opposite to the Cross Lane, where I heard a noise. I there saw Joseph Pugh, William Williams, a man of the name of Matthews, and Sarah Coley. I heard Mr. Carwardine's voice very plain. \*He said, 'For God's sake do not murder \*570] wardine's voice very plain. The said, 'For God's sake do not murder me.' I heard Coley say, 'I have got his blunt, and if you will keep secret I'll treat.' Williams said, 'We will soon put him out of the way.' I then heard a dreadful blow, and Mr. Carwardine fell on the ground on his back. I distinctly heard two long deep groans, as if he was dying. I did not hear him speak. After a moment Williams saw me, he ran to me, and forced me into the turnpike road, near Eign Gate; Williams ran back along the lane to the Cross Lane; I went along the turnpike road to the Red Lion Inn, turned up Townditch Lane into the Cross Lane, but no one was there. I went into Quaker's Lane, by the end of the barn, and listened. I heard Pugh, Williams, Matthews, and Coley, about Mr. Thomas's house, the carpenter, three parts down the lane, towards the tan yard, I distinctly heard Pugh curse his eyes, and say, 'Go on.' Coley said, 'Don't talk so loud; don't be in a hurry.' I was very much frightened, and I got into the house, and went to bed.

" (Signed) Mary Anne Williams.

"Sworn before me, William Milton."

The record of the conviction of William Williams, Joseph Pugh, and John Matthews, was put in; and it was admitted that there had been a demand of

the reward on the behalf of the plaintiff.

Curwood, for the defendant. It is clear, that any person, who, in consequence of this handbill, fairly gave evidence that led to the discovery of the murderers, would be entitled to the reward; but, in this case, it is manifest that the disclosure was made from other motives. Shortly after the finding of the body of the deceased there was an inquest, and after that Pugh and Connop were tried; and, previous to that trial, the plaintiff made a deposition, which was totally unlike what she had stated in her second deposition, which has been \*571] read. After the first trial, she \*was severely beaten by williams, and, being apprehensive of death, she made a disclosure. Does she do this in consequence of the handbill? No. From other and quite different motives. The handbill is published in April, and she makes the disclosure in August. If it was not the handbill, but other circumstances, which operated on her mind, there is no contract between these parties: indeed, her second deposition was of so little value that the magistrate would not act upon it, not only on account of her previous character, but on account of her having before made a different The declaration states, that she, confiding in the promise contained in the handbill, made a disclosure. This is, I submit, a case of what in the civil law is called policitation, that is, an offer by one party not accepted by the other.

Mr. Justice J. PARKE. Have you any authority for your position as to the motive? The terms of the handbill are, that "Whoever will give such information as may lead to a discovery," is, on conviction, to receive the reward. If this information had not been given, these men would not have been convicted.

The first deposition made by the plaintiff, on the 19th of April, 1831, was put in: it was as follows—"Mary Anne Williams states, that, on Thursday night in the assize week, between half-past ten and eleven o'clock, she went into Joseph Pugh's house in Quaker's Lane; when she went in she saw Susan Connop, a tall girl, a little girl, a lusty man sitting in a great chair, and Mr. Webb, the butcher. They were drinking spirits; witness staid there half an hour, and left there the persons whom she has described. She went into the town; as she came back she saw the same man that she has described as the lusty man standing at the corner of Mr. Thomas the coachmaker's building.

A gentleman went by, and spoke to this man, and said, 'Why, Mr. Carwardine, what brings you there?' \*He said, in answer, 'Why, how the devil do you know my name?' The gentleman answered, 'Oh, I know you very well.' This was very near twelve o'clock; witness does not think it had struck twelve."

Mr. Howells, in answer to a question put by the learned Judge, said, that the second deposition of the plaintiff was the material information that led to the discovery of the murders; but he also stated that the plaintiff did not attend the inquest; and that the magistrate declined granting any warrant upon her statement, unless some other person was brought to confirm it; and that a person, named Elizabeth Powell, was sent for, and she confirmed the statement in many respects.

Ludlow, Serjt., amicus curiæ. In a case tried before Lord Cheif Justice Gibbs, at Bristol, which was an action for a reward, his Lordship laid down, that, either the person claiming the reward must shew a title to it in himself alone, or all who are concerned in making the disclosure must join in bringing

the action.

Talfourd, Serjt., for the plaintiff. My client gives the information, and a conviction follows. If the case went to the full extent of the doctrine stated by Mr. Serjt. Ludlow, no one could recover unless he or she were the only witness examined. I submit that the plaintiff was the sole moving cause; and that the person who gives the first information, is the one that leads to a discovery.

Mr. Justice J. PARKE. The person who makes the first disclosure is certainly the person who leads to a discovery; for, if she had said nothing, no

discovery would have been made.

Talfourd, Serjt. If the plaintiff had herself known nothing, but had said A. B. knows all about it, and that had lead to a discovery, it would have been sufficient.

\*Mr. Justice J. Parke. There is only one reward to be paid. If two persons had come together to give the information, the action must have been joint; but, as the plaintiff alone gave the first information, she alone is entitled to the reward.

Curwood. There is then the question of motive. In the declaration it is averred, that the plaintiff, "confiding" in the promise, gave certain information,

which is alleging that as the motive.

Talfourd, Serjt. That is mere form of pleading, the same as the words

"fraudulently contriving and intending."

Mr. Justice J. Parke. If the plaintiff comes within the conditions of the handbill, I think she is entitled to the reward. The jury will probably find that the 201 was not the motive. We may, I think, assume that it was not. The motive was the state of her own feelings. My opinion is, that the motive is not material; and that, if she comes within the meaning of the handbill, that is sufficient.

Mr. Justice J. Parke. Yes; I will give you leave to move. It is to be taken as found by the jury, that the plaintiff gave the information which led to the discovery of the murderers; but that she did not give that information for the sake of the 20l. reward, nor in consequence of the handbill, but from stings of conscience.

Verdict for the plaintiff—Damages 20l.

Talfourd, Serjt., and Godson, for the plaintiff. Curwood and C. Phillips, for the defendant.

## \*COURT OF KING'S BENCH.

## [In Bank.]

BEFORE DENMAN, C. J., LITTLEDALE, J. PARKE, AND PATTESON, JS.

Curwood moved for a rule to show cause why a nonsuit should not be entered, on the ground that the plaintiff was not a meritorious informer; and that she sued on a contract which had in effect been negatived by the finding of the

DENMAN, C. J. Was any doubt suggested as to whether the plaintiff knew

of the handbill at the time of her making the disclosure?

Curwood. She must have known of it, as it was placarded all over Hereford, the place at which she lived.

Mr. Justice J. PARKE. I take this to have been a contract with any one

who did the thing.

Mr. Justice LITTLEDALE. If the person knows of the handbill and does the thing, that is quite enough. It does not say, whoever will come forward in consequence of this handbill.

DENMAN. C. J. As the plaintiff is within the terms of the handill, she is

entitled to the reward.

Mr. Justice Patteson. The plaintiff being within the terms, her motive is not material. Rule refused.

In the case of Fallick v. Barber, 1 M. & S. 108, where an advertisement respecting a stolen child promised a reward to the person who would give information where the child was, so that it might be restored to its parents, and the plaintiff communicated to the \*defendant her suspicion where the child was, in order to put the matter into his \*575] hands for his benefit, if he chose to run the risk, and the child was afterwards restored to its parents by the exertions of the defendant acting on the plaintiff's communication:

—Held, that the plaintiff could not recover from the defendant to whom the reward had been paid, either the whole or any portion of it. In the case of ——v. Brnst, 3 Went. Plead. 30, a party by handbill offered that "whoever would apprehend N. K., or give such information to S. W. as might be the means of his being apprehended, should receive a reward of fifty guineas." The plaintiff gave the information to S. W., but the defendants refused to next the reward to the plaintiff because they had not it to the person who refused to pay the reward to the plaintiff, because they had paid it to the person who had apprehended N. K., and they relied on this as an answer to the plaintiff's claim; but Lord Kenyon held, that the plaintiff was entitled to recover, and that both the plaintiff and the person who apprehended N. K. were entitled to a reward of fifty guineas.

## DOE on the demise of STANSBURY v. ARKWRIGHT. March 22.

A person's being assessed to the land-tax for certain lands, is not evidence of his seisin of those lands.

If a person is seen felling timber in a wood, it is prima facie evidence that he is the owner of it; and therefore, any thing that he says at that or any other time as to any one else being the owner of it, is evidence.

A. resided in Pennsylvania before the declaration of American independence, and he had a son B., born there also before that period. In 1783, A. came to England to get compensation for his losses as an American loyalist. In 1785, he returned to Pennsylvania, where he died. B. never was in England. Semble, that both A. and B. were American subjects; and that A. became so, by returning to Pennsylvania in 1785: and that a claim to lands could only (if at all), be made through them, under the stat. 37 Geo. 3,

What A. said in England, as to why he came, is evidence.

EJECTMENT for a wood and certain lands at Leominster.

The lessor of the plaintiff claimed as tenant in tail, under the will of Thomas

Stansbury, the brother of his great grandfather.

It appeared that the plaintiff's grandfather, Joseph Stansbury, in the year 1768, went to reside in Pennsylvania, which was then a British colony, and that he there continued till the year 1773, when he came to this country; but that he returned to Pennsylvania in the following year. It further appeared, that he came again to England, in 1783, to claim a compensation from the British Government for losses as an American loyalist.

Maule, for the defendant, objected that what Joseph \*Stansbury had told the witness as to the reason of his coming to England, was not evidence.

Mr. Justice J. PARKE. He comes to England, and says why he does so. I cannot exclude that. It is evidence in the same way, that, in proving an act of bankruptcy, we hear what a person says to explain his acts.

It appeared, that, in the year 1785, Joseph Stansbury again returned to America, and there remained to the time of his death. The father of the plaintiff was born in Pennsylvania, in the year 1772, and resided there to the time of

his death.

Talfourd, Serjt., for the lessor of the plaintiff, submitted, that the father and grandfather of the lessors of the plaintiff, or at least the latter, were to be considered as British subjects; and he cited the cases of Auchmuty v. Mulcaster,(a) Doe d. Thomas v. Acklan,(b) and Sutton v. Sutton,(c) and he further argued, that, if that were not so, the lessor of the plaintiff would be entitled to recover under the provisions of the statute 37 Geo. 3, c. 97, ss. 24, 25.(d)

(a) 8 D. & R. 593. In that case it was held, that the children of an American loyalist, who continued his allegiance to the crown of Great Britain after the colonies were separated from the mother country, and settled in America, were entitled to take lands by descent in England within the operation of the stat. 4 Geo. 2, c. 21, as natural born subjects of the crown of Great Britain.

(b) 4 D. & R. 394. In that case it was held, that a person born in the United States of America since the treaty of 1783, by which those states were acknowledged by this country to be free, sovereign and independent, is an alien, and cannot take lands by descent in

England.

(c) 1 Russ. & Mylne, 663. In that case it was held, that, under the treaty of 1794. between Great Britain and America, and the stat. 37 Geo. 3, c. 97, American citizens who held lands in Great Britain on the 28th of October, 1795, and their heirs and assigns, are at all times to be considered, so far as regards those lands, not as aliens, but as native

subjects of Great Britain.

(d) By s. 24, after reciting that whereas by the 9th article of the treaty between Great Britain and the United States of America, 'it was agreed that British subjects who then held lands in the territories of the United States, and American citizens, who then held lands in the dominions of his Majesty, should continue to hold them according to the nature and tenure of their respective states and titles therein, and might grant, sell, or devise the same to whom they should please, in like manner as if they were natives, and that neither they nor their heirs or assigns should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens; it is enacted, "that all lands, tenements, and hereditaments, in the kingdom of Great Britain, or the territories and dependencies thereto belonging, which, on the said twenty-eighth day of October. one thousand seven hundred and ninety-five (being the day of the exchange of the ratification of the said treaty between his Majesty and the said United States,) were held by American citizens, shall be held and enjoyed, granted, sold, and devised, according to the

stipulations and agreements contained in the said article; any law, custom, or usage to the contrary notwithstanding."

By sect. 25 it is provided, "That nothing herein contained shall extend, or be construed to extend, to give any right, title, or privilege to any person, not being a natural-born subject of this realm, which such person would not have been entitled to if this art had subject of this realm, which such person would not have been entitled to if this act had not been made, other than and except such rights, titles, and privileges as shall be necessary for the true and faithful performance of the stipulations in the said article contained. according to the true intent and meaning thereof, or to give to any person, not being a natural-born subject of this realm, or a citizen of the said United States, any right, title. or privilege to which such person would not have been entitled if this act had not been

\*577] The declaration of the independence of the United States of \*America was in the year 1778, and the treaty between the United States and this country was in the year 1783.

The lessor of the plaintiff had been naturalized by a private act of Parliament passed in the year 1827, and by this he was empowered by express words to

take lands, either by descent or purchase.

To prove that Thomas Stansbury was seised of the wood, a witness was called, who stated that he saw a man named Brown, who was since dead, felling timber there.

Busby, for the lessor of the plaintiff, wished to ask what Brown had said as to who was the owner of the wood.

\*Maule, for the defendant, objected.

Mr. Justice J. PARKE. He exercised an act of ownership, and he is, therefore, prima facie owner. And what he says as to any one else being the owner, is a declaration to cut down his own title.

Maule He was a mere workman.

Mr. Justice J. PARKE. I do not know that he was only a workman, except from what he may have said.

R. V. Richards. Your Lordship will only hear what he said at the time.

Mr. Justice J. PARKE. Yes; what he said at any time.

The question was put; but it did not appear that Brown had ever stated

whose the wood was.

To prove a seisin of the whole of the property in Thomas Stansbury, the duplicate land-tax assessments were produced by the clerk of the peace; and by these it appeared that Thomas Stansbury was assessed to the land-tax; and that the name of the defendant in the subsequent land-tax assessments had been substituted for that of Thomas Stansbury.

tuted for that of Thomas Stansbury.

Mr. Justice J. PARKE. I do not think these assessments are evidence of seisin. However, I will leave them to the jury to take into their consideration; and, if they find the seisin, which I expect they will, I shall nonsuit the plaintiff, with leave to move to enter a verdict, if the Court shall think there was any evidence of seisin to go to the jury.

The jury found the seisin, and the plaintiff was nonsuited, with leave to move

to enter a verdict.

\*579] \*Mr. Justice J. PARKE. I should say upon this evidence, that the lessor of the plaintiff's father and grandfather were American subjects;(a) and that the latter became American when he went back in the year 1785; and then the case would turn on the stat. 37 Geo. 3, c. 97.

Talfourd, Serjt., and Busby, for the lessor of the plaintiff.

Maule and R. V. Richards, for the defendant.

#### [Attorneys—Day & Fowler, and Austin & Co.]

In the ensuing term, *Talfourd*, Serjt., moved to set aside the nonsuit in pursuance of the leave given; but the Court of King's Bench refused a rule, being of opinion that the duplicate land-tax assessments were not evidence of the seisin of Thomas Stansbury.

(a) By the stat. 7 Ann. c. 5, 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, all children born out of the King's ligeance, whose fathers or grandfathers by the father's side were natural born subjects, are to be deemed natural born subjects themselves, unless their said ancestors were attainted or banished beyond sea for high treason, or were at the time of the births of such children in the service of a prince at enmity with Great Britain. But the grandchildren of such ancestors are not to be privileged in respect of the alien's duty, unless they be within the realm, and take an oath, &c., nor are they enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

#### REX v. The Inhabitants of St. WEONARD'S. March 23.

A road had been repaired by a parish, and persons on horseback had used it, but there was no evidence that any carriage had ever gone along the whole length of it:—Held. that the parish could not be convicted of non-repair of it on an indictment stating it to be a highway for carriages; and that there should have been a count in the indictment charging it to be a way for horses.

INDICTMENT for the non-repair of a highway. The indictment stated it to

be a highway for horses, coaches, carts, and other carriages.

\*It appeared that the road had been repaired by the parish of St. Weonard's, and that persons on horseback had frequently passed all along it; [\*580] but there was no evidence that any carriage had ever gone along the whole length of it, although there was evidence that carts had been seen at one end of it, which would lead them also to a farm-house which was near to that end.

Mr. Justice J. PARKE. There is no count charging this as a bridle road. The evidence of repair would shew it to be a parish road, but that might be for horses only. There is no evidence of a carriage ever having gone all along it; and, as to the carts, they might be merely going to the farm.

Ludlow, Serjt., for the prosecution. Does not your Lordship think, that, upon this indictment, the defendants may be convicted if it was a road for

horses?

Mr. Justice J. PARKE. Not without a count charging that it was a road for horses. The defendants must be acquitted. Verdict—Not guilty.

Ludlow, Serjt., and Justice, for the prosecution.

R. V. Richards and Burmester, for the defendants.

[Attorneys-Cooke, and Collins.]

# MONMOUTH ASSIZES.

BEFORE MR. JUSTICE TAUNTON.

## \*PROTHEROE v. MATHEWS. March 26.

r\*581

The servant of the owner of an ancient park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; and the servant may justify the shooting, although the dog may not have been chasing deer at the moment when it was shot, if the chasing of the deer and the shooting the dog, were all one and the same transaction.

TRESPASS, for shooting a dog.(a) Pleas—First, general issue. The second plea stated in substance, that Sir Charles Morgan was possessed of an ancient park, and that the dog was hunting and chasing divers deer in that park, and that the defendant, as the servant of Sir Charles Morgan, and by his command, "for the preservation of the said deer, and to prevent the said dog from continuing to hunt and chase the same respectively," shot the dog. The third plea stated a grant of park and free warren by King James the First in the locus in quo that there were deer there; and that the dog was on the land, hunting and

<sup>(</sup>a) The first count of the declaration was for shooting and wounding a dog called a setter, and another dog. The second count was for stabbing a pointer, a setter, and another dog. The third for killing three dogs. The fourth, for taking and seizing three dogs, and converting them to the defendant's use. The pleadings were therefore all framed as if there had been more than one dog injured, which was not the fact.

\*582] chasing them.(a) The fourth plea was \*similar to the second, except that it stated the park to have been a "lawful park," instead of an

(b) As the form of this plea may be useful to the profession, we have subjoined it. "And for a further plea as to the said supposed trespasses in the introductory part of the said second plea mentioned, and in that plea justified, the said defendant by like leave of the Court first had and obtained, says, that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says, that, at the respective times of committing the said supposed trespasses in the introductory part of this plea referred to, the said dogs in the said first and third counts respectively mentioned were in and upon certain lands in the county aforesaid; and that the said Sir Charles Morgan, Bart., long before any of the said times when, &c., in the first and third counts mentioned, and at those times respectively, was, and from thence hitherto hath been and still is lawfully possessed of the said lands, with the liberties, franchises, and appurtenances thereto belonging, or in anywise appertaining; and the said defendant saith, that, long before any of the said times when, &c., and before the said Sir C. Morgan was possessed of the said lands, or had any estate or interest therein, and at the time of the making and sealing of the letters patent hereafter mentioned, to wit, on the 1st day of December, in the 14th year of the reign of his Majesty King James the First, formerly King of England, one Sir William Morgan, Knight, was seised in his demesne as of fee of and in the said lands; and that, before any of the said times when, &c., in the as of lee of and in the said lands; and that, before any of the said times when, at., in the said first and third counts mentioned, to wit, on the day and year last aforesaid, his said Majesty, King James the First, by his letters-patent, sealed with the great seal of England, and duly enrolled, and now remaining of record in his Majesty's High Court of Chancery, (an exemplification of the enrolment thereof, sealed with the great seal of England, the defendant brings here into Court, according to the form of the statute in such case made and provided), of his special grace, certain knowledge, and mere notion, did grant for himself, his heirs and successors, unto the said Sir William Moran. Which the bear and successors, unto the said Sir William gan, Knight, his heirs and assigns, and every of them, that he the said Sir William Morgan, Knight, his heirs and assigns, and every of them, should for ever have free warren in the said lands; and his said Majesty, James the First, did, by his said letters-patent, further give and grant for himself, his heirs and successors, unto the said Sir William Morgan, Knight, his heirs and assigns, his said late Majesty's full, free, and entire license, power, and authority from time to time for ever, and at his and their pleasure, to make a park and parks, warren and warrens, with ditches, hedges, walls, pales, or in any other manner to have, hold, and enjoy the same park or parks, warren or warrens, so made and inclosed, or to be made and inclosed, and in every or any of these the liberties, rights, franchises, prerogatives, property, and benefit of a park and free warren. And his said late Majesty did further give and grant for himself, his heirs and successors, unto the said Sir William Morgan, Knight, his heirs and assigns, full, free, and entire liberty, license, power, and authority from time to time, at his and their will and pleasure for ever, to replenish, have, and keep, all and singular the said manors and lands, or any part or parcel thereof, as well inclosed or not inclosed, with stags, bucks, does, hares, conies, pheasants, partridges, and all other beasts and birds soever, being of a wild nature; and that he the said Sir William, Knight, his heirs and assigns, should and might for ever thereafter have, hold, and enjoy within the said lands and every of them the liberties, rights, privileges, property, and benefit of a park and parks, free warren and warrens. And his said late Majesty did, by his said letters-patent, further order and command, that no person should enter or presume to enter into the said park or parks, free warren or free warrens, or any of them, to shoot, hunt, hawk, chase, or in any manner to disturb or take any thing there that did, might, or ought to belong to the said park or parks, warren or warrens, nor to do or commit any thing within the same park or parks, warren or warrens, that could or might be to the damage, hurt, or prejudice of the same park or parks, warren or warrens, or the liberties, rights, or privileges of the same, or any part of them, without the will and license of the said Sir William Morgan, Knight, his heirs or assigns, under the penalties in the statutes and ordinances of the kingdom of England made and provided for the preserving and keeping of parks and warrens: which said letters-patent, before and at the times when &c., were and are still in full force, vigour, and effect, as by the said record thereof enrolled and now remaining in the said Court of Chancery will more fully appear. And the said defendant further saith, that the said Sir Charles Morgan, before and at the said several times when &c., had certain stags, bucks, and does, in and upon the said lands; and that the said dogs in the said first and third counts respectively mentioned, at the said times when &c. in those counts respectively mentioned, were in and upon the said lands, hunting and chasing certain stags, bucks, and does of the said Sir Charles Morgan therein, wherefore the said defendant, for the preservation of the said stags, bucks, and does of the said Sir Charles Morgan, and to hinder and prevent the said dogs from further huntancient park. \*The fifth plea stated the locus in quo to be the close of Sir Charles Morgan, and that the dog was chasing the \*deer, and because the dog could not "otherwise be restrained or hindered from running [\*584] after, chasing, hunting and killing the said deer, and would otherwise have killed the same respectively," the defendant, as the servant, &c., shot the dog. Replication, protesting that the locus was a park, protesting the grant of King James the First, and protesting the command, with de injuria as to the residue.

It appeared, that a tram-road for coal wagons, ran through the park of Sir Charles Morgan, and was not in any way fenced off from the park; this tramroad being also used as a foot way. It further appeared that the dog of the plaintiff had followed three young women who were walking along this road; and had then run off the road and chased the deer, and having done so returned to the women in the tram-road, and lay down; this being within twenty yards of the gate by which the women were going to leave the park; while the dog was in this situation, the defendant, who was a servant of Sir Charles Morgan, shot it. It was proved that a person named Potter had told one of the woman to take care of the dog, or he would be shot; and that boards were fixed up about the park, stating that dogs found in the park would be shot.

Maule, for the plaintiff, cited the case of Vere v. Lord Cawdor, (a) and submitted that the defendant could not \*justify the shooting of the dog, un-

less it was absolutely necessary for the preservation of the deer.

Mr. Justice TAUNTON. That case is very distinguishable from the present. There are the cases of Wadhurst v. Damme(b), and Barrington v. Turner.(c)

ing and chasing the same respectively, as the servant of the said Sir Charles Morgan, and by his command, did, at the said time when &c. in the said first count mentioned, shoot off and discharge the said gun in the said first count mentioned, so loaded as in that count mentioned, and did then and there shoot at and against the said dogs in the said first count mentioned, on the said lands, and did then and there hurt and wound the said dogs, as in the said first count mentioned, and did, at the said time when &c. in the said third count mentioned, shoot, kill, and destroy the said dogs in the said third count mentioned, on the said lands, as he lawfully might for the cause aforesaid, which are the said trespasses in the introductory part of this plea mentioned and referred to; and this he the said defendant is ready to verify; wherefore he prays judgment," &c.

In 3 Lev. 26, there is the form of a plea of justification, for shooting a dog in a chase, where the dog had hunted a deer and killed it; and in 9 Wentw. Plead. 66, is a plea by the bow bearer of a forest, justifying the killing of a dog that was chasing a hare there, and a very special replication thereto; and in Richardson's "Practice of the Common Pleas," p. 484, is a justification of the shooting of a greyhound, that was accustomed to

frequent a park and hunt there.

a) 11 East, 568. In that case it was held, that a plea to an action of trespass for killing the plaintiff's dog, cannot justify the act, by stating that the lord of a manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close, for the preservation of the hares; such plea not stating that it was necessary to kill the dog for the preservation of the hares, and not stating that it

was the dog of an unqualified person.

(b) Cro. Jac. 44. In an action for killing a mastiff, the defendant pleaded, that Sir F.

W. was seised of a warren, of which the defendant was warrener, and that the dog was divers times killing conies there, and that finding him there tempore quo, therefore he shot him. The Court held the justification good, "because, it being alleged that the dog used to be there killing conies, it is good cause for the killing him in the salvation of the conies; for, having used to haunt the warren, he cannot otherwise be restrained," But Yelverton, J., doubted, as it was not alleged that the master was sciens of the quality, or had warning given him thereof. However, Popham, J., said, "The common usage of

England is, to kill all dogs and cats in all warrens, as well as any vermin, which shews that the law hath always been taken to be, that they may well kill them."

(c) 3 Lev. 28. This was an action of trespass, for killing greyhounds. The defendant justified, for that the greyhounds chased a fallow deer in his park, and there killed it, upon which, to prevent them from doing other mischief there, he took them and killed them. The plaintiff replied, that the fallow deer was out of the park, on the land of the plaintiff, feeding on his grass, on which he incited the greyhounds to chase it off his land; and that they pursued the fallow deer into the park and there killed it. The defendant demurred, and it was adjudged that the replication was bad, because it did not

\*586] Maule. In those cases the dogs were in the act of chasing the \*deer.

The matter put in issue here is, that "at the said time" the dog was hunting and chasing, wherefore the defendant, for the preservation of the deer,

and to hinder the dog from further chasing the deer, shot the dog.

Mr. Justice TAUNTON (in summing up). It is clear that the defendant shot the dog; but he justifies his having so done, because the dog was chasing the The question for your consideration is, whether the dog was in that situation when the defendant shot it. It is not essential that the dog should have been at that very moment engaged in chasing the deer; it is sufficient if the chasing of the deer and the killing the dog were all one and the same transaction. If you think that the dog was hunting and chasing the deer, and that the defendant shot it to prevent that, the defendant is entitled to a verdict. It appears that there were notice boards fixed up, stating, that dogs would be shot; and a person named Potter also spoke to one of the witnesses to the same effect; so that ample notice appears to have been given. If you think that, before and at the time of the shooting, the dog was chasing the deer, the defendant is entitled to a verdict; but, if you think that the chasing was at an end, and that the dog would not have recommenced, you ought to find a verdict Verdict for the plaintiff—Damages, one farthing. for the plaintiff.

Maule and C. Phillips, for the plaintiff.

Ludlow, Serjt., and Justice, for the defendant.

[Attorneys-Protheroe & Phillips, and New.]

# \*587] \*MILLNE v. Sir MARK WOOD, Bart. March 26.

In an action against the sheriff for refusing to take bail, it is no answer to the action that the party arrested did not tender a bail-bond. The sheriff is to prepare the bond. But, semble, that he is entitled to be paid for so doing by the party arrested.

CASE against the defendant as late sheriff of Monmouthshire, for refusing to take bail. The first count of the declaration stated the suing out of a capias against the plaintiff by Isaac Williams and others (naming them), indorsed for bail in the sum of 20% and upwards, which was delivered to the defendant as sheriff to be executed; that the defendant arrested the plaintiff and kept him in custody; and that the plaintiff tendered and offered to the said defendant, so being sheriff as aforesaid, reasonable sureties of sufficient persons, to wit, one J. D., one W. W., one W. E., and one W. J., the same being then and there responsible and sufficient persons, and having, and each of them having, sufficient within the county aforesaid, in which said county the said plaintiff was so arrested and so in custody as aforesaid, and who then and there were willing, and offered to become bail and sureties for the appearance of the said plaintiff, according to the exigency of the said writ, yet the defendant, "not regarding his duty," &c.

state that the plaintiff tried to stop the greyhounds at the side of the park, or to prevent their entrance into the park. It was then objected, that the plea was bad, because, although it was not lawful to chase within the park, yet, when the defendant had taken the greyhounds, he ought not to have killed them; and upon this point Lewis's case was cited; but, e contra, the case of Wadhurst v. Damme was cited, and the Court, after consideration, gave judgment for the defendant. In Lewis's case, 2 Rol. Ab. 567, tit. "Trespass Justifiable," (L) 2, it is said—"Si home hunt ove un Tumbler en mon Garren, uncore jeo ne pois justifier l'occider del Tumbler ove mon mastife per mon incitation."

In the case of Grant v. Hulton, 1 B. & A. 134, where it appeared that a gamekeeper was authorized by his deputation to seize greyhounds, setting dogs, and ferrets, and to do all things belonging to the office of a gamekeeper, according to the directions of the acts of Parliament—it was held that he was not thereby authorized to seize hounds. See also Com. Dig. tit. "Chase."

Vol. XXIV.—46

"wrongfully and injuriously refused to accept the said sureties so offered by the said plaintiff as bail for his appearance, according to the exigency of the said writ," and wrongfully detained the plaintiff in person. The second count was similar, but instead of stating that the bail was offered to, and refused by, the defendant, it stated that the bail "was offered to one Jeffery Pearce, who then and there was the agent of the said defendant so being sheriff as aforesaid, and by him authorized to take bail according to the form of the statute in such case made and provided;" and that the defendant, not regarding his duty, but intending to injure the plaintiff, "then and there by the said Jeffery Pearce, his said agent in that behalf, wrongfully and injuriously refused to accept the said sureties so offered," &c. Plea—General issue.

The warrant was put in by the governor of the gaol of \*Monmouth, the seal to it being proved to be the sheriff's seal, by a clerk in the

under-sheriff's office.

It appeared that the plaintiff had been arrested by an officer of the defendant named Jeffery Pearce, and was in custody at the Westgate Inn at Newport, and that the clerk of the plaintiff's attorney asked Pearce if bail had been taken; when he replied, that before he took bail he should know who was to pay his fees, which were 2l. 12s. 6d. This sum was placed on the table, and the clerk of the plaintiff's attorney asked the four persons mentioned in the declaration as the intended bail, and who were present at the Westgate Inn, if they were housekeepers, and worth 40l. each. He then offered all or any of them as bail, and they were refused by Pearce; and the plaintiff was conveyed to Monmouth gaol, where he remained for several days. Two of the offered bail were called, and they stated that they had offered themselves as bail, and were willing to their debts, and that their property to that amount was in the county of Monmouth.

Maule, for the defendant, submitted, that this action could not be maintained, as neither the plaintiff nor any one on his behalf had tendered a bail-bond to the officer. He cited Watson's Office of Sheriff(a) and Tidd's Practice.(b)

(a) Page 104, where it is said—"On a refusal by the bailiff to discharge a defendant out of custody on a tender to him of a bail-bond, with sufficient sureties, the sheriff and

not the bailiff is liable to an action."

(b) Title "Bail Bond." It is there said-"When the defendant is arrested, and in actual custody, it is the duty of the sheriff to take bail if required, and, therefore, if a bail-bond be tendered with sufficient sureties, and the sheriff refuse to accept it and liberate the defendant, he is liable to a special action on the case." So, in 2 Wms. Saund. 61 c., (n. 5,) it is laid down, that, if the defendant tender a bail-bond with sufficient sureties, and the sheriff refuse to accept it, he is liable to a special action on the case, but not to an action of trespass; for the refusal does not make him a trespasser ab initio. These learned authors cite several cases, but in none of them is it stated that the party arrested must tender the bail-bond. By the stat. 23 Hen. 6, c. 9, it is enacted—"That the said sheriffs and all other officers and ministers aforesaid, shall let out of prison all manner of persons by them or any of them to be arrested, or being in their custody, by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons having sufficient within the counties where such persons be so let to bail or mainprise, to keep their days in such place as the said writs, bills, or warrants shall require." "And that all sheriffs, under-sheriffs, clerks, bailiffs, gaolers, coroners, stewards, bailiffs of franchises, or any other officers or ministers, which do contrary to this ordinance or any point of the same, shall lose to the party in his behalf indamaged or grieved, his treble damages, and shall forfeit the sum of xl. li. at every time that they or any of them do to the contrary thereof in any point of the same; whereof the king shall have the one half, to be employed to the use of his house, and in no other wise, and the party that will sue, the other half." It is essential that the persons offered as bail should have sufficient property within the county; therefore in the case of Lowell v. Plomer, 15 East, 320, it was held, that the sheriffs of London, to whom, as such, a special capias was directed, under which they arrested the plaintiff, could not be sued for not having taken bail under this stat., the sufficiency of the bail tendered being only alleged to be within Middlesex and London taken together, though it was also averred, that from time immemorial the same persons had

\*Mr. Justice Taunton (in summing up.) This is an action for not taking sufficient bail when offered. It has been objected, that the plaintiff has not proved a tender \*by him of a bail-bond. I cannot find that the burthen of tendering it is thrown upon the plaintiff by the statute, or by any decided case. The statute says, that the sheriff shall let out of prison all manner of persons by him arrested, upon reasonable sureties of sufficient persons having sufficient substance within the county. All that the party has to do, as far as I know, is to tender sufficient sureties. It is for the sheriff's security to take the bond. Therefore, he is to tender the bond. Whether the party arrested be not bound to pay the expenses of the bond before he is liberated is another question: probably the sheriff is entitled to be paid for it by the party arrested. Perhaps in this case the fee of two guineas and a half was intended to cover this charge; however, as it does not appear that the officer required the bond to be tendered, or that the two guineas and a half was not a sufficient sum, the objection respecting the tender of the bail-bond hardly appears to arise.

Verdict for the plaintiff.

Ludlow, Serjt., and R. V. Richards, for the plaintiff. Maule and Walesby, for the defandant.

[Attorneys-Walker and James Evans.]

# GLOUCESTER ASSIZES.

(Civil Side,)

BEFORE MR. JUSTICE J. PARKE.

#### POWELL v. HARPER and Others. March 29.

Libel, imputing that the plaintiff had received rose-wood, knowing it to have been stolen. Pleas of justification, stating that B. had stolen the rose-wood from A., and that the plaintiff had received it, knowing it to be stolen:—Held, that the defendant's counsel might ask what B. said, with a view of proving that B. committed the larceny; and held also, that the plaintiff's counsel might ask the defendant's witnesses what was the plaintiff's general character for honesty.

LIBEL. The declaration stated, that the defendants published of the plaintiff the following libel:—

\*591] \*\*\* At a meeting of the trade of cabinet makers and upholsterers of Cheltenham, held at Yearsley's hotel, on Monday, January 21, 1833, the following resolutions were adopted:

"First, It having appeared to this meeting that Mr. Nicholson has been robbed of certain rosewood chair tops by one of his workmen, which were pur-

always been duly appointed to, and had exercised the office of sheriff of the two counties at the same time, and that the defendants were sheriffs of both at the time of the grievances complained of. In the same case it was held, that this statute was a public act, and need not be specially pleaded; and in the case of Cresswell v. Hoghton, 6 T. R. 355, it was held, that a party grieved who recovers damages against the sheriff for not taking bail under this statute, is also entitled to costs. In the case of Matson v. Booth, 5 M. & S. 223, it was held, that a sheriff is bound to let his prisoner, arrested on mesne process, go at large upon reasonable sureties; and a bond with five sureties, three of whom are respectively, worth more than the penalty of the bond, is sufficient, though the other two are worth less than the penalty; and in the same case it was also decided, that the addition of another obligor, after the bond had been executed, but before the sheriff has accepted it, with the assent of the sheriff and the prior obligors, does not vacate the bond, or make a new stamp necessary.

chased by a tradesman of this town (meaning the plaintiff,) we deem ourselves imperatively called upon to recommend Mr. Nicholson to prosecute both the thief and the receiver, (innuendo, that the plaintiff had received the goods, knowing them to have been stolen;) being convinced, that, were facilities not afforded for the disposal of stolen goods, the system of robbing must be speedily abated."

There was no plea of the general issue; but there were several pleas of justification, stating in substance that the chair tops had been stolen from Mr. Nicholson by a person of the name of Askins, and that the plaintiff had received them, well knowing them to have been stolen.

C. Phillips, for the plaintiff, opened the pleadings-

Talfourd, Serjt., for the defendant, opened his case, and called witnesses in support of the pleas of justification.

One of the witnesses stated that he saw Askins in the plaintiff's yard.

Godson, for the defendant, proposed to ask what Askins said.

Ludlow, Serjt., for the plaintiff. I submit that we ought not to hear what Askins said.

Mr. Justice J. PARKE. Yes. What he said is evidence to shew that he committed the larceny.

The evidence was received.

\*Ludlow, Serjt., proposed to ask the defendant's witnesses, what was the plaintiff's general character for honesty.

Mr. Justice J. PARKE. I think that is a legitimate question.

The question was put. Verdict for the plaintiff—Damages 40s.

Ludlow, Serjt., and C. Phillips, for the plaintiff. Talfourd, Serjt., and Godson, for the defendants.

[Attorneys-Winterbottom and Packwood.]

DOE on the demise of SHELLARD, Assignee of HARRIS the elder, an Insolvent, v. HARRIS the younger. March 30.

The protection of communications made by a client to his attorney, applies to all cases in which the relation of attorney and client subsists, and to all cases where the client applies to the attorney in his professional capacity.

An attorney cannot be asked whether A. applied to him to draw a certain deed, nor whether A. asked his advice for a lawful or an unlawful purpose.

EJECTMENT for two cottages and a piece of land at Bitton.

The real question in the case was, whether a deed dated in the year 1825, by which the property was conveyed by the insolvent to the defendant, was a bona fide or a fraudulent conveyance.

On the part of the lessor of the plaintiff, Mr. Stanley, an attorney, was called; and it was proposed, on the part of the lessor of the plaintiff, to ask him whether the insolvent had not applied to him to draw a conveyance in fraud of the creditors?

Ludlow, Serjt., for the defendant, objected that any conference between a client and his attorney was privileged; and he cited the case of Cromack r. Heathcote.(a)

(a) 2 B. & B. 4. In that case an attorney, who had been requested to draw an assignment of goods, had refused to do so; and the deed was drawn by another. The validity of the deed was afterwards questioned on the ground of fraud, in an action against the sheriff, in which the attorney first applied to was not employed. At the trial, it was held by Richards, C. B., that the communication made to this attorney was professional, and could not be given in evidence; and the Court of Common Pleas, on a motion for a new trial, were unanimously of opinion, that the evidence of fraud, proposed to be given by ans of proving this communication with the attorney, was properly rejected.

\*Talfourd, Serjt. contrà.—It was held in the case of Williams v. Mudie, ante vol. 1, p. 158, that the privilege was confined to cases where the communication relates to the bringing or defending an action; and, besides, no privilege can originate in an intended fraud. This is quite different from the case of a party confessing a by-gone crime to his attorney for the purpose of his defence, which

of course would be privileged.

Mr. Justice J. PARKE. I should not limit the privilege to those cases in which an action is contemplated. The Lord Chancellor has recently consulted with the two Lord Chief Justices and the Lord Chief Baron, and they considered that the privilege was not limited in the way that was stated by Lord. Tenterden. The protection applies, in my opinion, to all cases in which the relation of attorney and client subsists. I believe that the case decided by Lord Tenterden was the first in which the law was laid down with the limitation that he put upon it.

R. V. Richards.—There was also the case of Broad v. Pitt, ante, vol. 3, p. 518, decided in the Court of Common Pleas; and the case of Williams v. Mudie

was also acted upon in Ireland.(c)

Mr. Justice J. PARKE. I am aware that that case had been acted on since; but I consider that it has now been overruled by the Lord Chancellor, the Lord Chief Justice and the Lord Chief Baron.

Talfourd, Serjt., proposed to ask the witness, whether the insolvent

\*594] asked his advice for a lawful or an unlawful purpose?

Ludlow, Serjt., objected to the question.

Talfourd, Serjt.—I must ask it, unless your Lordship decides there is no difference between a lawful and an unlawful communication, and that both are

equally privileged.

Mr. Justice J. PARKE. There is a great deal of difficulty in the witness's disclosing whether the conference between him and his client was for a lawful or an unlawful purpose, without our being told what it was. It might be that the party asked if a particular thing could legally be done.

Talfourd, Serjt., proposed to ask, if the insolvent applied to the witness to

draw a certain deed?

Mr. Justice J. PARKE. I think, on the authority of the case of Cormack v.

Heathcote, that that question cannot be put.

Talfourd, Serjt.—That case can perhaps hardly be sustained to its full extent. Mr. Justice J. PARKE. I think that the safe course would be for me to abide by the case of Cormack v. Heathcote. I will, however, make a note of the objection. I am of opinion that the privilege applies to all cases where the client applies to the attorney in a professional capacity; and an application to draw a deed is, I think, of that description.

Verdict for the plaintiff. The evidence was rejected.

\*Talfourd, Serjt. and R. V. Richards, for the lessor of the plaintiff. \*5957 Ludlow, Serjt., and Justice, for the defendant.

#### [Attorneys-Drewe and Hinton.]

This case was mentioned by Mr. Justice J. Parke, on the argument of the case of Moore v. Terrill, in K. B., Easter Term, 1833.

#### DOE on the demise of HIATT and Others v. MILLER. April 1.

- A., having agreed to buy certain lands of B., had paid part of the purchase money, and was let into possession. B. had not executed any conveyance:—Held, that this was a
  - (c) We believe in the case of Rex v. O'Connell, which was a trial at bar.

mere tenancy at will in A., and that, if B. had made a demand of possession, to determine the tenancy at will, he might recover the lands by ejectment.

EJECTMENT. The lessors of the plaintiff having proved their title-

Curwood, for the defendant, opened, that, in the year 1828, one of the lessors of the plaintiff had agreed to sell the land in question to a person named Blackwell, who had paid 524., which was part of the purchase money, on which he was let into possession; he being willing to pay 113. more, which was the residue of the purchase money, on a proper conveyance being executed.

Mr. Justice J. PARKE. If there has been any demand of possession, or any thing to determine the estate at will which Mr. Blackwell had, the plaintiff is

entitled to recover at law.

On the part of the plaintiff, a demand of possession was proved.

Mr. Justice J. PARKE directed a-

Verdict for the plaintiff.

Ludlow, Serjt., and R. V. Richards, for the lessors of the plaintiff. Curwood and Justice, for the defendant.

[Attorneys-Warren and Lambert.]

# \*THOMAS v. MARSH and NEST. April 2.

**[\*5**96

By a private act of Parliament, the shire-hall of G. was vested in the justices of the peace for the county, in trust, to allow courts of justice to sit there, &c., and to permit and suffer it to be used for such other public purposes as a major part of the justices in Sessions should direct. The hall had always been used for the holding of the county musical festivals; but there was no evidence that the justice had, under that act, so directed it to be used:—Held, that the stewards of one of these musical festivals had such a possession of the hall, that they might justify the turning out an intruder. If, in answer to a plea of justification, stating that the plaintiff was intruding himself there, the plaintiff rely on his having a ticket, as giving him a right to be there, he must reply that specially. A replication de injurià in trespass, with a new assignment that the defendant committed the trespasses with more violence, and in a greater degree than was necessary for the purposes in the plea mentioned, is demurrable.

ACTION for assaulting the plaintiffs in a certain building at Gloucester, called the County Hall. Pleas-First, the general issue. Secondly, that, at the time when &c., the Right Hon. Lord Redesdale, R. S. H., Esq., C. W. C., Esq., the Rev. J. H. S., the Rev. M. F. T. S., and the Rev. R. W. G., were lawfully possessed of the said building called the County Hall; and that being so possessed, the said plaintiff, just before the said time when &c., to wit, on &c., was unlawfully in the said building and making a great noise and disturbance, and stayed and continued making such noise and disturbance, against the will and without the leave of the said Right Hon. Lord R. &c.; and thereupon the defendants, as servants of the said Lord R. &c., "then and there requested the said plaintiff to cease making the said noise and disturbance, and to depart from and out of the said building, which the said plaintiff refused to do;" whereupon the defendants gently laid their hands on him, and removed him. Third ples, that Lord Redesdale, &c., were the stewards of a certain musical festival, and as such were possessed of the County Hall for the celebrating the said festival, "and that no persons were admitted into the said building, except upon presenting a proper ticket of admission;" that the defendants were peace officers, and directed by the stewards to prevent any person from entering or being in the building, except upon such person presenting a proper ticket of admission; that the plaintiff came there without presenting a proper ticket of admission; and at he was requested to depart out of the building unless he presented a proper

ticket, which he refused to do; and therefore the defendants gently laid hands on him, &c.

Replication—That the defendants committed the trespasses of their own wrong \*597] and without the cause aforesaid; \*and they seized and laid hold of the plaintiff "with more force and violence, in a greater degree, and to a greater extent, than was necessary for the purposes" in the pleas mentioned.(a) Plea to the new assignment—Not guilty.

It appeared, that, on the 13th of September, 1832, there was a musical festi-

\*598] val and ball at the Shire-hall, at Gloucester, \*under the management of the six stewards named in the pleas; and that the musical festivals had been held in the Shire-hall ever since it had been built; but there was no evidence of any vote of the magistrates at the Quarter Sessions permitting its use in that way, although five of the stewards were also magistrates of the county; and it was proved by Mr. Goodrich, a magistrate, that he had attended the sessions for twenty years, and had never heard of any such permission. It further appeared, that the defendants were police officers, stationed at the Shire-hall to preserve order; and that Mr. Ford, one of the stewards, had directed them to keep the top of the grand staircase clear. It was proved, that the plaintiff had come up the grand staircase, and had his hand on the door of the ball-room as if going in; and that the defendants told him that he must not go in unless he produced a ticket. He then produced a performer's ticket; but was told that that ticket was for another entrance, which was the fact. The plaintiff insisted on going into the ball-room; and the defendants laid hold of him and pulled him down the stairs, and put him into the street.

Ludlow, Serjt., for the plaintiff. By the act of Parliament under which this hall was built, the defendants could have no right to be in it and turn other persons out of it, unless they had an authority from a majority of the magis-

trates at the sessions.(b)

(a) As this form of replication is not unfrequently seen in practice; and, as the learned Judge stated it to be demurrable, we have thought it best to set it forth at length. It was in the usual form of a replication de injuria to each of the special pleas, concluding to the country; and it then continued-"And the plaintiff further says, that he exhibited his said bill against the said defendants, and brought his action thereon, not only for the several trespasses in the respective introductory parts of the said second and third pleas mentioned and referred to, and attempted to be justified; but for that the said defendants, at the said times when &c. in the said declaration mentioned, with force and arms, &c. seized and laid hold of the said plaintiff, and pulled, forced, and dragged him down the steps or stairs, and pulled, forced, and cast him from and out of the said building into the said street, as in the first count mentioned, and laid hold of him, as in the second count mentioned, with more force and violence, and in a greater degree, and to a greater extent, than was necessary for the purposes in those pleas, or either of them, mentioned, in manner and form as the said plaintiff hath above thereof complained against them the said defendants; which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said respective introductions to the said second or third pleas mentioned, and therein attempted to be justified; wherefore, inasmuch as the said defendants have not answered the said trespasses above newly assigned, the said plaintiff prays judgment, and his damages by him sustained on occasion of the commit-ting thereof, to be adjudged to him," &c.

Rejoinder.—A similiter to each de injuria—"And the said defendants, as to the said several supposed trespasses newly assigned, say that they are not guilty thereof, or of any part thereof, in manner and form aforesaid," concluded to the country.

A new assignment that the trespass was in other lands, being in nature of a declaration, the defendant must plead to it in the same way as to a declaration. Odiham v. Smith, Cro. El. 589; Moore, 540; Goldsborough, 191. As to new assignments, see Greene v. Jones, 1 Wms. Saunders, 297 et seq., and the notes of Mr. Justice Patteson and Mr. E. V. Williams to that case. And as to costs in cases where there are new assignments, see the case of Broadbent v. Shaw, 2 B. & Ad. 940.

(b) By the private act of Parliament, 54 Geo. 3, c. clxxv. s. 59, intitled 'An act for the erecting a Shire-hall, and Courts for the administration of justice, and other buildings for public purposes for the county of Gloucester and county of the city of Gloucester, it is enacted, that the Shire-hall and buildings "shall hereby from henceforth be vested in, Mr. Justice J. Parke. There does not appear to have been \*any capture or Sessions; but the stewards had possession of the hall, and that capture is sufficient against a wrong-doer. You must rely on your new assignment; which, however, is certainly demurrable. The first plea states that the plaintiff was intruding himself into the hall; and, if he relied on his ticket as giving him a special right to be there, he should have replied it specially.

Ludlow, Serjt., replied, and went to the jury on the question of excess.

Mr. Justice J. PARKE (in summing up.) The pleas in this case state, that

Mr. Justice J. Parke (in summing up.) The pleas in this case state, that the plaintiff was making a great noise and disturbance; but that is not material in this case, as there was a request made to him to depart. The defendants have shewn that the stewards of the musical festival had possession of the hall for their concerts and balls; and I think there is abundant evidence that they they were in possession as against any person who had not a better right, although there is no evidence that they had the permission of the magistrates under the act of Parliament. If the plaintiff had meant to have relied on his ticket as giving him a right to be there, he should have replied it. The stewards having possession of the hall for this purpose, they must not only be taken to have the use of the rooms, but the avenues; for, if they had not a right to keep out improper persons, it would be of no use for them to have the hall. The officers for this purpose were their servants; and they gave the plaintiff notice to depart. The question therefore is, whether the defendants used unnecessary violence \*in removing the plaintiff, as they had authority to use such force as was necessary to turn him out.

Verdict for the defendants.

Ludlow, Serjt., and Busby, for the plaintiff. C. Phillips and Justice, for the defendants.

[Attorneys-Smallridge, and White & W.]

(Crown Side.)

BEFORE MR. JUSTICE TAUNTON.

# REX v. NICHOLS, GEORGE ORGAN PARSONS, and SARAH PARSONS. April 5.

The counsel for the prosecution in a case of felony opened that he should call A. and B. as witnesses, the former being a King's evidence. Both before and after those persons were called, the prisoner's counsel were allowed to ask the other witnesses, whether A. and B. were not persons of very bad character.

INDICTMENT against Thomas Nichols and George Organ Parsons, for robbing Henry Eade Stephens of sovereigns, bank notes, and promissory notes, and against Sarah Parsons, as an accessary after the fact, in harbouring G. O. Parsons.

Justice, for the prosecution, opened, that he should call a King's evidence, named John Smith, and also a witness named Ann Mercer.

and the same are hereby from henceforth vested in the justices of the peace for the time being for the said county of Gloucester, upon trust, and to the end, intent, and purpose" to allow the Courts of assize, sessions, hundred courts, county and city meetings, &c., to be held there, and to also "peaceably, quietly, and freely permit and suffer the said Courts of justice, Shirehall, and other buildings and premises, to be had, used, and enjoyed for such other public uses and purposes as the justices of the peace for the time being for the said county of Gloucester, at the General Quarter Sessions of the peace for the said county, or the major part of them, shall from time to time direct, order, or appoint." The section then goes on to provide for the Shire-hall being used for the holding of meetings, &c., for the city of Gloucester.

Mr. Justice J. PARKE, both before and after those persons were called, allowed the prisoners' counsel to ask the other witnesses for the prosecution, whether John Smith and Ann Mercer were not persons of very bad character.

Mr. Jackson, one of the witnesses for the prosecution, said, in answer to that question, and to the question whether he would believe those persons on their oaths—that they were both persons of very bad character; and, although he would not say he would not believe them on \*their oaths, yet he should not like to act on their testimony, unless it was confirmed by other evidence.

Verdict—G. O. Parsons, Guilty; Thomas Nichols

and Sarah Parsons, Not guilty.

Justice, W. J. Alexander, and Chichester, for the prosecution.

Curvood and Carrington, for the prisoner Nichols.

Watson, for the prisoners.

[Attorneys—Blozsoms & Co., for the prosecution—Weight and Crook, for the respective prisoners.]

### REX v. JAMES BERRIMAN and THOMAS BERRIMAN. April 6.

In an indictment for robbery the property was laid in J. H. It appeared that the prosecutor's name was J. W. H.:—Held, not material, if he was generally known by the name of J. H.

ROBBERY. The property was laid in John Hancox.

The son of the prosecutor stated, that his father's name was John Walter Hancox.

Mr. Justice J. PARKE. Is your father generally known by the name of John Hancox?

The witness. Yes, my Lord.

The case proceeded: but, at a latter stage of it, the prosecutor being called, it then appeared that his name was correctly stated in the indictment

Verdict—Guilty.

Justice and Phillpotts, for the prosecution.

C. Watson, for the prisoners.

[Attorneys-Newman and Crook.]

See the case of Rex v. Sheen, ante, Vol. 2, p. 634.

# NORTHERN CIRCUIT.

1833.

BEFORE MR. JUSTICE ALDERSON AND MR. BARON GURNEY.

(Crown Side.)

BEFORE MR. BARON GURNEY.

\*602] \*REX v. BINGLEY and LAW. March 12.

A. was attacked by robbers, who after using very great violence towards him took from

him a piece of paper, on which was written a piece of memorandum respecting some money that a person owed him:—Held, robbery.

ROBBERY. The prisoners were indicted for robbing John Atkinson of "one piece of writing paper of the value of one penny, one other piece of paper, of the value of one penny, and one written memorandum, of the value of one penny, of the goods and chattels of the said John Atkinson."

It appeared that the prosecutor, had, in the month of February, 1833, been at Pontefract Market; and that, before he left Pontefract, he had given all his money into the charge of the landlord of the inn at which he had taken refreshment; so that when he left the inn to go home, he had nothing in his pockets, except a slip of paper, which contained a memorandum of a sum of money which a person owed him. On his way home, the two prisoners rushed upon him and knocked him down, and after beating him till he was disabled, they rifled his pockets and left him; when he came to himself, he missed the slip of paper, which was never found afterwards.

Gurney, B. If any thing was taken away from the \*prosecutor by violence, however insignificant its value, that is sufficient to constitute robbery. In cases of robbery, the value is immaterial, and the prosecutor, by carrying this memorandum in his pocket, shewed that he considered that it was of some value to himself.(a)

Verdict—Guilty.

## \*(Civil Side.)

**[\*604** 

#### BEFORE MR. JUSTICE ALDERSON.

#### COPE v. COPE. March 14.

If a husband have access, and others at the same period have a criminal intimacy with his wife, and she have a child, such child is legitimate; but if the husband and wife be living separately, and the wife is notoriously living in adultery, a child born under such circumstances would be illegitimate, although the husband had an opportunity of access. On the trial of an issue, in which the question is, whether A. is the legitimate son of B., neither the declarations of B., nor of his wife, the mother of A., are receivable to show that A. is illegitimate.

Issue directed by the Master of the Roll, to try whether the plaintiff, Wil-

liam Cope, was the legitimate son of Richard Cope.

It appeared that Richard Cope and his wife had lived together for some years; but that, several years before the birth of the plaintiff, Richard Cope went to work at a place about fourteen miles distant from the place at which his wife and himself had resided, and at which she continued to reside; and it appeared

(a) In larceny and robbery, the value of the thing stolen is immaterial, but still it mus be of some value to the person robbed; and therefore, where a prisoner compelled the prosecutor, by threats, to give her his promissory note for a sum of money, which was therefore a void instrument in law, this was holden by the Judges not to be robbery, because the note was of no value to the prosecutor. Rex v. Phipoe, 2 Leach, 673. In the case of Rex v. Henry Clerk, R. & R. C. C. R. 181, where it was held, that stealing reissuable notes after they had been paid, and before they were, in fact, re-issued, did not subject the party to an indictment on 2 Geo. 2, c. 25 [then in force] for stealing notes: it was held that the party might be convicted on counts for larceny, in stealing "so many pieces of paper, each piece of the said paper being respectively stamped with a stamp of 4d. and being of the value of 4d.;" for, although it was contended that the paper and stamps in their then state were worth nothing, and that they would not sell for so much as a farthing, and that nothing could be the subject of larceny which was not worth the smallest current coin in the kingdom; yet the Judges held the conviction for larceny on these latter counts good, for the paper and stamps, particularly the latter, were valuable to the owners.

that, from that time, Richard Cope resided near the place at which he worked, but that he used to come home to the house at which his wife resided, at intervals of from three to six weeks; and that he always maintained his wife. The plaintiff's mother had five children, of whom the plaintiff was the youngest.

F. Pollock, for the defendant, proposed to give evidence of the declarations of

the plaintiff's mother, as to the illegitimacy of the plaintiff.

ALDERSON, J., rejected the evidence.

F. Pollock, proposed to give evidence of the declarations of Richard Cope, that

the plaintiff was not legitimate.

ALDERSON, J. It has been decided by Lord Hardwicke, that the declarations of a wife are not receivable to bastardize her child; and I think, a fortiori, \*305] that the \*declarations of the husband ought not. Lords Hardwick and Mansfield, have both decided, that illegitimacy can only be made out by the fact of their having been no marriage, or by proof of non-access.

The cvidence was rejected.

For the defendant, a copy of the plaintiff's baptismal register was put in, in which he was described as the illegitimate son of Isabella Cope. The clergyman by whom the plaintiff was baptized was living, but was not called as a witness.

ALDERSON, J., (in summing up.) If a child be born in marriage, during the life-time of the husband, it is presumed to be legitimate. It appears that the plaintiff in this case is the youngest child, that he was born after four other children, and during the lifetime of Richard Cope. He therefore is clearly legitimate, unless it be proved that the husband had no access. Now, it is shewn that he had opportunity of access, and if a husband have access, and others at the same time are carrying on a criminal intimacy with his wife, a child born under such circumstances is legitimate in the eye of the law. But, if the husband and wife are living separate, and the wife is notoriously living in open adultery, although the husband have an opportunity of access, it would be monstrous to suppose, that, under these circumstances, he would avail himself of such opportunity. The legitimacy of a child born under such circumstances could therefore not be established.

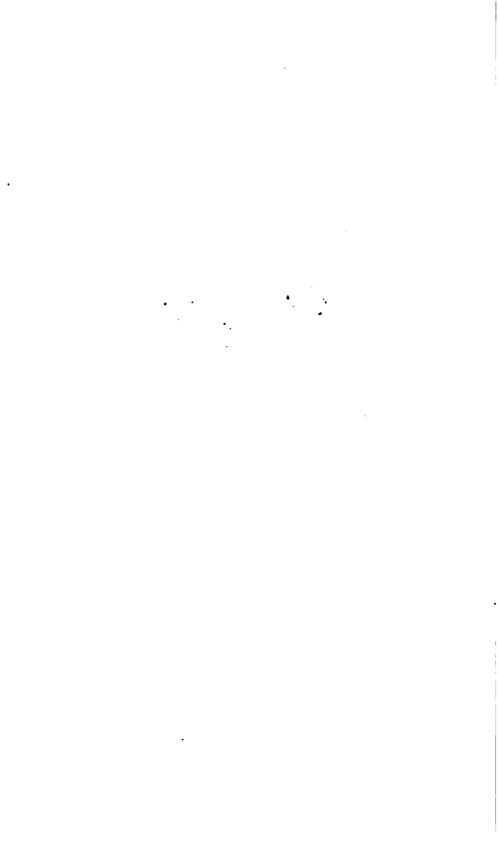
Verdict for the plaintiff.

\*606] J. Williams, C. Cresswell, and Wrangham, for the plaintiff. \*F. Pollock, Jones, Serjt., and Wightman, for the defendant.

See the case of Morris v. Davies, ante, Vol. 3, pp. 215 and 427, and the authorities there referred to; and also the report of the case of the Gardner Peerage, in the House of Lords.

#### PROMOTIONS.

In the vacation after Hilary Term, D. Pollock, Esq., Philip Courtenay, Esq., J. Blackburne, Esq., and W. H. Maule, Esq., were appointed his Majesty's counsel learned in the law.



# INDEX

TO THE

# PRINCIPAL MATTERS.

#### ABUSING CHILDREN. See Rape.

#### ACCESSARY.

It is not essential that there should have been any direct communication between an accessary before the fact and the principal felon. It is enough if the accessary direct an intermediate agent to procure another to commit the felony; and it will be sufficient even if the accessory does not name the person to be procured, but merely directs the agent to employ some person. Rex v. Cooper, 535

# ACCOMPLICE.

### See Manslaughter, 4.

A prisoner ought not to be convicted upon the evidence of any number of accomplices, unconfirmed by other testimony. Rec. v. Noakes.

#### ADMINISTRATOR.

An intestate died in the month of August: her next of kin took out letters of administration in the same month, and went and lived in her house till the month of November, when the goods of the intestate in the house were seized under a fieri facias against the administrator for a debt of his own: Held, that an action lay against the shoriff by the administrator, in his representative capacity, for this seizure. But, semble, that, if the administrator had remained in possession for a very long time, it would have been otherwise. Gaskell v. Marshall,

#### ADULTERY.

In an action of crim. con., letters written by the wife to third persons, before she became acquainted with the defendant, and in which she mentioned her husband, are receivable in evidence to shew the terms on which they were with respect to affection. Willis v. Bernard,

# AGENT. See PRINCIPAL AND AGENT. AGREEMENT.

A. having printed a work, sold 300 copies to B., a bookseller, at 40s. a copy, binding himself not to sell to others, in quires, under 48s., and in single copies under 50s. a copy, until B.'s 300 were sold, or his consent was obtained, In his letter, which constituted the agreement, he said to B. "I do not expect you to sell under 48s. and 50s., but do as you like." When B. had sold a part of the 300 copies, he went into partnership with C., and transferred all his stock at the cost price. He also sold some copies at 45s. and 46s.-A. in contravention of his agreement, sold under the stipulated prices; but, on being threatened with proceedings by B., per-suaded D., who had purchased the principal part, to consent to give them back, if it would satisfy B.-D. had an interview with B., and told him this. D. said, that he understood the arrangement was a settlement of the difference, and that B. went away from the interview perfectly satisfied: Held, in an action by B. against A. for a breach of the agreement, that neither the underselling by B. nor the transfer of the stock to the partnership, were grounds of nonsuit; but that the arrangement with D. was an answer to the action, if the jury thought it made an end of the dispute between the parties. Held, also, that, on the question of damages, it might be considered whether B.'s own underselling had or had not contributed to affect the price of the work in the market. Benning v. Devoe,

#### ALIEN.

 A. resided in Pennsylvania before the declaration of American independence, and he had a son, B., born there also before that period. In 1783, A. came to England, to get compensation for losses as an American 734 Index.

loyalist. In 1785, A. returned to Pennsylvania, where he died. B. never was in England. Semble, that both A. and B. were American subjects, and that A. became so by returning to Pennsylvania in 1785; and that a claim to lands could only (if at all) be made through them under the stat. 37 Geo. 3, c. 97, s. 24. Dod d. Stansbury v. Arkwright,

 What A. said in England as to why he came, is evidence.

# A MERICAN.

#### APOTHECARY.

A diploma of M. D. from the University of St. Andrew's, in Scotland, is no defence to an action for penalties under the 55 G. 3, c. 194, s. 20, for practising as an apothecary, without having obtained a certificate from the Apothecaries' Company; and, semble, that a similar diploma from an English university would not be so. The Apothecaries' Company v. Collins, 519

# APPREHENSION. See Imprisonment.

Magistrates have no authority to detain a person known to them, till some other person makes a charge against him. Before they detain a known person, they should have a charge actually made. Rex v. Birnie, 206

#### ARSON.

See Outhouse.-Lord Chief Justice Tindal's Charge, p. 265, n.

- If a person set fire to a stack, the fire from which is likely to and which does communicate to a barn, which is thereby burnt, the person is indictable for burning the barn. Rev. Chapper.
- Rex v. Cooper,

  2. A prisoner tried at the assises for arson, on Wednesday, the 20th of March, was, on Monday the 18th, served at the prison with a notice to produce a policy of insurance. The commission-day was Friday, the 15th, and the prisoner's home was ten miles from the assise town. Held, that the notice was served too late. Rex v. Ellicombe, 522
- 3. Held, also, that the intent to defraud an insurance office being charged in the indictment was not such notice to the prisoner as would make a notice to produce the policy unnecessary.

#### ASSAULT.

1. One of the marshals of the city of London, whose duty it was, on the day of a public meeting in the Guildhall, to see that a passage was kept for the transit to their carriages of the members of the corporation and others, directed a person in the front of a crowd at the entrance to stand back, and, on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him : Held, that in so doing the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity of removing the party in a more peaceable way. Imason v. Cope, 193

2. If one of two persons, fighting, unintentionally strike a third, he is answerable in

an action for an assault, and the absence of intention can only be urged in mitigation of damages. James v. Campbell, 372

#### ATTORNEY.

#### See EVIDENCE, 8, 18, 19.

1. A. brought an action for an attorney's bill against B., but only recovered a small sum for money lent, as there had been no bill delivered: Held, that A. might recover the amount of the attorney's bill in another action, brought after the bill was delivered, although this was a part of his demand in the first action; and that it was not necessary that he should have been nonsuited in the first action to entitle him to bring the second. Heming v. Wilton,

2. An attorney brought an action against the petitioning creditor, under a commission of bankrupt, for business done previous to the assignment: Held, that, notwithstanding the 14th section of the bankrupt act (6 Geo. 4, c. 16), he might maintain the action without proof that his charges had been allowed by the commissioners, according to the provisions of that section, as the whole was matter of investigation before the taxing officer. Fisher v. Filmer, 92

3. When two persons are in partnership as attorneys, it is sufficient, under the statutes 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23, if their bill for business done is signed in the name of the firm, without the Christian name of either partner. Smith v. Brown, 94

 An attorney in a cause is not answerable for the absence, neglect, or want of attention in the counsel engaged in it. Lowery v. Guilford.

ford,

5. Two persons in partnership as attorneys may recover in a joint action, for business done in the Palace Court, although it appear that one of them only was a person entitled to practise in that court. Arden v. Tucker.

An attorney cannot be asked whether A. applied to him to draw a certain deed, nor whether A. asked his advice for a lawful or an unlawful purpose. Doe d. Shellard c. Harris, 592

7. The protection of communications made by a client to his attorney applies to all cases in which the relation of attorney and client subsists, and to all cases where the client applies to the attorney in his professional capacity. Ibid.

#### AUTHOR.

1. An author was engaged to write for a certain sum an article to appear among others in a work called "The Juvenile Library." Before he had completed his article, and before any portion of it was published, the work in which it was to appear was discontinued: Held, that the publishers were not entitled to claim the completion of the article, that it might be published in a separate form for general readers, but were bound to pay the author a reasonable sum for the part which he had prepared. Held, also, that such reasonable sum was recoverable on a quantum meruit in a common count for work and labour. Planche v. Colbura, 53

If A., being the author of a law book, sell the copyright to B., and B. publish a third edition of the work edited by another, but not stated to be so, and which purchasers were likely to suppose was edited by A., such edition having errors and mistakes in it calculated toinjure the reputation of A. as an author: Held, at Nisi Prius, that, for this, an action lies by A. against B. The question, whether an edition purports to have been edited by A. is a question for the jury; but the question, whether the alleged errors and mistakes be so or not, and whether they are such as are calculated to injure the reputation of A. as an author, are questions for the Court. Archbold v. Sweet, 219

#### BATT

 One of the bail was called as a witness for the defendant and objected to; but on a sum equal to double the amount sworn to being deposited with the marshal of the L. C. B., his Lordship struck the witness's name out of the bail piece, and he was examined. Pearcy v. Fleming, 503

2. In an action against the sheriff for refusing to take bail, it is no answer to the action that the party arrested did not tender a bail bond. The sheriff is to prepare the bond. But, semble, that he is entitled to be paid for go doing by the party arrested. Millnev. Sir M. Wood, 587

#### BANKRUPT

See Concordat.—Evidence, 8.—Maliciously suing out a Commission of Bankrupt.

1. A was entitled to commission for introducing to a tradesman a purchaser for his business, which was to be paid on the completion of the bargain. After he had introduced the purchaser, but before the matter was settled, he became bankrupt, and his assignees brought an action for the commission, which they afterwards discontinued, and wrote to him, saying that they disclaimed all right to the money. A upon this brought an action in his own name: Held, that he was not entitled to recover. Hillary v. Morris,

A bankrupt is not indicable on the stat. 6 Geo. 4, c. 16, s. 112, for concealing his books till after he has concluded his last examination. Rex v. Walters,

 Parol evidence of any thing that a bankrupt says at the time of his last examination cannot be received, although it should appear that no part of what he said was taken down in writing.

 Whether on such an indictment, the petitioning creditor is a competent witness to prove the petitioning creditor's debt—Quere Itsid.

5. Where the bankruptcy of a party is stated in an allegation, in an indictment for a conspiracy, the assignment cannot be received as evidence in support of such allegation, unless it be proved by the subscribing witness. Rex v. Pope, 208

#### BIGAMY.

On an indictment against a man for bigamy, it appeared that, for the purpose of concealment, the second wife was married by a name by which she had never been known:

Held, that this was no answer to the charge, although, if the first marriage had taken place under such circumstances, that would have been thereby rendered void. Rex v. Penson,

#### BILL OF EXCHANGE.

See Composition, 2.—Evidence, 9.—Witness, 3.

1. A publican took from a person, who boarded and lodged in his house, a bill and a note, both at one time, for his score, part of which consisted of a demand for spirits, but not to the amount of either bill or note; money was also paid on account: Held, in an action on the securities, that, although they were given at the same time, the plaintiff might recover on one of them, and also that he might apply the money paid in reduction of the demand for spirits, although such demand could not be recovered, in consequence of the act of 24 Geo. 2, c. 40. Crookshank v. Rose,

2. Where a bill is by the acceptor made payable at a particular place, which is not his residence, proof of presentment at that place is not sufficient in an action against the drawer, without proof of the acceptor's handwriting. Sedywick v. Jager, 199

3. Semble, that an indorsee for value, who receives part payment from the drawer of an accommodation bill, and takes a new bill to give time for the payment of the remainder, does not thereby discharge the acceptor, unless he was aware that the acceptance had been given for the drawer's accommodation. Rolfe v. Wyatt,

Whether, if he knew that fact, it would make any difference—Quere. Ibid.

4. The traveller of a tradesman in London called on his employer's debtor in the country, and, being unable to obtain cash, consented, at the request of the debtor, to take an acceptance for the amount, and wrote the whole form of a bill except the name of the drawer, and sent it up to his employer, telling the debtor that he did not think it would be satisfactory. The employer kept the bill, but did not put his name to it as drawer. The traveller had no authority to sign bills, but was in the habit of sending them up without the drawer's name, to prevent risk by loss: Held, that these facts did not amount to proof of the drawing of a bill so as to prevent the creditor from recovering for his original demand, before the instrument purporting to be a bill became due. Vyse v. Clarke,

5. An offer on the part of the indorser of a bill to pay part of the amount, and the costs, and to give a warrant of attorney for the residue, will not dispense with the proof of notice of dishonour. Standage v. Creighton,

6. It was proved, in an action against the indorser of a bill of exchange, that, two months after it was due, it was produced to him, and inquiries were made as to the drawer and acceptor; upon which he said, that if the holder would take 10e. in the pound, he would secure it: Held, sufficient to dispense with proof of notice of dishonour. Dixon v. Elliott,

 A bill of exchange for twenty-five seventeen shillings and three pence, is a bill of exchange for twenty-five pounds seventeen shillings and three pence, and may be declared on as such. Phipps v. Tanner,

 A. procured a banking company to advance 100L on a bill of exchange for 300L, A. giving the company his guarantie for the amount so advanced, but having no other interest in the bill: Held, that A. might recover the whole amount of the bill in an action against the acceptor, and not merely the amount for which he gave his guarantie.

Reid v. Furnival,

499

In an action on a bill of exchange, where
the defence is that the bill had been altered,
the defendant cannot go into evidence to
shew that other bills had been likewise altered. Thompson v. Mosely, 501

#### BOND.

#### See STAMP.

A bond was executed by a person who could not write: Held, that if there was no other plea besides non est factum, the defendant's counsel could not ask whether the bond was read over to the defendant before he signed it, nor what was the transaction respecting which it was given. Cranbrook v. Dadd, 402

#### BRIBERY.

#### See TRRATING.

1. Two of the electors of a borough went to a banker there, and said, they wished to draw checks upon the bank. The banker promised to honour any checks they might draw. The checks drawn were signed by one only, but the account in the banker's books was opened in the joint names: Held, that they might maintain a joint action against the candidate in whose interest they were, if he adopted the payments made. Bremridge v. Campbell,

2. Semble, that, where the same sum is given to every voter coming from the same place to an election, for his travelling expenses, it is bribery; and it is not the less so, though all the candidates agree in the payment of the same amount. But it is for the jury to say, in an action by an agent of the candidate to recover the amount from his principal, whether the money was bona fide paid for expenses, and expenses only.

1bid.

#### BUILDING ACT.

The building act, 14 Geo. 8, c. 78, s. 100, limits actions to be brought within three months. A. had begun to build a party wall, partly on the soil of B., more than three months before the action, but had not completed it till within that time: Held, that B. might recover for such part of the trespass as was committed within the time limited; but that, if nothing had been done within the three months, he must bring ejectment. Trotter v. Simpson,

#### BURGLARY.

If a married woman take a house in which a burglary is committed, the house must be laid as the house of the husband, although she be living separate from him. Rex v. Smyth, 201

#### CARRIER.

#### See STAGE COACH.

 In stating the termini of the journey in declaring against a carrier, the word London will be taken as a nomen collectivum, including all that is commonly so called, and not the city merely. Beckford v. Crutwell, 2. If a carrier directs goods to be sent to a particular booking office, he is answerable for the negligence of the booking office keeper. Colepepper v. Good,

3. In an action against the carrier, the person at the booking office who delivered the goods to the carrier, is a competent witness to prove the state in which they were delivered. Bid.

#### CATTLE.

If A. set fire to a cow-house and burn to death a cow which is in it, A. is indictable under under the statute 7 & 8 Geo. 4, c. 30, s. 16. for killing the cow. Rex v. Haughton, 559

#### CERTIFICATE FOR EXECUTION.

1. Practice as to certificates for execution, under the statute 1 Will. 4, c. 7, s. 2. Barford v. Nelson,

2. In cases of ejectment, the certificate of the Judge must, under the stat. 11 Geo. 4, c. 70. s. 38, be for immediate possession, or the case must take its ordinary course: but if the Judge should think that some time ought to be allowed to the defendant, he will grant a certificate for immediate possession, the leasor of the plaintiff undertaking not to enforce it for a certain time. Doe d. Packer v. Hilliard,

#### CHARITABLE INSTITUTION.

1. A member of a committee of management, taking an active part in the concerns of a charitable institution supported by voluntary contributions, is liable for goods furnished by a tradesman for the use of the institution, although it appear that such tradesman did not furnish them on any contract with the committee, but having at first furnished goods on the credit of an individual, who, previously to the formation of a committee, had the sole management, continued to send them in afterwards on orders given, as before, by the servants of the institution, without any inquiry as to who was liable to pay him. Glenester v. Hunter,

2. If a builder do work at an intended hospital on the order of the physician and surgeon, they being announced to deliver lectures there, and being members of the provisional committee, such building is not bound to look solely to the funds of the hospital for payment, but may sue the persons who gave the orders, unless he was distinctly informed that the dealing was to be on the terms of looking for payment to the funds of the hospital only. Pink v. Scudios.ore 71

#### CLERK.

#### See PARISH CLERK.

#### CLOTH TRADE.

Semble, that there is not any custom in the cloth trade, by which a tailor, who receives cloth from a clothier which he does not approve, is bound to pay for it, if, when sent back, it does not reach the seller, unless he shews that he has delivered it to the seller's order in writing. Davice v. Halton, 69

#### COMMENCEMENT OF ACTION.

#### See TIME.

#### COMPOSITION.

1. A., being creditor of B., had executed a

composition deed, in which it was stipulated that the debt should be paid at 6e. in the pound, by promissory notes. After executing this deed, A. obtained payment from B. in full: Held, that B. could not recover back the difference between the full amount and 6e. in the pound, without proving that the composition notes had been paid, or giving some evidence that would be equivalent to such proof. Ward v. Bird,

2. A. advanced 100% to B. on the joint and several promissory note of B. and C., the latter at that time owing A. 65%, on his own account. C. failed, and, at a meeting of his creditors, A. and others entered into a resolution that C. should assign certain property for the benefit of his creditors; and that his creditors should give him a release. the meeting, stated his debt to be 65L, and he afterwards received a dividend on that sum; subsequently to this B. failed; Held, that A. could not then sue C. on the promissory note. Seager v. Billington, CONCORDAT.

Where parties have become bankrupt in France, but have been reinstated in their affairs by a concordat; it is not necessary in an action

brought by them for money due to them before their bankruptcy, to prove that they have performed their part of the concordat. but they should shew that the action is brought with the assent of the commissioners named therein. Orr v. Browns,

#### CONFESSION.

- 1. On the trial of a prisoner, who has made before a magistrate a voluntary confession of his guilt, previous to the conclusion of the evidence against him, which confession is taken down in writing, and signed by the prisoner, and attested by the magistrate's clerk; the proper course is, for the clerk to give evidence of the prisoner's statements, refreshing his memory by the written paper. Rex v. Bell.
- 2. A prisoner indicted for stealing two heifers, said: "I drove away two heifers from 'the World's End Dolver," (i. c. Fen). The prosecutor's farm was called by that name, but he could not swear that there was not any other of the same name in the neighbourhood: Held, insufficient to warrant a convic-
- viction. Rex v. Tuffs, 167
  3. A prisoner ought to be told by the magistrate, that, if he makes any statement, it may be used as evidence against him; and that he must not expect any favour if he confesses: but the magistrate ought not to dissuade him from confessing. Rez v. Green,
- 4. A girl, accused of poisoning, was told by her mistress, that if she did not tell all about it that night, a constable would be sent for in the morning to take her before a magistrate; she then made a statement, which was held to be not admissible in evidence. Next day, a constable was sent for, and as he was taking her to the magistrate, she said something to him, he having held out no inducement to her to do so: Held, that this was receivable, as the former inducement ceased on her being put into the hands of the constable. Rex v. Richards,

5. The committing magistrate had told a prisouer, that he would do all that he could for | 1. If A., without the authority of B., pledges

him if he would make a disclosure: after this, the prisoner made a statement to the turnkey of the prison, who held out no inducement to the prisoner to confess: Held, that what the prisoner said to the turnkey could not be received in evidence, more especially as the turnkey had not given the prisoner any caution. Rex v. Cooper, 535

- 6. A man and woman being apprehended on a charge of murder, another woman, who had the female prisoner in custody, told her, that she "had better tell the truth, or it would lie pon her, and the man would go free:" Held, that a declaration of the female prisoner, made to this woman afterwards, was not receivable in evidence. Rex v. Enoch,
- 7. A statement relating to an offence, made upon oath by a person not at the time under suspicion is admissible in evidence against him, if he be afterwards charged with the commission of it. Rex v. Tubby.

#### CONSTABLE.

See FORCIBLE ENTRY. 3 .- IMPRISONMENT.

CONTRA PACEM. See Indictment. 3. CONVICTION. See DEER .- EVIDENCE, 3.

COPYRIGHT. See Author, 2.

#### CORN TRADE.

By custom in the corn market, a buyer may pay the factor upon discount within the two months which constitute the ordinary time of payment, either for his own accommodation, or that of the factor; and, therefore, where a factor stopped payment after he had received the money for corn sold, but before the expiration of the two months, it was held, that the principal could not sue the buyer, but must look to the factor. Heisch v. Carrington,

#### COSTS.

See Expenses .- Landlord and Tenant, 6.

#### DEER.

#### See PARK.

On an indictment under the stat. 7 & 8 Geo. 4, c. 29, s. 26, for killing a deer after a previous summary conviction, a conviction by two Justices of the previous offence was put in: Held, that such a conviction was good. This conviction, in stating the offence, did not state the place at which it was committed; but the Justices, in awarding the distribution of the penalty, awarded it to the overseers of D. in the said county, "where the said offence was committed:" Held, sufficient. Rex v. Weale,

#### DEPOSITIONS.

It is the duty of a magistrate to return to the Judge, not only the depositions of witnesses, but also any confession taken down as made by the prisoner: and it is no excuse for not doing so, that the confession was wanted to be sent before the Grand Jury. Rex v. Fallows,

#### DETINUE.

Vol. XXIV.—47

INDEX. 738

his property with C., a joint action of detinue is maintainable by B. against both A. and C. Whether in such an action a verdict may be taken against one defendant only Queere. Garth v. Howard, 346

2. Statements made by the shopman of a pawnbroker who is left in the shop to answer in his master's absence, can only be received in evidence in an action against the master, when they relate to transactions which are strictly within the business of a pawnbroker: and are not receivable if they relate to an advance of money not within the terms of the Pawnbrokers' Act. Ibid.

3. If the jury, in such a case, are satisfied that B. held out A. as a person authorized to pledge his property for the purpose of raising money, they may find a verdict for both

defendants.

#### DISTRESS.

Thid.

See LANDLORD AND TENANT, 4, 5, 7 .- RE-CRIVER.

The carriage of A., being on the premises of B., was seized by C. for rent due by B. to his landlord, D. In an action of trover brought by A. against C., a witness proved that B. had held the premises of D. for more than a year, but that he had a lease of them: Held, that the lease must be produced and given in evidence, and that B.'s acquiescence in the distress would not dispense with such proof. Skepherd v. Cafe, 418

#### DOG. See PARK, 1.

- 1. In an action against a party for keeping a dog accustomed to bite mankind, it is not essential that the dog should be his; if he harbours the dog, or allows it to be at and resort to his premises, that is sufficient. M'Kone v. Wood,
- 2. In an action for not sufficiently securing a fierce dog, kept by the defendant, and by which the plaintiff was bitten, the plaintiff may recover, notwithstanding he had, on a previous day, been warned against going near the dog, if the jury think that the accident was not occasioned by the plaintiff's own carelessness and want of caution. Curtie v. Mille, 489

#### DURESS.

#### See MACHINE BREAKING.

#### EJECTMENT.

See CERTIFICATE FOR EXECUTION, 2 .- LAND-LORD AND TENANT, 2.—LIMITATION, 5.

#### ELECTING.

A. was indicted for shooting at B., a gamekeeper; there being another indictment against A. for night poaching: Held, that although both indictments related to the same transaction, yet these were offences quite distinct from each other, and that the prosecutor ought not to be put to his election to go upon one indictment and abandon the other. Rex v. Handley,

#### EMBEZZLEMENT.

1. A. gave his clerk 5l., out of which he was to pay for an advertisement; he paid 11., but told A. he had paid 21. 0s. 6d., and accounted with A. accordingly: Held, no embezzle-

ment; and that, if in such a case the indictment, hesides containing a count for emberslement, contained a count for a lareeny charged to have been committed "in manner and form aforesaid," the prisoner could not be convicted on that count. Rez v. Mer-

2. Where a party is charged with embende-ment, the Judge, before the indictment is found, will order the prosecutor to furnish the prisoner with a particular of the charges, if the prisoner make an affidavit that be does not know what the charges are, and that he has applied to the prosecutor for a particular, and it has been refused. Rev v. 300 Bootyman,

3. The prisoner had worked for the prosecutor sometimes as a regular labourer and sometimes as a roundsman, but, at the time in question, he, not being at all in the proce-cutor's service, was sent by the prosecutor to get a check cashed at a banker's, for doing which he was to be paid sixpence. He got the cash and made off: Held, no embessiement, as the prisoner was not a servant of the prosecutor within the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 47. Rex v. Freeman.

#### EVIDENCE.

- See ACCOMPLICE. ADULTERY .- ALIEN, 2 .-Attorney, 6, 7.—Bankrupt, 3, 4, 5.—Bul of Exchange, 9.—Bond.—Convession.— Detinue, 2.—False Representation, 3.— FORGERY, 2, 3, 6.—INSOLVENT, 4, 5.—LEGI-TIMACY, 2.—LIBEL, 4, 5.—LIEN, 1.—MA-CHINE BREAKING.—MANSLAUGHTER, 4.—PA-LACE COURT .- PAVING .- PAYMENT OF MO-NEY INTO COURT .- PERJURY, 2 .- SEISIE.
- 1. Where an indictment is founded on a written instrument, and where the instrument itself is the crime, it is receivable in evidence, although not stamped; but where the indictment is for an offence distinct from the instrument, and the instrument be only introduced collaterally, it cannot be received unless it be properly stamped. Rer v. Smyth,

2. Persons who cohabit as man and wife, after a marriage de facto, supposed by both to be a good marriage in law, may, after the marriage is found to be a nullity, give in evidence, in a Court of justice, statements made by each other during the cohabitation. Wells v. Flotcher, 12

3. If a plea justifying a lible state that an information was laid before a magistrate, an examined copy of the magistrate's conviction, reciting the information, is sufficient proof of the information. Scarth v. Ger-

dener,

 In slander, the words imputed the prescribing of medicine in improper doses, and the defendant justified: Held, that medical books, which were stated by the medical witnesses to be works of medical authority. could not be put in, to shew that such doses were sanctioned; but, that the medical witnesses might be asked their judgment, and the grounds of it, which might in some degree be founded on these books as a part of their general knowledge. Collier v. Simpson.

5. A brought an action against the sheriff for a false return of nulla bona to a fi. fa. issued against the goods of B. B. had filed a bill of discovery against A., on which there had been a decree or order, that A. should bring into the Court of Chancery all letters written by B. or any other person to him respecting the original debt. A., under this decree or order, brought in various letters: Held, that none of them could be read in evidence on the part of the defendant in the present action, without first putting in the bill and answer. Hewsit v. Piggott, 75 6. The statements in a special plea, on which

6. The statements in a special plea, on which judgment has been given for the plaintiff on demurrer, cannot be used at the trial of the cause as an admission on the record by the defendant; but the cause must be tried on the general issue, without any reference to the special plea at all. Firmin v. Crucifix,

7. If, in a case of felony, a witness for the prosecution is too ill to attend the assizes, this is a good ground for postponing the trial, but will not authorize the reading the deposition of the witness taken before the magistrate. Rex v. Savage, 143

8. A conversation between a client, who afterwards becomes bankrupt, and his attorney's clerk, on the subject of his affairs, is a privileged communication, and cannot be given in evidence in an action by his assignees, for the purpose of shewing his motives. Boveman v. Norton, 177

9. A witness formed his opinion of the handwriting of a party from having observed it signed to an affidavit used in the cause (on a motion to postpone) by the counsel for the party against whom it was proposed to be proved: Held, sufficient. Smith v. Sainebury, 196

10. A witness is not only not bound to answer a question, the answer to which would eriminate him, but he is not bound to answer any question, the answer to which would tend to criminate him. A witness is, therefore, not bound to answer whether he wrote an advertisement referring to libellous letters which the prosecutor had received; and, though he is bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself. Rex v. Nanev.

self. Rex v. Slaney,

11. A clork who has seen numerous letters addressed by a party to his employer, and has acted on those letters, may prove the handwriting of such party.

Ibid.

12. An information for a libel stated that the prosecutor had received certain anonymous letters, and that of and concerning those letters the defendant published a libellous placard. The defendant was proved to have caused the placard to be published. In the placard it was asked if the prosecutor had not received certain warning. The prosecutor stated that he understood that to refer to the letters, and that he should not have understood the meaning of the placard if he had not received the letters: Held, that the letters might be read in evidence as explanatory of the placard, without proof of the handwriting of them.

1 bid.

13. The statements in a special plea, which has been holden bad on demurrer, are not evidence for the plaintiff on the general issue, although the jury are to assess damages as well as to try the case on the

general issue. Montgomery v. Richardson, 247

14. Any evidence that is a confirmation of the original case cannot be given as evidence in reply; and the only evidence that can be given in reply, is that which goes to out down the defence without being any confirmation of the original case. Rex v. Hitdisch, 299

15. Where the examination on interrogatories of an absent witness is read on the part of the plaintiff, the whole, including the answers to the cross-interrogatories, must be read as part of his case. Temperley v. Scott.

16. A witness cannot be called to contradict another who denies having made a particular statement, if such statement was not of a fact, but only of a matter of opinion; as such statement of opinion does not come within the rule which confines contradictions to matters directly connected with the issue in the cause. Ellow v. Larkins, 385

17. Written admissions made for the purpose of a former trial may be used on a new trial. If the party who made them wishes to withdraw them, he should take out a summon before a Judge, in order to obtain his permission.

\*\*Total Company of the Property of the Property

18. If the clerk of an attorney has the management of a cause, what he says is receivable in evidence, the same as if it had been said by the attorney himself. Standage v. Creighton, 406

19. A debtor, being in prison, wrote to the town agents of his creditors' attorneys, requesting them to send a confidential clerk to him, with whom he might communicate on the subject of his creditors' claim: Held, in an action by the creditors to recover the claim, that what the debtor said to the person who went to him in consequence of his letter, was receivable in evidence, even though the subject-matter of the communication was an offer of 10s. in the pound. Hill v. Elliott,

20. A witness for the defence cannot be asked whether he has heard a witness for the prosecution commit perjury on the trial of a cause: and, in stating whether he would believe that witness en his oath, he must do so from his knowledge of the witness's general character, and not from having heard him give particular evidence on a particular trial. Rex v. Hemp, 468

21. The minute book of a Court of Quarter Sessions is not evidence of its proceedings. The record should be made up on parchment, and an examined copy produced by a witness who examined it. Rex v. Thring,

22. On the trial of an indictment for arson, a witness for the prosecution was himself in custody on a charge of felony. The counsel for the prisoner wished to ask him, "Have you not said that you committed the offence for which you are now in custody?" Held, that this question ought not to be put. Rex

v. Pegler,

23. What a party says in evidence against himself as an admission, notwithstanding it may relate to the contents of a written paper. Earl v. Picken,

542

24. The counsel for the prosecution opened that he should call A. and B. as witnesses,

the former being a King's evidence. Both before and after those persons were called the prisoner's counsel were allowed to ask the other witnesses whether A. and B. were not persons of very bad character. Rez v. Nichols, 600

#### EXPENSES.

 On the trial of an indictment for manalaughter, the surgeon will only be allowed for his attendance on the trial, and not for his fee for opening the body by order of the coroner. Rex v. Taylor,

 The Judge, on a trial for murder, has no power to allow the expenses of the witnesses for their attendance at the coroner's inquest. Rex v. Rees.

3. A prosecutor and his witnesses were bound by recognisances to prosecute and give evidence at the assises. They attended there, and preferred an indictment, which was found. The prisoner had been by mistake discharged by proclamation at an adjourned session which preceded the assizes, and had absoonded. The Judge allowed the expenses. But semble, that if the prosecutor and witnesses had merely appeared at the assizes, and had not preferred any indictment, the Judge would have had no power to allow any expenses. Rex v. Robey, 552

#### FALSE PRETENCE. See Forgery, 7.

#### FALSE REPRESENTATION.

#### See WARRANTY.

A tradesman can only recover against a
person making a false representation of the
means of one who referred to him, such damage as is justly and immediately referable
to the false representation. Therefore, if
the tradesman gives an indiscreet and illjudging credit, he cannot make the referee
answerable for any loss occasioned by it.
Corbett v. Brown, 363

2. A party bought a ship under a representation that she was copper fastened. He ascertained in the course of a few days that she was not, but did not make any complaint to the seller till several months afterwards, when she had been on a voyage and returned: Held, that this delay would not prevent his recovering, provided the action was in other respects maintainable. Freeman v. Baker.

 Held, also, that "Lloyd's Register of Shipping" was not admissible in evidence to shew that the vessel was considered as copper fastened.

per fastened.

4. The contract stated, that the vessel was to be delivered with all her stores according to the inventory. The inventory was at the end of the advertisement for the sale: Held, that this did not import into the contract the representation as to the vessel contained in the advertisement, as the vessel itself was not mentioned in the inventory, but only the stores.

\*\*Thick\*\*

\*\*

5. The questions for the jury in such a case are, whether the vessel was in fact copper fastened; and, if it was not, did the seller know that it was not? and if he did, did he use any means to conceal the fact from the buyer?

\*\*Thick:\*\*Thick: Thick: Th

#### FORCIBLE ENTRY.

 An indictment for a forcible entry cannot be supported by evidence of a mere treepass; but there must be proof of such force, or at least such shew of force, as is calculated to prevent any resistance. Rex v. Smyth, 201

2. If a wife, separated from her husband, take a house of which the husband, with the landlord's consent, obtains possession: Semble, that if the wife come with others and make a forcible entry into this house, she may be convicted on an indictment for a forcible entry, stating it to be the house of the husband. Ibid,

3. Where a constable entered a house with a warrant in his hand, and searched it, and for such entering and searching was indicted for a forcible entry: Held, that his counsel might ask the witnesses for the prosecution what the constable said at the time as to whom he was searching for.

1bid.

#### FORGERY.

1. A forged paper was in the following form—
"Per bearer two 11-4 superfine counterpanes. T. Davis, E. Twell." It was not addressed to any person: Held, by the 15 Judges, that it was neither an order nor a request within the stat. I Will. 4, c. 66, a. 10, (the forgery consolidation act). Rez, Cullen,

On an indictment for forging a check, purporting to be drawn by G. A. upon Messra. J. L. & Co., proof that no person named G. A. keeps an account with or has any right to draw on Messra. J. L. & Co., is prima facie evidence that G. A. is a fictitious person. Rex v. Backler,

3. Where a bill purported to be accepted by "Samuel Knight, Market-place, Birmingham"—It was held, on an indictment for the forgery of the acceptance, that the result of inquiries made at Birmingham by the procedutor, who was not acquainted with the place, was evidence for the Jury, though neither the best nor the usual evidence given to prove the non-existence of a party whose name is used. Rex v. King, 123

4. The practice of issuing county court processes in blank for the attorneys to fill up after they have been issued by the county clork, is highly irregular; and semble, that the filling up of a county court summons, or altering a distringas into a summons after it has been so issued in blank, is a forgery at common law. Rex v. Collier, 160

5. An indictment which charges a forged check to be a "warrant and order for the payment of money, which said warrant and order is in the words and figures following," is good. Rex v. Orouther, 316

Rex v. Crowther,

5. A forged check on the W. bank was presented for payment at the S. bank, where the supposed drawer never kept cash: Held, that this was sufficient evidence of an intent to defraud the partners of the S. bank, although there was no probability of their paying the check, even if it had been genuine.

1bid.

 A person who obtained goods on delivering a forged letter—"Please to let the bearer W. T. have for J. R. 4 yards of linen," signed J. R., is not indictable for obtaining goods by false pretence, as this is uttering a forged request for the delivery of goods which is a felony under sect. 10 of the stat. 1 Will. 4, c. 66. Rex v. Ecans, 553

#### GAME.

#### See POACHING.

- To bring a party within the stat. 52 Geo. 3, c. 93, for not producing his game certificate, it is not necessary that the demand of it should be made on the land on which he was sporting; but the demand must be made so immediately after the party has left the land, as to form part of the same transaction. Scarth v. Gardener.
- Scarth v. Gardener, 38
  2. It is not necessary that the person making the demand should produce any certificate; and if the other party refuses to produce his, he takes the risk of whether the person demanding it is one having a right to make such demand.

  Ibid.
- 3. If a person refuses to produce his game certificate, or to tell his name or residence, the person demanding need not go on to ask in what place, if any, he is assessed to the game duty. Ibid.

# GOODS LET ON HIRE.

#### See Horse.

# GOODS NOT CONFORMABLE TO CONTRACT.

Where a party contracted to supply and erect a warm air apparatus for a certain sum: Held, in an action for the price, (the defence to which was, that the apparatus did not answer,) that, if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sum as would enable the defendant to do what was requisite. Cutter v. Close, 337

#### GOODS SOLD.

#### See CHARITABLE INSTITUTION.

- A. sold to B. a butt of wine, which was not delivered. B. compounded with his creditors, and the amount of the wine was, by A.'s consent, included in the composition. The composition money was secured by bills, and A. had a claim against B. beyond the price of the wine. Before the whole of the composition was paid, B. demanded the wine of A., who refused to deliver it; Held, that he was bound to deliver it, as he had undertaken to do so; and that the doctrine with respect to stoppage in transitu did not apply under the circumstances. Nichole v. Hart,
- 2. A., a publisher, had for some years supplied a periodical work to W. as fast as the numbers came out. W. died, and A., not knowing of his death, continued sending the numbers of the work by the stage coach, addressed to W. These numbers were received by B., who had succeeded to the property of W., and there was no evidence that B. had ever offored to return them: Held, that A. might maintain an action for goods sold and delivered against B., though at the time of the deliveries A. was not aware of the death of W. Weatherby v. Banham, 228

#### GUARANTIE.

A person gave a guarantie in these words, "I hereby agree to be answerable for the payment of 50% for T. L. In ease T. L. does not pay for the gin, &c., he receives from you, I will pay you the amount:" Held, that it was not a continuing guarantie. Nicholoon v. Paget,

#### HIGH TREASON.

- If a true bill be found against a person for high treason, the Judge will, on the application of the counsel for the Crown, order the Sheriff to furnish the solicitor to the Treasury with a list of the persons to be summoned on the jury, that a copy of it may be delivered to the prisoner. Rex v. Colline, 305
- Semble, that counts charging a party with high treason in "compassing &c. the maim and wounding" of His Majesty, and with "compassing &c. the wounding" of His Majesty, are bad.
- 3. The prisoner, in a case of high treason, has a right to address the Jury in addition to the speeches of his counsel—and semble, that both the prisoner's counsel have a right to address the Jury, although there be no evidence on the part of the defence. Ibid.

#### HIGHWAY.

#### See WAY.

A road had been repaired by a parish, and persons on horseback had used it; but there was no evidence that any carriage had ever gone along the whole length of it: Held, that the parish could not be convicted of non-repair of it on an indictment stating it to be a way for carriages; and that there should have been a count in the indictment charging it to be a way for horses. Reev. The Inhabitants of St. Weonard's, 579

#### HORSE

A. let a horse on hire to B. for one month, B. kept it for two months, and then sold it to C.: Held, that A. might recover the value of the horse from C., although C. had acted bone fide, and had paid B. the full value.

Shelley v. Ford,

313

#### HORSE RACE.

- The clerk of the course at a race cannot set off a claim of an unpaid stake due from the plaintiff on one race against a stake of another race won by the plaintiff's horse. Charlton v. Hill,
- 2. The clerk of the course at a race cannot bring actions for unpaid stakes. Ibid.

#### HUSBAND AND WIFE.

#### See EVIDENCE, 1, 2.—LEGITIMACY.

- 1. To make a husband liable for his wife's board and lodging at the house of a third person, when the wife leaves in consequence of a dispute, it must be shown, either that his conduct rendered it improper for her to live with him, or that he knew where she was residing, and did not make any offer to take her back, except upon conditions which he had no right to make. Reed v. Moore,
- A man is answerable to a third person for what is done by his wife, so long as the relation of husband and wife continues, though

they may be permanently living apart; at least, if it be not shewn that the wife at the time was living in adultary. Head v. Bricco.

#### IMPRISONMENT.

A weman died after a very short illness; rumours were generally in circulation in the neighbourhood where she had lived that her husband had poisoned her, and a great crowd was collected in front of his house; upon which the constable of the parish, without any warrant, took him into custody, and conveyed him before a magistrate, who detained him until a medical man had reported the cause of death, and then discharged him: Held, that if the Jury were of opinion that the constable had reasonable ground of suspicion to justify the apprehension, the action could not be maintained. Nicholeon v. Hardwick, 495

#### INDICTMENT.

See LARCENY, 1.—MANSLAUGHTER, 1, 2, 3, 7.
MURDER, 2, 3, 5.—POACHING.—RIOT ACT.

 Where an indictment is tried at Nisi Prius, the nisi prius record does not shew what names were on the back of the indictment. Rec v. Smyth, 201

 On an indictment for felony, a matter, which was the subject of another indictment for felony, was material to be given in evidence, as it formed a part of the facts of the case. The Judge received the evidence, and did not direct the second prosecution to be abandoned. Res. v. Solibburg. 155

abandoned. Rex v. Salisbury, 155
3. An indictment preferred in 2 Will. 4, for a felony committed on the 12th of March, 1830, charged the offence to have been "against the peace of our Lord the King." This was objected to as soon as the case for the prosecution had closed. The prisoner was convicted, and the fifteen Judges held the conviction right. Rex v. Chalmers, 331

4. In an indictment the property was laid in J. H. It appeared that the prosecutor's name was J. W. H.: Held, not material, if he was generally known by the name of J. H. Rex v. Berriman. 601

#### INSANITY.

To justify the acquittal of a prisoner indicted for murder on the ground of insanity, the Jury must be satisfied that he was incapable of judging between right and wrong, and at the time of committing the act did not consider that it was an offence against the laws of God and nature. Rex v. Offord, 168

#### INSOLVENT, See Release.

1. An insolvent debtor, omitting to state in his schedule debts due to him, is not indictable for perjury, although he has sworn to the truth of his schedule; but he must be indicted for a misdemeanor, under sect. 70 of the insolvent debtors' act, 7 Geo. 4, c. 57. Perjury under sect. 71 of that act is only committed as to things falsely stated in the schedule. Rev. Monday

schedule. Rex v. Moody,

2. The form of oath at the end of an insolvent's schedule is an affidavit in writing, and may be so stated in an indictment for perjury.

10td.

3. Debts due to the inselvent are "effects or property," within sects. 70 of the inselvent debtors act.

1bid.

4. In an action by the assignee of an insolvent, it is necessary to prove the provisional assignment, although, by the Insolvent Debtors' Act, 7 Geo. 4, c. 57, it must be executed at the time of signing the petition, on which the adjudication of the Insolvent Debtors' Court (which is a court of record) is founded. Jeffrey v. Robinson, 230

5. In an action by the assignee of an insolvent, a letter written by the defendant was given in evidence; on the back of it something had been written by the insolvent: Held, that the defendant's counsel were entitled to have it read. Dagleisk v. Dodd, 238

6. If an insolvent knows at the time of filing his schedule that a bill of exchange had been indorsed to a particular person some time before, he is bound to give notice to that person, although he cannot tell whether he continues to be holder at the time of filing the schedule. Pegh v. Hookkan, 376

the schedule. Pugh v. Hookham, 376
7. A received from B., an insolvent, the pawn-broker's duplicate of a harp, which was an undue preference under sect. 32 of the Insolvent Act, 7 Geo. 4, c. 57. A. took the harp out of pawn: Held, that, as against the assignees, A. had no lien on the harp for the sum he paid to take it out of pawn. Ayling v. Williams, 399

 Semble, that, where a party claims to hold goods for his general balance, he cannot object that a smaller sum, for which he really has a lien, has not been tendered to him.

#### INSURANCE.

#### See PRINCIPAL AND AGENT.

It is not necessary, to defeat an action on a
policy of insurance on a ship, on the ground
of concealment of material facts, that freed
should be made out: but it is enough, if the
information be withheld, although the party
withholding may only have erred in judgment. Elton v. Larkins,

In general, it is not necessary that the assured should communicate the time of saling; yet, if it be such as to make the ship a missing ship, then it becomes a material fact, and should be communicated. Rid.

 Whether underwriters at Lloyd's must be taken, under all circumstances, with references to insurances, to be cognisant of the contents of the foreign lists filed in the reading room there—Quere. Ibid.

4. In a question of marine insurance, a material concealment is a concealment of facts, which, if communicated to the underwriter, would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium; and a letter containing facts, which, if communicated, would lead to inquiry, which would produce important information, ought to be shewn by the assured to the underwriter. Elton v. Larkins, 385

5. A party is not bound, at the time of effecting a policy, to communicate the time of sailing of the ship, unless at that time it is a missing ship; neither is he bound to communicate any knowledge he may have of the time of sailing of another vessel from the same place, either before or at the

same time as his own, unless he knows of something particular having happened to such other vessel, which might affect the insurance of his own.

6. Where material facts are known to the assured at the time of effecting a policy, he is bound to communicate them; and the circumstance of their being contained in what are called Lloyd's Lists, which the underwriter has the power of inspecting, will not dispense with the necessity of such communication.

10 id.

#### INTEREST.

Interest cannot be recovered on money had and received, or money paid, without a special agreement; but, if money was at first had and received, and there is a subsequent agreement to pay interest, the plaintiff may recover such money and interest on a count for money had and received, and on a count for interest, and need not declare specially. Hicks v. Mareco, 498

#### JURY.

On the trial at bar for an information, the Special Jury were summoned from a distant county, in which the offence was not charged to have been committed: Held, that the Court had no power to order their expenses to be paid. The Jurors who tried this information were only paid one guinea each, and other Jurors who had come from the same county, and had been summoned to try another information, which was not tried, were not paid any thing. Rex v. Pinney,

# JUSTICE OF THE PRACE. See MAGISTRATE.

# LANDLORD AND TENANT. See DISTRESS.

1. A. the landlord of premises, sued B. as assignee of a lease, for rent due, with a count for use and occupation. At the trial, A. put in the lease, which was a lease to W., who had taken the benefit of the Insolvent Debtors' Act. It was proved that B. had occupied the premises, and had treated A. as landlord, and had paid rent to him: but that the lease had never been assigned: Held, that A. could not recover against B., either for the rent or for the use and occupation. Hyde v. Moakes,

2. In ejectment against a weekly tenant, the notice proved was, to quit on Wednesday, the 4th of August. The witness who was called to prove that Wednesday was the expiration of the current week of the tenancy, said, "that he guessed" the defendant came in "about a Tuesday or a Wednesday," but had no recollection which: Held, insufficient. Doe v. Bayley, 67

3. A tenant from year to year of a house is only bound to keep it wind and water tight. A tenant, who covenants to repair, is to sustain and uphold the premises; but that is not so with a tenant from year to year. Ausorth v. Johnson,

A. A., a tenant, owed rent to B. his landlerd;
B. distrained for more rent than was due,
and removed the goods to the auction rooms
of C.; A. gave C. notice not to sell, and C.
delivered the goods back to the person from

whom he received them: Held, that, as some rent was due from A. to B., C. was not liable to A. in an action of trover. Whitworth v. Smith, 250

5. In case for selling goods under a distress, without appraisement, if the sum produced is less than the fair value to the tenant, he may recover the difference without any allegation of special damage. Knotts v. Curtis, 322.

6. A. rented land of B., who was trustee of certain property, a part of which was this land, the rents of which B. was to pay in certain shares; one of these shares belonged to the wife of A. B. had in his hands a greater amount due to A. in right of his wife, than the rent amounted to: Held, that this could not be set off against the rent, without a special agreement to that effect. Willeon v. Darsnoort, 531

In replevin, a defendant avowed, for rent

In replevin, a defendant avowed, for rent payable yearly, for rent payable half-yearly, and for rent payable quarterly, and to each of these avowries the plaintiff pleaded non tenuit, and riens in arrear. A holding at a rent payable half-yearly was proved, and half a year's rent to be due, and the jury were directed to find for the plaintiff on the first and fifth issues, for the defendant on the third and fourth, and the jury were discharged on the second and sixth issues. Ibid.

7. Upon a count for not selling goods distrained at the best prices, the plaintiff may go into evidence to shew that the goods were allowed to stand in the rain, and that they were improperly lotted. Poynter v. Buckley, 512

#### LARCENY.

#### See POST OFFICE.

 An indictment for stealing a bank note did not conclude contra formam statuti: Held, by the 15 Judges, that it was bad. Rex v. Pearcon,

2. A. went to the shop of B., and asked for shawls for Mrs. D. to look at; B. gave her five; she pawned two, and three were found at her lodgings. Mrs. D. was not called as a witness: Held, that A., on this evidence, could not be convicted of a larceny in stealing the goods of B. Rez v. Savage, 143

3. A. had consigned three trusses of hay to B., and had sent them by the prisoner's cart; the prisoner took away one of the trusses, which was found in his stable, but not broken up: Held, no larceny, as the prisoner did

up: Held, no larceny, as the prisoner did not break up the truss. Rex v. Pratley, 533 4. A bible had been given to a society of Wesleyans, and it had heen bound at the expense of the society. B. stated that he was one of the trustees of the chapel, and also a member of the society. No trust deed was produced: Held, that in an indictment for stealing the bible, the property was rightly laid in B. and others. Rex v. Boulton, 537

5. If a poscher take a gun by force from a gamekeeper, under the impression that it may be used against him, it is not felony, though he state afterwards that he will sell the gun, and it be not subsequently heard of. Rex v. Holloway.

#### LEGITIMACY.

 If a husband have access, and others at the same period have a criminal intimacy with his wife, and she have a child, such child is legitimate; but, if the husband and wife live separately, and the wife is notoriously living in adultery, a child born under such circumstances would be illegitimate, although the husband had an opportunity of access. Cope v. Cope,

2. On the trial of an issue, in which the question is, whether A. is the legitimate son of B., neither the declaration of B., nor of his wife, the mother of A., are receivable to shew that A. is illegitimate.

#### LIBEL

See EVIDENCE, 3, 4, 10, 11, 12.—SLANDER.

1. The declaration in an action for libel alleged that the plaintiff was a good and faithful subject, &c., and that he was a medical practitioner, and stated the libel to have been published of and concerning him, and of and concerning him in his said practice. No evidence was given of any license or authority to practise, nor was the plaintiff mentioned in the libel as a regular medical man, but merely as "Physician extraordinary to several ladies of distinction," and "doctor, or rather quack;" Held, that this did not withdraw the claim to damages in the medical capacity from the consideration of the jury, but that they might give such damages as they thought right, both for that and the libel on the plaintiff's private character.

Long v. Chubb, 55

2. Every wilful unauthorized publication, injurious to the character of another, is a libel; but, where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of that other, that which he writes, under such circumstances, is a privileged communication; and no action will lie for what is thus written, unless the writer be actuated by malice.

Cockayne v. Hodgkisson, 3. A. being a tenant of B., was desired by B.

to inform him if he saw or heard anything respecting the game. A wrote a letter to B, informing B that his gamekeeper sold game: Held, that, if A had been so informed, and believed the fact to be so, this was a privileged communication, and that the gamekeeper could not maintain an action for a libel. Ibid.

4. In such a case the defendant may give in evidence representations made to him as to the conduct of the gamekeeper, but cannot go into evidence of the acts done by the

gamekeeper.

5. Libel, imputing that the plaintiff had received rose wood, knowing it to have been stolen. Pleas of justification, stating that B. had stolen the rose wood from A., and that the plaintiff had received it, knowing it to have been stolen: Held, that the defendant's counsel might ask what B. said, with a view of proving that B. committed the larceny; and held, also, that the plaintiff's counsel might ask the defendant's witnesses, what was the plaintiff's general character for honesty. Powell v. Harper, 590 590

#### LIEN.

See Insolvent, 8 .- Stage Coach, 1.

A person's having a lien upon a document is no objection to his producing it on a trial

at Nisi Prius: but, if he fears that it may be abstracted, the Judge will allow him to stand by the witness while he is examined respecting it. Thompson v. Mosely, 501

2. A. was desired by B. to go to a pawnbroker. and take goods of B. out of pledge. A. did so; but, on B. sending to A. for the goods, A. said he had not got them, and refused to tell who had : Held, that if, after this, traver was brought against A., he could not insist on a lien on the goods for the money he had advanced to get the goods out of pledge. Jones v. Cliff,

#### LIGHTS.

#### See BUILDING ACT, 1.

That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises, is such as really makes them, to a sensible degree, less fit for the purposes of business or occupation. Parker v. Smith,

#### LIMITATION.

1. If, since the stat. 9 Geo. 4, c. 14, a defendant by letter admit a balance to be due, without stating the amount, this will take the case out of the statute of limitations, so as to entitle the plaintiff to nominal damages. Dickenson v. Hatfield, 46 2. The object of the stat. 9 Geo. 4, c. 14, was

to procure that in writing for which words

were previously sufficient.

3. A letter, stating that an appointment of funds to pay a debt due from the defendant to the plaintiff had been made, and that Mr. Y. was one of the trustees, but that some time must elapse before the trustees would be in cash, will not take the case out of the statute of limitations, as it is at most only a promise to pay as soon as the trustees are in cash. But semble, that the creditor's remedy would be by a bill in equity against the trustees. Whippy v. Hillary, 209
4. A defendant had written a letter to T., to

make a proposition to the plaintiff respecting a debt he owed him; and in his letter he desired T. to arrange with the whole of his ereditors. T. wrote a letter to the plaintiff. offering an acceptance for 7s. 6d. in the pound on the debt : Held, not sufficient to to take the case out of the statute of limita-

tions. Gibson v. Baghott, 5. A. who was tenant for life, with a power of appointment by will attested by three credible witnesses, by his will attested by three witnesses appointed the lands to B. for life, and after her death to C. in fee. B. was one of the witnesses to the will, and the appointment to her was therefore void. On the testator, the husband of B, entered, and held the land till his death, which was three years after the death of B.; Held, that the statute of limitations did not begin to run against C. till the death of B. Doe d. Allen v. Blakeway,

#### MACHINE BREAKING.

On an indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 4, for breaking a threshing machine. the Judge allowed a witness to be asked whether the mob by whom the machine was broken did not compel persons to go with them, and then compel each person to give

one blow to the machine; and also whether, at the time which the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob the first opportunity. Rex v. Crutchley, 133

#### MAGISTRATE.

- 1. The general rules of law require of magistrates, at the time of a riot, that they should keep the peace, and restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them; and all the king's subjects are bound to do so, upon reasonable warning. In point of law, a magistrate would be justified in giving fire-arms to those who thus come to assist him, but it would be imprudent in him to do so. Rex v. Prinney,
- 2. It is no part of the duty of a magistrate to go out and head the constables, neither is it any part of his duty to marshal and arrange them; neither is it any part of his duty to hire men to assist him in putting down a riot; nor to keep a body of men, as a reserve, to act as occasion may require. Neither is he bound to call out the Chelsea pensioners, any more than the rest of the king's subjects; nor is it any part of his duty to give any orders respecting the fire-arms in the gunsmith's shops. Nor is a magistrate bound to ride with the military; if he gives the military officer order to act, that is all that is required of him.

3. Mere good feeling and upright intention in a magistrate will be no defence, if he has been guilty of a neglect of his duty. Nor will the fact of his having acted under the advice of others be any defence for him. The question is, whether he did all that he knew was in his power, and which could be expected from a man of ordinary prudence, firmness, and activity.

1 bid.

4. On the trial of a magistrate for neglect of duty, he ought not to be found guilty, unless all the jury are satisfied that he has been guilty of the same act of neglect; and if four jurors think him guilty of one act of neglect, and eight think him guilty of another act of neglect, that is not sufficient.

1 bid.

5. A magistrate may assemble all the king's subjects to quell a riot, and may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. At the time of a riot, a magistrate may repel force by force, before the reading of the proclamation from the Riot Act. Rex v. Kennett.
282, n.

6. If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is prima facie evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather than apprehend the rioters, his sole care was for himself, this is also neglect.

I bid.

MALICIOUSLY SUING OUT A COMMISSION OF BANKRUPT.

In an action for maliciously suing out a com-

mission of bankrupt, it is not sufficient to prove merely that the commission was superseded, as a supersedeas may proceed upon striot legal grounds, and does not, therefore, furnish evidence of the wantof probable cause. Hay v. Weakley,

#### MALICIOUS PROSECUTION.

1. In an action for malicious prosecution against A. and B., if it appear that both A. and B. entered into a joint recognizance to prosecute and give evidence, but it also appear that A. only employed the attorney, and that B. attended before the magistrate and the grand jury at the request of the attorney, the judge will direct the acquittal of B. Eager v. Dyott,

2. If C. be entrusted to receive money for A., with a written direction for its application, and C. write a letter to A. stating that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C., under the statute 7 & 8 Geo. 4, c. 29, s. 40, not malicious.

#### MANSLAUGHTER.

See L. C. J. TINDAL'S CHARGE, p. 267, n.

- 1. A. was indicted for the manslaughter of B., by a blow of a hammer. No proof was given of the striking of any blow, only of a souffile between the parties. The appearance of the injury was consistent with the supposition, either of a blow with a hammer, or of a push against the lock or key of a door:—Held, that, if it was occasioned by a blow with a hammer or any other hard substance held in the land, it was sufficient to support the indictment; but otherwise, if it was the result of a push against the door. Rex v. Martin,
- 2. An indictment for manslaughter charged, that the deceased was on horseback, and that the prisoner struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened, and threw him, giving him a mortal fracture. The evidence was, that the prisoner struck the deceased with a small stick, and that the latter rode away, and the former rode after him; whereupon the deceased spurred his horse, which then winced, and threw him, whereby he was killed :- Held, that this evidence sufficiently supported the indictment. R. v. Hickman.
- 3. An indictment for manslaughter charged that A. gave to the deceased divers mortal blows at P., in the county of M., and that the deceased languished and died at D. in the county of K.; and the prisoner was then and there aiding in the commission of the felony:—Held, held that the indictment was good, and that the word there referred to P., in the county of M. Rex v. Hargrave,
- 4. Although all persons present at and sanctioning a prize fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree; yet they are not such accomplices as to require their evidence to be confirmed, if they are called

746 Index.

as witnesses against other parties charged with the manslaughter. Ib.

5. It is not every alight proceedies, even by a blow, which will, when the party receiving it strikes with a deadly weapon, and death ensues, reduce the crime from murder to manslaughter. Rex v. Lynch, 324

manslaughter. Hex v. Lynes, 324 6. Any person, whether a licenced medical practitioner or not, who deals with the life or health of any of his Majesty's subjects, is bound to have competent skill; and is bound to treat his or her patients with care, atten-

bound to have competent skill; and is bound to treat his or her patients with care, attention and assiduity; and if a patient dies for want of either, the person is guilty of manalaughter. Rex v. Spiller,

7. An allegation in an indictment, charging that the death of a porson was caused by a plaster made and applied by the prisoner, is sufficiently proved, by shewing that three plasters were applied, and that two of them applied by the prisoner, and the third made from materials furnished by the prisoner.

I bid.

#### MASTER AND SERVANT.

A baker delivered bread from week to week, and was paid many sums by the housekeeper of his customer, and receipted weekly bills for a period of time subsequent to a time for which the housekeeper had not paid him:—Held, in an action by him to recover from his sustomer the amount of the unpaid bills, that the question of negligence was not raised and that the plaintiff was entitled to the verdict, as the defendant did not prove that he had given the housekeeper money for the purpose of paying the bills in question.

Miller v. Hamilton.

# MEDICAL PRACTITIONER. See MASSLAUGHTER, 6, 7.

#### MONBY LENT.

A clerk in a house lent money to the partner-ship composing it, two of them signed an acknowledgment for it, agreeing to pay 5£. per cent. interest. Various changes took place in the house, in the course of which one of the parties who signed the acknowledgment retired from it. The interest was paid from time to time by the different firms, till the last became bankrupt. The clerk continued to serve all the different firms, and was cognizant of the different changes:—Held, that he might, notwithstanding, recover the money he had advanced from the two persons who signed the acknowledgment. Blew v. Wyatt, 397

#### MURDER.

#### See MANSLAUGHTER.

1. A. was fighting with his brother; and to prevent this B. laid hold of A., and held him down upon a locker on board the barge in which they were, hut struck no blow. A. stabbed B.:—Held, that if B. did nothing more than was sufficient to prevent A. from beating his brother, and had died of this stab, the offence of A. would have been murder; but that, if B. did more than was necessary to prevent the beating of A.'s brother, it would have been manslaughter only.

Rex v. Bourne,

2. A. was charged with suffocating B. by placing both her hands about the neck of B.:—Held,

that A might be convicted on this indictment if B. was sufficated in any wanner, either by A. or any other person in her presence, she being privy to the commission of the offence. Rex v. Cultin, 121
3. The phrase "about the neck," in an indict-

3. The phrase "about the neek," in an indictment for murder, is good, and is not open to the same objection as "about the breast."

4. To justify a conviction on an indictment charging a woman with the wilful murder of a child of which she was delivered, and which some born after, the jury must be satisfied affirmatively that the whole body was brought alive into the world; and it is not sufficient that the child had breathed in the progress of the birth. Rex v. Poulton,

5. Where the indictment in such a case states the child to have been born a bastard, the proof that it was so, lies on the prosecutor; but evidence that the prisoner told a person that she had only mentioned her being with child to the father of it, who had latting get married, was held to be sufficient proof of the allegation.

6. If a child has breathed before it is born, this is not sufficiently life to make the killing of the child murder. There must be an independent circulation in the child, or the child cannot be considered as alive for this purpose. Rex v. Esoch,

#### NEGLECT OF DUTY.

See MAGISTRATE.

#### NEGLIGENCE.

1. A booking-office keeper, who also keeps a wine vaults, is guilty of negligence, if he allows goods to remain in front of the bar, exposed to persons coming in for liquor, even though they are of too large a size to be conveniently taken behind the counter. Door v. Mills,

2. If a horse and cart are left standing in the street, without any person to watch them, the owner is liable for any damage dose by them, though it be occasioned by the act of a passer by, in striking the horse. Illidge v. Goodsoin, 190

3. A person driving a carriage is not bound to keep on the regular side of the road; but, if he does not be must use more care, and keep a better look-out to avoid concussion, than would be necessary if he were on the proper part of the road. Pluckwell v. Wilson, 375

4. A foot-passenger, though he may be infirm from disease, has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it. Boss v. Litten, 407

5. In an action of trespass for injury done to a horse by a pony and chaise running against it, it was sworn on the part of the defendant that his wife was holding the pony by the bridle, and a showman came by and frightened the pony, who ran off with the chaise:—Held, that, if true, this was a good defence on a plea of not guilty. Goodman v. Taylor, 1414

6. In an action against the captain of a steam vessel for swamping a loaded wherry on the river by a swell produced by a too rapid rate of passage, the jury, to find for the plaintie, must be satisfied that the mischief was occasioned by the swell alone: and if they think

it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained, by his own improper conduct, sither in mismanaging pr overloading the boat, they must find their verdict for the defendant. Luxford v. Large, 421

7. In an action for the negligent driving the defendant's carriage against that of the plaintiff, the plaintiff cannot examine his servant who drove his carriage without releasing him. Wake v. Lock, 454

#### NEW ASSIGNMENT.

A replication of de injuria in trespass, with a new assignment that the defendant committed the trespasses with more violence and in a greater degree than was necessary for the purposes in the plea mentioned, is demurable. Thomas v. Marsh, 596

## NOTICE TO PRODUCE.

See ARSON, 2.

- 1. A cause came on to be tried at the Assizes on a Wodnesday morning; on the previous Monday evening, the defendant's attorney, being at the assize town, was served with a notice to produce a book, which would probably be at his office, which was nineteen miles from the assize town:—Held, that this service was too late. Hargest v. Fothergill.
- A notice to produce served on a defendant in London on a Saturday, the cause being tried on the following Monday, is too late. Houseman v. Roberts.
- Notices to produce ought to be served on the attorney, if there be one. Ibid.

#### OUT-HOUSE.

A building had been built for an oven to bake bricks, but afterwards was roofed, and a door put to it. In this place, the prosecutor kept a cow; adjoining to it, but not under the same roof, was a lean-to, in which another person kept a horse. Neither the prosecutor, nor the person of whom he rented this building, had any house or farm-yard near it, nor did any wall connect with any dwelling-house, the nearest dwelling being one hundred yards off, and not belonging to either the prosecutor or his landlord:—Held, that the building was neither a stable nor an outhouse, and that, if a person set it on fire (the lean-to not being burnt) he was not indictable for arson. Rex v. Haughton,

#### PALACE COURT.

#### See Attorney, 5.

On a trial at Nisi Prius, evidence that the cause was originally commenced in the Palace Court, and that the defendant let judgment go by default in that Court, and afterwards removed the cause by hab. corp., is admissible. Tidman v. Lees, 233

#### PARISH CLERK.

After the great fire of London, 1666, the parish of St. Mary Colechurch, was united with that of St. Mildred the Virgin, by stat. 22 Car. 2, c. 11. By custom, in each of the parishes before their union, the right of appointment to the office of parish clerk was in the rector and parishioners. In the year 1831, the parishioners of the united parishes in vestry assembled elected a parish clerk, but the

rector at first refused to sanction the appointment, and himself appointed another person: afterwards, however, he appointed the person elected by the assent of the parishioners. But the person whom he had previously appointed, one Sunday morning placed himself in the clerk's desk in the church of the united parishes, and, refusing to retire upon request, was laid hold of by one of the churchwardens and the vestry clerk, and an attempt was made to remove him by force, but which was not successful. For the purpose of try-ing the right to the office, he brought an action of assault against these officers, who pleaded specially two sets of justifications; one set alleging the legal appointment of the person elected by the parishioners, to place whom in the desk they sought to remove the plaintiff; and the other set treating the plaintiff himself as an intruder. The jury were of opinion that the custom was for the rector to appoint, with the assent of the parishioners, and found a verdict for the defendants. A rule was afterwards obtained for a new trial, which, after argument and time taken to consider, was discharged, the Court being of opinion that the plaintiff was not lawful parish clerk, as he was appointed by the rector alone, without the concurrence of either of the parishes; but they did not decide whether the election by the united vestries was right or not, though they said that it appeared to be the natural mode. In the course of the trial, it was ruled that old entries in the vestry books of the parishes were not evidence to show the right of election, as it did not appear whether the incumbent was present at the meetings they re-lated to. But extracts from the register of the bishop of the diocese were received in evidence to prove the same appointments, as were also several entries of vestry meetings at which the rector was present. Hartley v. Cooke,

#### PARK.

The servant of an owner of an ancient park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; and the servant may justify the shooting, although the dog may not have been chasing the deer at the moment when it was shot, if the chasing of the deer and shooting of the dog were all one and the same transaction. Protheroe v. Mathenee. 581

#### PARTICULAR OF DEMAND.

It will not prevent a plaintiff from giving evidence on a special count in his declaration, that he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts. Day v. Davies, 340

#### PAVING.

By the stat. 57 Geo. 3, c. 29, s. 114, the commissioners of paving of the metropolis are to enter their proceedings in a book, and such entries are made evidence. Whether an entry stating that A. sent a letter to the commissioners, asking their permission to erect a rail at the side of the street, is evidence of such asking permission—Quere.

British Museum v. Finnie, 460

#### PAYMENT OF MONEY INTO COURT.

Payment of money into Court in assumpsit on the common counts for work and labour, is an admission that the contract was with the party suing, where it appears that there was in fact only one contract. Walker v. Rawson,

#### PERJURY.

#### See INSOLVENT, 1, 2, 3.

1. If an indictment for perjury contain several assignments of perjury, on one of which no evidence is given on the part of the prosecu-tion,—The defendant cannot go into proof to show that the evidence charged by that assignment of perjury to be false, was in reality true. Rex v. Hemp, 468
2. On the trial of an indictment for perjury,

the witnesses to character were asked "What is the character of the defendant for veracity and honour?"-and "Do you consider him a man likely to commit perjury?"

#### PLEADING

See BILL OF EXCHANGE, 7.—BOND, 1.—CAR-BIEE, 1.—INDICTMENT.—NEW ASSIGNMENT.

#### POACHING.

1. "A certain cover in the parish of A." is too general a description to sustain an indictment for poaching, under the stat. 9 Geo. 4, c. 69. Rez v. Crick,

2. A count in an indictment for night peaching stated, that the prisoners were in a field called A., for the purpose of then and there taking game:—Held, that the prisoners could not be convicted on that count, unless the Jury were satisfied that the prisoners had an intention of taking game in that particular field. Rex v. Capewell,

3. A count for night peaching may be joined with a count in sect. 2 of the stat. 9 Geo. 4. c. 69, for assaulting a game-keeper authorized to apprehend, and with counts for assaulting a game-keeper in the execution of his duty, and for a common assault. Rez v. Finecane, 551

# POSSESSION.

#### See SHIRE HALL POST OFFICE.

1. S. was employed by a post-mistress to carry letters from Dursley to Berkely, at a weekly salary paid him by the post-mistress, but which was repaid to her by the post-office: Held, that S. was a person employed by the post-office, within the stat. 52 Geo. 3, c. 143, s. 2. But a letter sent from Cardiff to Dudley, and which, it was alleged, was mis-sent to Dursley, if stolen by S., would not be a letter which came to his hands "in consequence of his employment." Rex v. Salisbury,

2. Semble-That the words, "whilst employed," in sect. 2 of the stat. 52 Geo. 3, c. 143, relative to stealing letters, merely mean that the party should be then in the employ of the post-office; and not that the letter, when stolen, was in the party's hands in the course of his duty. Ibid.

#### POSTPONING TRIAL.

The Judge at the assises will not postpone the trial at the instance of the plaintiff, on the ground of the illness of a material witness, as the plaintiff can withdraw his record. Maspero v. Strachan,

#### PRACTICE.

- See CERTIFICATE. ELECTING. NOTICE to PRODUCE.—PARTICULAR OF DEMAND.—PAY-MENT OF MONEY INTO COURT .- POSTPONING TRIAL -- BEPLY.
- 1. The plaintiff's counsel has a right to begin and state the facts, although, by a rule of Court the defendant is under obligation to admit the plaintiff's case. Thwaites v. Sainsbury,
- 2. A counsel for the prosecution, on opening a case of felony, has in strictness a right to state in his own way a conversation supposed to have passed between the prisoner and a witness whom he intends to call; but, in correct practice, the statement ought to be confined to the general effect of the conver-sation. Rex v. Deering, 165
  3. A person indicted with others for an offence,

but against whom the bill has been thrown out, may, if he be in custody at the time of the trial of the others, be placed at the bar to be identified as one who was in their company.

If a letter be shewn to a witness for the defendant, on the voire dire, to make out that he has an interest, and the witness be released and examined, the Judge will not prevent the plaintiff's counsel from observing on this letter in his reply. Paul v. White,

5. A counsel, to whom a retainer in a cause has been given, no brief having been delivered, cannot withdraw the record. Doe d. Crake v. Brown, 215

6. Observations made by a wife to her husband upon a subject, which afterwards becomes matter of criminal charge against him, and to which he gave no direct reply, may be opened to the jury by the counsel for the prosecution. Rex v. Smithies, 332 7. Rule as to remanets in C. P. 440

# PRINCIPAL AND ACCESSARY.

See ACCERSARY.

#### PRINCIPAL AND AGENT. See BRIBERY .- DETINUE.

A memorandum indorsed on a ship's policy of insurance for a change of voyage, was signed by an agent of the insurance com-pany. It was proved that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it; though, when a new policy was required, he always sent the proposals to the company:—Held, that this was sufficient proof of the agent's authority to sign such memorandums; and that the other policies, on which such memorandums had been signed, need not be produced. Brockelbank v. Sugrue,

#### PLIVILEGED COMMUNICATION.

See Attorney, 6, 7.—Evidence, 8.—Libel, 2. 3, 4.—Slander.

PRIZE FIGHT.

See MANSLAUGHTER.

PROMOTIONS, 1, 435, 606.

#### RAPE.

1. Where on a charge of rape the jury found that there had been penetration, but that there had been no emission from the prisoner, the fifteen Judges held, that the prisoner was rightly convicted of the rape.

Rex v. Cox.

2. On an indictment for carnally knowing and abusing a female child under ten years of ge, the best evidence of the age of the hild ought to be produced. Where an child ought to be produced. Where an offence of this kind was committed on the 5th of February, 1832, and the child's father proved, that, on his return after an absence from home of a few days, on the 9th of Feb., 1822, he found that the child had been born. and was told by her grandmother that she had been born the day before; and the register of baptisms shewed that the child had been baptised on the 9th of February, 1822: it was held not sufficient to prove that the child was under ten years old. Rex v. Wedge,

3. If, in a case of rape, there has not been sufficient penetration to rupture the hymen, the offence is not complete. Rex v. Gammon,

#### RECEIVER.

A receiver, appointed by the Court of Chancery, has a right to distrain for rent, without any special authority from the Court for that purpose. Bennett v. Robins,

#### RELEASE.

#### See NEGLIGENCE, 7.

1. A., having a cause of action against B., is discharged under the Lord's act, but does not execute any assignment, alleging that he has no property. After his discharge, he gives B. a release: this release is good; and therefore, if in an action by A. against C., it appear that A. might sue B., if he did not recover against C., A. may, notwithstanding this discharge, release B. and make him a competent witness. Briant v. Eicke,

2. A defendant executed a release to a witness; but, before it was given to the witness, it was handed to the counsel on the opposite side for his inspection. He objected to the form of it, and it was altered, and the de-fendant re-executed it:—Held, that it was sufficient, and that it did not require a new stamp. Alten v. Farren,

#### REPAIRS.

See LANDLORD AND TENANT, 3.

REPLY.

See PRACTICE, 1.

RETAINER. See PRACTICE, 5.

#### REWARD.

A. published a handbill, offering a reward to any person who would give such informa-tion as would lead to the discovery of the murder of B. C. knowing of this handbill, gave the information:—Held, that C. was entitled to the reward, although it was found by the jury that C. did not give the information in consequence of the offered reward, but from other motives. Held, also, that the first person who gives the information is entitled to the reward, and the motive of such person in giving the information is not material. Williams v. Carwardine, 566 If two persons go together to give the information, they must bring a joint action for the reward.

#### RIOT.

#### See MAGISTRATE.

If parties assemble together for a purpose, which, if executed, would make them rioters; but, having assembled, they do nothing, and separate without carrying their purpose into effect, this is an unlawful assembly. Rex v. Birt,

#### RIOT ACT.

1. An indictment on the riot act, 1 Geo. 1, st. 2, c. 5, s. 1, for remaining assembled one hour after proclamation made, need not charge the original riot to have been in terrorem populi. Rex v. James,

2. If an indictment on the riot act 1 Geo. 1, st. 2, c. 5, s. 1, for remaining assembled one hour after proclamation, in setting out the pro-clamation omit the words " of the reign of," which were contained in the proclamation read by the magistrate—this is a fatal variance. Rex v. Woolcock, 516

3. If the proclamation be read several times, the hour is to be computed from the first

reading.

4. If there be such an assembly that there would have been a riot if the parties had carried their purpose into effect, this is within the statute; and whether there was a ces-

#### RIQTOUSLY DEMOLISHING.

#### See L. C. J. TINDAL'S CHARGE, 265, n.

An indictment on the stat. 7 & 8 Geo. 4, c. 35, s. 8, feloniously beginning to demolish a house, cannot be supported unless the persons committing the outrage had an intention of destroying the house; and therefore, where considerable damage was done to a house by a mob, who did this with an intention of seising a person who had taken refuge in the house, this was held to be not within the stat. Rex v. Price,

#### ROBBERY.

#### See L. C. J. TINDAL'S CHARGE, p. 267, n.

1. A. and B. were walking together, B. carrying A.'s bundle, when C. and D. came up and assaulted A. B. threw down the bundle and ran to the assistance of A., when C. took it up and made off with it. C. and D. were indicted for robbery, A. being the prosecutor:
—Held, that they could not be convicted of the robbery, but only of simple larceny, as the thing stolen was not in the personal custody of A. Rex v. Fallows,

2. Obtaining money from a woman by threatening to accuse her husband of an indecent assault, is not robbery. Rex v. Edwards,

3. A. was attacked by robbers, who, after using very great violence towards him, took from him a piece of paper, on which was written a memorandum respecting some money that a person owed him:—Held, robbery. Rex v. Bingley,

#### SEISIN.

1. A person's being assessed to the land tax for certain lands, is not evidence of his seisin of these lands. Doe d. Stanebury v. Arkwright,

2. If a person fells timber in a wood, it is prima facie evidence that he is the owner of it; and therefore any thing that he says at that or any other time as to any one else being the owner of it is evidence.

Ibid.

SET OFF.

See HORSE RACE.

#### SHERIFF.

#### See BAIL, 2.

If a sheriff defends an action for a false return as well as he can, he may recover his costs from the sureties of his bailiff who executed the writ; though he has a verdict against him, on the ground that evidence was not produced, which, in another and subsequent suit between other parties, involving the same question, was obtained. Faretrother v. Worsley, 102
 Semble, that, if in such an action, after he

8. Semble, that, if in such an action, after he has obtained a rule nisi for a new trial, he compromises the suit, with the assent of some of the sureties, by paying a less sum for damages than would be recoverable, and a less sum for costs than were incurred—he may recover his own costs against the surety who did not assent, if it appears that the compromise was, under the circumstances, reasonable.

3. Semble, also, that in such a case the words "costs of any application to the Court touching or concerning any matter, wherein the bailiff should act or assume to act as bailiff," will comprise the costs of an application to the Court to set aside the judgment on which the execution was founded, the return to which gave rise to the action against the sheriff.

4. A sheriff had obtained judgment against A. in an action on a bail bond. On this a fi. fa. issued directed to the coroner. S., whe was attorney for the sheriff and also for others, indorsed the name of a sheriff's officer on the writ. The coroner's broker seized a barge which was bought by B., and the price paid to the officer; subsequently, the barge was claimed by others, and B. lost his purchase: Held, that under these circumstances, the officer was not the agent of the sheriff so as to make the sheriff liable in an action for money had and received at the suit of B., although it was proved to be the practice at the sheriff's office to indorse the name of the officer on the writ. Sarjeant v. Coman, 492

#### SHIPPING.

#### See FALSE REPRESENTATION.

1. When a ship owner, knowing that a port is blockaded, enters into a contract with a merchant for the delivery of a cargo there, if he afterwards refuses to go, he is liable to an action for the breach of the contract, but, whether the damages are to be nominal or otherwise, must depend upon the opinion of the jury as to whether, if the vessel had gone to the place, she would have been able to get in. De Medsiros v. Hill,

The captain of a ship, who gives directions
for repairs, is liable to the tradesman in the
first instance, if it does not appear that any
credit was given to the owners. Essery v.
Cobb.

3. If a person who is mortgagee as well as broker of a ship, gives directions for repairs to be done, the question for the jury will be, in an

action by the tradesman against him whether he gave the directions only in his character of broker, or as a person having an interest in the vessel. Castle v. Duke, 359

4. Where a vessel, bound for the East Indies, is advertised to sail by a certain day, and does not, the ship-owner will be entitled to recover half the passage money of a person who refused to go, after having engaged a passage, unless either time was of the essence of the contract, or the delay in sailing was unreasonable. Yater v. Duff, 369

#### SHIRR-HALL

1. By a private Act of Parliament, the shire-hall of G. was vested in the justices of the poace for the county, in trust to allow cours of justice to sit there, &c., and to permit and suffer it to be used for such other public puposes as a major part of the justices in sessions should direct. The hall had always been used for the holding of the County Musical Festivals; but there was no evidence that the justices under the act directed it so to be used:—Held, that the stewards of one of these musical festivals had such a possession of the hall, that they might justify teming out an intruder. Thoseas v. Marsh, 596

2. If in answer to a plea of justification, stating that the plaintiff was intruding himself there, the plaintiff rely on his having a ticket as giving him a right to be there, he must reply that specially.

Bid.

#### SHOOTING.

#### See MANSLAUGHTER.-MURDER

 If an indictment for shooting another, with intent to murder, &c., in all the counts aver that the pistol was loaded with powder and a leaden bullet, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquital. Rez v. Huyles.

 If a pistol be loaded with gunpowder and balls, but its touch-hole be plugged, so that it cannot by possibility be fired, this is not "loaded arms," within the stat. 9 Geo. 4, c. 81, ss. 11, 12. Rex v. Harris,

#### SLANDER.

#### See EVIDENCE, 4 .- LIBEL.

If a person has a communication to make to an inquest for their information, not on each he is bound to do it in such a way as to satisfy a jury, if he is afterwards charged with slander, that he is only stating the fact for the information of the inquest, and that he did it in a proper manner. Wilson v. Collins,

#### SMUGGLING.

Semble, that bats, which are long poles used by snugglers to carry tube of spirits, are not offensive weapons within the meaning of 6 Geo. 4, c. 108, s. 56. Rex v. Nokes, 326 SPIRITS.

See BILL OF EXCHANGE, 1.

#### STABBING.

See MANSLAUGHTER. -- MURDER. -- WOUNDING. STABLE.

See OUTHOUSE.

#### STAGE COACH.

See CARBIER.-NEGLIGENCE.

If a person go to a coach-office, and direct that

INDEX. 751

a place be booked for him by a particular coach, and that be done, and he leave his portmanteau, the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the coach fare; but, if the party merely leave the portmanteau while he goes to inquire if there be an earlier coach, and no place be actually booked, the coach proprietor has no lien at all. Higgins v. Bretherton,

#### STAMP.

#### See EVIDENCE, 1 .- RELEASE.

I. A bond was conditioned for the payment, on a certain day, being a year from the date, of a certain sum, with interest thereon, at the rate of 51. per cent :- Held, that a stamp covering the amount of the principal was sufficient. Dixon v. Robinson

2. A bond conditioned to pay 1,000%. on a day five years from the date, and to pay interest, half yearly, in the mean time, only requires a stamp for the amount of the principal sum of 1,000l. Foreman v. Jeyes,

#### STAMPS, TRANSPOSING.

It was the duty of the prisoner, who was a clerk in the Stamp Office, to cut off the corners of parchments which bore the blue paper stamps allowed for as spoilt by the commissioners of stamps, and to put the blue paper stamps and the small pieces of parchment so cut off, and which were glued to them, into the fire, without separating them. Instead of doing this, he separated a blue paper stamp from the small piece of parchment to which it had been glued, and glued it to a new skin of parchment, on which the words "This Indenture" had been written. The jury found, that he had no fraudulent intent when he cut the stamp from the skin of parchment, but that he had when he separated the blue paper stamp from the small piece of parchment; and that he then intended to apply the stamp to a parchment intended to be used as an indenture :-- Held, that this was a capital offence. And it being uncertain whether the stamp so separated was impressed before or after the passing of the stat. 55 Geo. 3, c. 184, it was held, that the party might be properly convicted on a count stating the stamp to be the impression of a die made and used "in pursuance of the statute made and provided for denoting a certain duty, being one of those under the management of the commissioners of stamps." Rex v. Smith, 107

> STEAM VESSEL. See NEGLIGENCE, 6.

#### THEATRE

1. The 2d section of the stat. 10 Geo. 2, c. 28, inflicting a penalty of 50% on persons per-forming, or causing to be performed, plays, &c., without letters patent, &c., is not repealed by the stat. 5 Geo. 4, c. 83. Parsons qui tam v. Chapman,

2. Proof that a party was the acting manager of a theatre, and that he paid the salary of and dismissed one of the performers, is sufficient proof that he caused the performances; and if he caused the performances, it is not material whether he did so as the agent of others or not.

#### TIME.

Assumpsit for necessaries supplied to the defendant's wife. The writ was sued out in June, the declaration being in November, and the record dated in November:-Held, that the plaintiff might recover for things supplied up to the date of the record. Joll V. Fisher, 514

#### TREATING.

#### See BRIBERY.

The treating act, 7 & 8 W. 3, c. 4, only applies to candidates and their agents. Hughes v. Marshall,

#### TRESPASS.

#### See Negligence, 5 .- New Assignment.

If a man employing an officer attends with the officer, who seizes in his presence the goods of a third person under an execution which he has sued out, he makes himself responsible for the officer's acts. And, semble, that in such a case, where he is present and interferes, he ought to point out to the officer what goods are to be taken, and what not; also, if in such a case an unjustifiable assault be committed by the officer, the party enthorizing the seizure will not be answersble for it, unless it be shown in some way to have been committed by his direction. Meredith v. Flaxman,

#### TRIAL.

See Postponing Trial.

#### TROVER.

See LIEN.

A., who was paying his addresses to a lady, lost her letters and two memorandum books containing remarks of his own; B. found them, and kept them, on the ground that the books contained matter injurious to him, and also showed them to others: A. sent a person to demand them of B., who, at first, refused to give them up at all; but, before the person left, said he would not give them to him, but would to C. or D. C. went, and B. offered to give him the letters and one book, which C., after consulting with A., accepted, saying that he made a sacrifice to obtain the letters:-Held, that there was a conversion of the whole; but the verdict was only for nominal damages. Clendon v. Dinneford,

#### VENDOR AND PURCHASER.

1. In assumpsit by vendee against vendor to recover back a deposit paid on the purchase of real property, the defendant at the trial produced (under a notice to produce) the agreement which had been signed at the foot of the conditions of sale :-Held, that it was not necessary to call the subscribing witness to prove the execution of this agreement. Bradshaw v. Bennett,

2. Where, in the particulars of sale, property was stated to be held under the C. estate upon three lives, and it appeared in an action to recover back the deposit, that one of the lives had dropped before the sale, and that the property was not held directly under the -Held, that the defendant could C. estate :not call the auctioneer to prove that he stated before the sale that the life had dropped; but that the defendant might give evidence to shew that, before the sale,



